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1957

EDITED
BY
THE LATE
SIR HERSCH LAUTERPACHT, Q.C., LL.D., F.B.A.
JUDGE OF THE INTERNATIONAL COURT OF JUSTICE;
BENCHER OF GRAY'S INN; MEMBER OF THE INSTITUTE
OF INTERNATIONAL LAW

AND

E. LAUTERPACHT
FELLOW OF TRINITY COLLEGE, CAMBRIDGE;
OF GRAY'S INN, BARRISTER-AT-LAW

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THIS VOLUME

IS DEDICATED TO THE MEMORY

OF

SIR HERSCH LAUTERPACHT
Q.C., LL.D., F.B.A.

August 16, 1897—May 8, 1960

PREFACE

In dedicating this volume of the *International Law Reports* to the memory of my father, I believe I have done as would any other new editor. He made a unique contribution to the development of these *Reports* and, through them, to the sources and literature of international law. He participated, in conjunction with Lord (then Dr. Arnold) McNair, in the preparation of the first two volumes (which covered the years 1925–1926 and 1927–1928) and then joined Sir John Fischer Williams in the production of the volumes for 1919–1922 and 1923–1924. But from 1933 onwards, when the preparation of the volume for 1929–1930 began, my father alone bore the burden of producing the series. During this period, as the changes in their title indicate, the volumes gradually grew from a system of digests into a series of reports. They now constitute as full a collection of decisions bearing on international law as is practicable, having regard to the available resources of time, money and assistance. They demonstrate, also, as my father hoped from the beginning that they would, the validity of his belief that international law is not simply " book law " but rests upon a substantial and growing body of case law.

It is not really necessary, nor would it be appropriate, for me to attempt to recall the character of my father's achievment in relation to the *Reports*. I can perhaps do no more than record the deep devotion which he felt for them and his conviction that they, perhaps more than anything else he did, would stand as his memorial. I can mention too his constant preoccupation with the preparation of the individual volumes. For example, the Preface to the 1956 volume was dictated by him to me from his sick-bed in The Hague within ten days of his first heart attack in October 1959. Again, though I was responsible for the routine correspondence involved in collecting the material for the present volume, it was he who, during the few weeks of activity he enjoyed after his recovery from that illness, did the essential editorial work of reading and selecting the copy, revising the headings and generally preparing the cases for the printer. Only after his death did I become fully responsible for the volume.

It was one of my father's last expressed wishes that I should succeed him as Editor; and I am grateful that the Advisory Committee have felt able to implement it. But I doubt if he would have felt justified in voicing such a wish if he had not been confident that the true strength of the *Reports* lay as much in the contributors and in those who had helped him over the years as in the person of the editor. I have certainly found this confidence justified. During recent months I have turned frequently to Lord McNair for guidance. Upon Mrs. Gladys Lyons, as well as upon her husband, Mr. A. B. Lyons, whose names have for so many years appeared in these Prefaces, I have placed the greatest reliance. I also owe a particular debt to Professor R. R. Baxter who, besides preparing what as usual is the heaviest contribution, namely, the decisions of courts of the United States of America, has done much to lighten my task and to guide and encourage me in other ways. In addition, I have received from each of the contributors who worked with my father the most heartening assurances of their willingness to continue their association with the *Reports*. I am immensely grateful for their response to the situation, which, I am sure, will be as much appreciated by the users of these volumes as it is by me.

It is my intention to continue my father's policy of developing the *Reports* into the fullest possible collection of judicial decisions in the field. Ideally, the volumes should be so complete that there should be no need for the reader to go outside them or even to refer to the original source. At the present time, however, this object cannot be achieved. Although minor changes can be introduced, such as the printing in the text of decisions of page numbers in heavy type which reflect the pagination in the original source, it is still impossible to reproduce every decision of every tribunal, whether international or municipal. One difficulty lies in obtaining translations of decisions in foreign languages. The Reports are fortunate to have contributors such as Mr. Lyons and Dr. Honig who, besides the other work which they do for these volumes, carry so admirably much of the heavy burden of translation. Nevertheless, limitations of time occasionally compel the omission of some foreign material such as, from the present volume, the dissenting opinions rendered in the Franco-Italian Conciliation Commission.

The principal new feature of the contents of the present volume is the series of decisions of the European Commission of Human Rights, which begins in 1955. I much appreciate the patient work which has been done by Mr. P. A. Allott in translating all but two of these decisions and in preparing them for publication.

In addition, the number of decisions of the Italian-United States Conciliation Commission has increased. Also, as a result of the efforts of Dr. K. Skubiszewski, some gaps in the reports of Polish decisions over the last decade have been filled. I am grateful to Dr. Skubiszewski not only for finding these cases but also for the careful translations of them which he has prepared.

A number of the decisions in the present volume were given in years prior to that to which the volume is nominally devoted. As stated above, the Polish cases reach back to 1948. Forty out of the fifty-eight decisions of the European Commission of Human Rights were given in 1955 and 1956. The same is true of some of the Dutch and Italian decisions, of a few of the decisions of the Italian-United States Conciliation Commission, and of the arbitral award of MM. Ripert and Panchaud in the case of *Société Européenne d'Études et d'Entreprises*. Even with the interval which now exists between the title-year of a volume and the date of its publication, it is by no means easy to gather in all the relevant material in due time.

The 1956 volume contained a report of the award in the *Ambatielos Arbitration*, but the Dissenting Opinions were, unfortunately, omitted. They are now printed in the present volume.

Professor J. H. W. Verzijl has indicated that he will no longer be able to prepare the Dutch cases for these *Reports*. I should, therefore, like to take this opportunity of thanking Professor Verzijl most warmly on behalf of the Advisory Committee and myself for all the devotion which he has shown to these *Reports* since his first participation in them exactly thirty years ago. His association with those volumes was, I know, most highly valued by my father.

As has now been the case for a number of years, this volume owes much to the grants made by the Ford Foundation and by the International Law Fund. To them, once more, I should like to express the gratitude of the Advisory Committee and myself.

I am indebted to Professor B. Goldman for his help in providing the text of the arbitral award given by MM. Ripert and Panchaud in the case mentioned above; and to Professor M. Bartos, Legal Adviser, and Dr. L. Serb, Senior Counsellor, of the Yugloslav Foreign Office, for providing the information which appears in the note appended to that decision.

I am also grateful to Mr. J. F. McMahon for assuming responsibility for the preparation of the Index.

Mrs. E. E. Jansen, has, as in the past, given valuable secretarial assistance and has prepared the Tables of Cases.

Finally, I would wish to express my appreciation of the consideration shown and help given by Messrs. Butterworth & Co. and their printers and compositors during this period of transition.

E. LAUTERPACHT

TRINITY COLLEGE,
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LIST OF ABBREVIATIONS

OF TITLES OF COLLECTIONS OF DECISIONS, LAW REPORTS, PERIODICALS, ETC., QUOTED IN THE TEXT

A.C. =British House of Lords and Judicial Committee of the Privy Council
A.I.R. =The All India Reporter
A.J. =American Journal of International Law
All E.R. =The All England Law Reports
A.L.R. =American Law Reports
App. D.C. =Reports of the United States Court of Appeals for the District of Columbia Circuit
B.G.E. =Entscheidungen des Bundesgerichts (Switzerland
BGH St. =Entscheidungen des Bundesgerichtshofes in Strafsachen (Germany)
BGHZ =Entscheidungen des Bundesgerichtshofes in Zivilsachen (Germany)
B Verf GE =Entscheidungen des Bundesverfassungsgerichts (Germany)
B Verw GE =Amtliche Entscheidungssammlung des Bundesverwaltungsgerichts (Germany)
Cal.App. =Reports of Cases Determined in the District Courts of Appeal of the State of California (United States)
C.C.P.A. =United States Court of Customs and Patent Appeals Reports
Ch. (or Ch.D.) =Chancery Division of the English High Court of Justice
Clunet =Clunet, Journal du Droit international
C.M.R. =Court-Martial Reports (United States)
Cong. Rec. =Congressional Record (United States)
Ct. Cl. =Court of Claims Reports (United States)
Dalloz =Recueil périodique et critique de Jurisprudence, de Législation et de Doctrine (founded by Dalloz)
D.L.R. =Dominion Law Reports (Canada)
Documents and Decisions =European Commission of Human Rights: Documents and Decisions, 1955–1956–1957
F.2d =Federal Reporter, Second Series (United States)
Fed. =Federal Reporter (United States)
F.Supp. =Federal Supplement (United States)
I.C.J. Reports =International Court of Justice: Reports of Judgments, Advisory Opinions and Orders
J.B. =Juristische Blätter (Austria)
K.B. (or K.B.D.) =King's Bench Division of the English High Court of Justice

L.Ed. = United States Supreme Court Reports, Lawyers' Edition
L.R. = Law Reports (England)
Misc. = Reports of Selected Cases decided in the Courts of the State of New York other than the Court of Appeals and the Appellate Division of the Supreme Court (United States)
N.E.2d = North Eastern Reporter, Second Series (United States)
N.J. = Nederlandse Jurisprudentie (Holland)
N.J.W. = Neue Juristische Wochenschrift (Germany)
N.W. = North Western Reporter (United States)
N.Y.Supp. = New York Supplement (United States)
N.Y.S. 2d = New York Supplement, Second Series
Ob. = Oberster Gerichtshof (Austria)
ÖR. = Österreichische Richterzeitung (Austria)
P. = Pacific Reporter (United States)
Q.B. (or Q.B.D.) = Queen's Bench Division of the English High Court of Justice
R.G.Z. = Entscheidungen des Reichgserichts in Zivilsachen
R.S.C. = Rules of the Supreme Court, 1883, as subsequently amended (England)
Rt. = Norsk Rettstidende (Norway)
Sirey = Recueil général des Lois et des Arrêts (founded by Sirey)
Stat. = United States Statutes at Large
Sup. Ct. = Supreme Court Reporter (United States)
SZ = Sammlung der Entscheidungen des Obersten Gerichtshofes in Zivil- und Justizverwaltungssachen (Austria)
T.I.A.S. = Treaties and Other International Acts Series (United States)
U.S. = United States Reports
U.S.Av. = United States Aviation Reports
U.S. & C.Av.R. = United States and Canadian Aviation Reports
U.S.C.[A.] = United States Code [Annotated]
U.S.C.M.A. = Decisions of the United States Court of Military Appeals
Zl = Unpublished judgments of the Austrian Administrative Court (Verwaltungsgerichtshof)

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International Law—Subjects of—Sovereign Order of Malta—Status of—Action by Doctor Employed by Order—Whether Action Subject to Jurisdiction of Italian Courts—The Law of Italy.

SCARFÒ *v.* SOVEREIGN ORDER OF MALTA.

Italy, Tribunal of Rome. April 27, 1957.

THE FACTS.—The plaintiff was employed by the Sovereign Order of Malta as a doctor, and in this action, which arose out of an alleged breach of his contract of employment, he contended that the Order was subject to the jurisdiction of the Italian courts. The Sovereign Order of Malta contended that, notwithstanding that the plaintiff was employed by them, the nature of his employment was such as to constitute the relationship between the parties one in which the Order had acted in a sovereign capacity, having regard to the Constitution of the Order which provided, *inter alia*, that one of the foremost duties of the Order was to succour the sick, the wounded and the poor.

Held: that, in making a contract of employment with the plaintiff, the Sovereign Order of Malta had acted in a sovereign capacity, and that the Italian courts accordingly lacked jurisdiction.

The Court said: "There can be no doubt that the Order of Malta is a sovereign entity and a subject of international law. While it is true that the judgment of January 24, 1953, given by the Tribunal of Cardinals which was set up by the Holy Father on December 10, 1951, in order to determine the status of this entity as a sovereign and religious order and its relationship to the Holy See, has posed certain problems, it did not in any way deny the sovereignty of the Order. On the contrary, it expressly stated that

'its capacity as a sovereign Order, to which Article 2 (1) of the existing Constitution of the Order refers and which has been repeatedly recognized by the Holy See and in the provision here referred to, consists of the enjoyment of a number of privileges which belong to the Order as a subject of international law.'

With regard to the rights enjoyed by sovereign entities in accordance with the rules of international law, the judgment confirmed that, 'following the example of the Holy See, these rights are recognized by a number of States but do not, as far as the Order is concerned, represent that degree of power and privilege which is enjoyed by those subjects of international law which are sovereign within the full meaning of that word.'

"The limitations on the sovereignty of the Order of Malta which undoubtedly exist result mainly from the absence of State territory and citizens, and also from the fact that it is a religious Order recognized by the Holy See and what may be termed a '*persona moralis in Ecclesia*' (which, by reason of its military, noble and knightly origin, occupies a special position). These limitations, however, are not such as to be able to negative its sovereignty. Its sovereignty exists in law and is determined by its own legal order which is entirely independent of that of other subjects of international law. The Order has its own administration and courts, and the right of active and passive legation (Article 2 of the Constitution) which has been recognized by the Holy See. The latter has approved a diplomatic representation of the Order (Article 4 of the new Constitution), and the right of legation is also recognized by the Italian State, which has a legation accredited to the Order of Malta. Thus the status of the Order as a subject of international law, at any rate *vis-à-vis* the Italian State, cannot be doubted because the Italian State, by establishing a legation, has recognized the sovereignty of the Order within its own territory. It is therefore unnecessary to state—whatever interpretation may be given to the judgment of the Tribunal of Cardinals—that this judgment does not seem to prejudice the question of the sovereignty of the Order in any way. We may add that this judgment does not concern the Italian State because it is within the exclusive competence of each individual State to accord to an entity the status of a sovereign body and to regard it as a subject of international law. We must, therefore, on the basis of the sovereignty of the Order of Malta (which was confirmed by the judgment of the United Chambers of the Court of Cassation on July 14, 1953, No. 2281), examine the question whether this entity is subject to the jurisdiction of the Italian courts so far as concerns a contract of employment made between the parties.

"The rules applicable to such an examination are those which are constantly applied by the courts in the case of States and sovereign entities comparable to States, in accordance with prevailing doctrine, namely, the distinction between the status of an entity which has international personality and an entity within the framework of municipal law, and the legal capacity—which differs according to whether we are concerned with public or private law. In this context, exemption from the jurisdiction is limited to acts performed by the State or other sovereign entity within the framework of international law and concerning activities of a public nature which are the emanation of supremacy within the framework of international relations. On the other hand, where a State or a sovereign entity performs acts primarily of a private character, it does so as a subject of private law, and the jurisdiction of the Italian courts is [then] rightly claimed. Acting in accordance with this rule, the United Chambers of the Court of Cassation, in the above-mentioned judgment No. 2281, affirmed the view that the Sovereign Order of Malta is subject to the jurisdiction of the Italian courts in a private dispute [concerning a contract of sale with an Italian company]. The action now before the Court, however, cannot be treated on the same basis because the facts are entirely different, and for this reason a decision in the opposite sense does not seem to be unjustified.

" It cannot be denied that the medical services performed by the plaintiff which formed the subject-matter of his contract of employment with the Order of Malta were connected with the activities to be performed by the Order in accordance with the objects for which it has been established. Article 2 of the Constitution of the Order of Malta provides expressly that the Order ' shall support and further the Christian virtues of charity and brotherliness and shall perform acts of charity in the service of the sick ' [as well as of refugees and persecuted persons, abandoned children and the poor] and wounded in time of war as well as victims of disasters. For this purpose, ' medical units ' are established which, as is provided in Article 2 of the Constitution, are set up in pursuance of international conventions and which carry out their work in the territories of different States in accordance with the respective laws of those States, which have agreed to these activities of the Order.

" It follows, without any doubt, that the work performed by the plaintiff falls within the scope of the activities of the Order which are concerned with the care of the sick. We must needs recognize that the nature of these activities is reflected in the professional relationship between the plaintiff and the Order, and that the plaintiff has performed his work in accordance with the objects for which the Order was established and within the sphere of the public activities of the Order. Further, there can be no doubt that the assistance afforded to others is the most important characteristic of the Order of Malta, which is expressly authorized to adopt the description of a Hospital Order, an appellation which makes reference to its origin, namely, the association of the 'hospital brethren' of the hospital of Holy John of Jerusalem (Article 1 of the Constitution). It cannot be doubted that the objects of the Order are of a public nature, since they are concerned with work in the service of social solidarity extending beyond the interests of individuals to the international community of those States to which the Order and its hospitals are admitted. It is true that work in the fields of health and care need not, as such, be of a public nature since that work can be performed by private individuals. However, this is irrelevant in the present case because it is quite clear that the public character of such work always predominates where the work is not limited to a restricted class of persons but extends to the public in general and where it is performed, within the territories of different States, by a sovereign entity which *vis-à-vis* other States is recognized as a subject of international law and whose essential characteristic is the performance of precisely this activity which concerns itself exclusively with benefits to be conferred on the '*comitas gentium*' within whose sphere the work is performed. Thus there can be no doubt that everything concerning the organization of these activities, including the employment of medical personnel, must form part of the public function of the sovereign entity, because it is to serve its public purposes. By reason of its direct connection with these purposes, therefore, the contract of employment regulating the relations between the parties falls within the framework of the activities of the organization and enables it to carry out its public objects deriving from its sovereign character as a subject of international law. There is nothing in the present case which causes us to assume that the Order of Malta was willing to limit its own sovereignty so as to submit to the municipal law of Italy by accepting the jurisdiction of the Italian courts. As the Italian State has, by treaties and laws (*inter alia*, the Law No. 23 of January 4, 1938), acknowledged the right of the Order to carry out its public activities, and as Italian law applies the generally recognized principles of international law (Article 10 of the Constitution), the courts cannot interfere in relations which, as far as the position between the parties in this case is concerned, are regarded by the Order of Malta as being within its own sovereign sphere because they directly serve its constitutional objects (*par in parem non habet jurisdictionem*). Thus we hold that in this case the Sovereign Order of Malta is not subject to the jurisdiction of the Italian courts."

[Report: *Völkerrecht und Rechtliches Weltbild, Festschrift für Alfred Verdross*, 1960, p. 81.][1]

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[1] The report of this case appears in a contribution by Breycha-Vauthier ("Betrachtungen zur Erneuerung des Malteser-Ordens") to the *Festschrift* in honour of Alfred Verdross. The above English translation has been prepared from a German translation contained in this contribution.

IV.—Relation to Municipal Law

[*See also* PART VIII, TREATIES: B, VII, Operation and Enforcement of Treaties, Necessity for Municipal Legislation; *and* PART VI, THE INDIVIDUAL IN INTERNATIONAL LAW: A, In General.]

International Law—Relation to Municipal Law—Statute in Implementation of International Law—Counterfeiting of Currency—Whether Violating International Law—Currency of States Which Have Ceased to Exist—" Offences against the Law of Nations" —The Law of the United States of America.

UNITED STATES *v.* GERTZ.

United States, District Court, District of Hawaii. October 3, 1956.

Court of Appeals, Ninth Circuit. November 25, 1957.

THE FACTS.—This was a libel for the forfeiture of 3,827 coins, likenesses of the hapa haneri coin of the former Kingdom of Hawaii, which had been manufactured by Gertz and sold as souvenirs. Hawaii had been annexed by the United States in 1898, and the hapa haneri coins had not been in general circulation since 1900. It was contended by the owner that the statute under which forfeiture was sought, 18 U.S.C. § 489, applied only to coins of a currently existing country. The statute read:

> " Whoever, within the United States, makes or brings therein from any foreign country, or possesses with intent to sell, give away, or in any other manner uses the same, except under authority of the Secretary of the Treasury or other proper officer of the United States, any token, disk, or device in the likeness or similitude as to design, color, or the inscription thereon of any of the coins of the United States or of any foreign country issued as money, either under the authority of the United States or under the authority of any foreign government shall be fined not more than $100."

Held (by the District Court, *sub nom. United States* v. *3,827 Coins*): that the libel must be dismissed and the coins returned to the owner. The statute related only to the coins of existing foriegn countries. The Kingdom of Hawaii had ceased to be such in 1898. [Report: 144 F. Supp. 740.]

On appeal,

Held (by the Court of Appeals): that the judgment of the District Court must be affirmed. As a matter of the municipal law of the United States, the statute referred only to the coins of existing foreign Governments. The authority of the Congress to enact the statute in question was grounded in Article 8, section 8, clause 10, of the United States Constitution conferring power " to define and punish . . . Offences against the Law of Nations " in order to protect the United States in its relationships with other nations. Since there would be no question of imperilling relationships with a Government which was no longer in existence, a constitutional basis for the statute might be lacking it if were construed to cover the coins of Governments which had ceased to exist.

After applying rules of statutory construction drawn from the municipal law of the United States, the Court continued " The parties have devoted much attention to the definition of ' foreign government ', set out in 18 U.S.C.A. § 11.[1] This definition, which is concededly applicable to § 489, reads as follows:

> ' The term " foreign government ", as used in this title, includes any government, faction, or body of insurgents within a country with which the United States is at peace, irrespective of recognition by the United States.'

"Appellee argues that the quoted section defines a foreign government as that of a ' country with which the United States *is* at peace . . .,' (emphasis supplied) and contends that the United States could only be at peace with an existing country.

"Appellant points out, however, that this statutory definition is preceded by the words, ' the term " foreign government ", as used in this title, *includes* . . .'. (Emphasis supplied.)

" The word ' includes ' is usually a term of enlargement, and not of limitation. As stated in *Federal Land Bank of St. Paul* v. *Bismarck Lumber Co.*, 314 U.S. 95, 100, 62 S.Ct. 1, 4, 86 L.Ed. 65, ' " including " is not one of all-embracing definition, but connotes simply an illustrative application of the general principle.'[2]

" The likelihood that ' includes ' is used in this sense in § 11 is fortified by the fact that in one of the definitions set out in chapter 1 of title 18 (§ 9) U.S.C.A., ' means ' is used instead of ' includes,' and in another such section (§ 6) both ' means ' and ' includes ' are used. It would therefore appear that in chapter 1, ' means ' is used when the term and its definition are to be interchangeable equivalents, and ' includes ' is used when it is desired to eliminate any doubt as to the inclusion in a larger class of the particular class specifically mentioned.[3]

" It is reasonable to conclude from this that § 11 is not intended to limit the term ' foreign government ' to that of a country ' with which the United States is at peace,' but, as appellant argues, is broad enough to also embrace the government of a country with which the United States is at war.[1] But it is not readily apparent how this conclusion destroys the force of appellee's argument based on this definition. If ' foreign government ' includes not only that of a country ' with which the United States is at peace,' but also that of a country with which the United States is at war, the inference still remains that it is only presently-existing countries to which reference is being made. The United States could no more be at war than at peace with a non-existent country.[2]

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[1] [Footnote omitted.]

[2] See, also, *Gray* v. *Powell*, 314 U.S. 402, 416, 62 S.Ct. 326, 86 L.Ed. 301; *Phelps Dodge Corp.* v. *National Labor Relations Board*, 313 U.S. 177, 188–189, 61 S.Ct. 845, 85 L.Ed. 1271; *American Surety Co. of New York* v. *Marotta*, 287 U.S. 513, 517, 53 S.Ct. 260, 77 L.Ed. 466.

[3] That this is not necessarily true in every statute where the two words are used, see *Blankenship* v. *Western Union Tel. Co.*, 4 Cir., 161 F.2d 168. See, also, *Helvering* v. *Morgan's, Inc.*, 293 U.S. 121, 125, 55 S.Ct. 60, 79 L.Ed. 232.

"Adoption of appellant's construction of 18 U.S.C.A. § 489 as applying to countries and governments no longer in existence would present a grave constitutional question. In *United States* v. *Arjona,* 120 U.S. 479, 7 S.Ct. 628, 30 L.Ed. 728, the power of Congress to enact statutes making it unlawful to forge or counterfeit the securities ' of any foreign government ' was challenged. The Supreme Court held that Congress had such power under Art. I, § 8, clause 3, conferring power ' to regulate Commerce with foreign Nations . . .,' and Art. I, § 8, clause 10, conferring power ' to define and punish . . . Offenses against the Law of Nations.' The rationale of that decision is that, in thus protecting the securities of other nations with which the United States maintains intercourse, it is serving its own best interests.

" No such rationale, of course, can be applied with regard to countries and governments no longer in existence. Making or possessing replicas of the hapa haneri of the former Kingdom of Hawaii does not pertain to commerce ' with ' foreign nations, and violates no law of nations.

" It is a principle of constitutional adjudication that, where there is a choice of fair alternatives, that construction of a statute should be accepted which will avoid serious doubts as to its constitutionality. *United States* v. *Rumely,* 345 U.S. 41, 45, 73 S.Ct. 453, 97 L.Ed. 770.[3] The construction of § 489 contended for by appellant is not required by the express language used. The canon of statutory interpretation to which reference has just been made thus argues strongly for acceptance of that construction which will avoid the constitutional problem which has been suggested . . ."

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[1] An additional reason for reaching this conclusion is that the definition contained in § 11 is, with minor changes in phraseology, derived from § 4 of Title VIII of the act of June 15, 1917 (chapter 30, 40 Stat. 217, 226), known as the Espionage Act of 1917. (See historical note after 18 U.S.C.A. § 11). The Espionage Act of 1917 (see § 2 (a) of 40 Stat. 217, 218), as well as its present-day counterpart (see 18 U.S.C.A. § 794), expressly applies in time of war as well as in time of peace.

[2] It may be added that, if the term " foreign government " had been intended to include not only that of a country with which the United States is at peace or war, but also a nonexistent government of a nonexistent country, it is probable that Congress would have taken as much pains to say so as it did to say, in § 11, that the term includes the government of a country with which the United States is at peace, " irrespective of recognition by the United States."

[3] Conversely, a restrictive interpretation should not be given a statute merely because giving effect to the express language employed by Congress might require a court to face a constitutional question. *United States* v. *Sullivan,* 332 U.S. 689, 693, 68 S.Ct. 331, 92 L.Ed. 297.

(The Court then proceeded to an examination of other issues of the municipal law of the United States.)

[Report: 249 F.2d 662.]

International Law—Relation to Municipal Law—Whether Treaty to be Applied in Accordance with Provisions of Municipal Law or Provisions of Treaty—Land Owned by United States Citizens in Germany—Land Expropriated for Town and Country Planning Purposes—Treaty of Friendship between United States and Germany Providing for Payment of Full Compensation in Cases of Expropriation—German Town and Country Planning Law Providing for Less than Full Compensation—Whether Compensation Payable in Accordance with Treaty or German Law—The Law of Germany.

TOWN AND COUNTRY PLANNING (UNITED STATES CITIZENS IN GERMANY) CASE.

German Federal Republic, Federal Supreme Court. December 19, 1957.

THE FACTS.—Land owned by United States citizens in Berlin was expropriated by the authorities in accordance with the relevant German Town and Country Planning legislation. The question arose whether the compensation payable to the owners had to be assessed in accordance with the relevant German law (which ignored any increase in the value of the land subsequent to a certain date) or in accordance with the German-American Treaty of Friendship of October 29, 1954, which provided that the compensation payable to United States citizens in cases of expropriation must be equal in value to the value of the property expropriated by the German authorities.

Held: that the compensation must be assessed in accordance with the terms of the Treaty of Friendship.

The Court said: " The contents of the Treaty of Friendship with the United States became part of municipal law and fully effective on the date of the coming into operation of the Treaty (July 14, 1956), by virtue of the ratifying enactments dated May 7, 1956 (for the Federal Republic) and October 4, 1956 (for Berlin). Article V (4) of the Treaty contains details as to the conditions subject to which the property of a national of one of the Contracting Parties may be expropriated in the territory of the other Contracting Party. In so far as concerns the compensation payable in respect of expropriation this Article provides as follows: ' The compensation shall be equivalent to the value of the property expropriated . . .' In the circumstances of this case this can only mean that the full value of the property must be paid. It is true that the sentence here quoted might possibly admit of an interpretation that the compensation must be similar to the value of the property expropriated ' in some manner ', *i.e.*, must bear some relation to its value, but the English wording of the Treaty (' such compensation shall represent the equivalent of the value of the property taken ') excludes all doubt that the parties had in mind anything other than the actual value of the property taken at the date of expropriation. To concede the full value of the property may possibly not be in accordance with the provisions of the relevant German Law on Town and Country Planning. According to that Law, for example, any increase in the value of the expropriated land which has been brought about since October 17, 1936, by virtue of a change in user is not to be taken into account. Such a diminution in the value of property is certainly not in conformity with the provision made for compensation by the Treaty of Friendship. Where there is a lack of conformity between the amounts of compensation payable, the assessment laid down in the Treaty of Friendship must be applied because, for one thing, the Treaty of Friendship with the United States of America is the later enactment, and in addition it also deals with the special case, as far as the application of German law is concerned, of the expropriation of American citizens in Germany. Thus, if American-owned real property in Germany is taken over under the provisions of German Town and Country Planning legislation, the compensation must be assessed not in accordance with the relevant German Law but in accordance with the provisions of the Treaty of Friendship."

The Court then dealt with certain questions of the German law of procedure and in particular the right to submit to the Supreme Court a question of the kind here referred to.

[Report: BGHZ, Vol. 26, p. 200.]

International Law—Relation to Municipal Law—Treaties—Absence of Enabling Municipal Legislation—Annexes to Chicago Convention on International Civil Aviation, 1944—The Law of Belgium.

BELGIAN STATE, MINISTER OF TRANSPORT, AND AIR TRANSPORT BOARD *v.* MARQUISE DE CROIX DE MAILLIE DE LA TOUR LANDRY *ET AL.*

Belgium, Court of Cassation. October 3, 1957.

THE FACTS.—The appellants had on several occasions prohibited the reconstruction by the respondents of the towers of their castle in order to safeguard the approaches to a nearby aerodrome. The respondents brought an action for damages on the ground that the appellants had interfered with the exercise of their right of property without having a legal basis for so doing. The appellants based their defence on the ratification by Belgium of the Chicago Convention on International Civil Aviation. That Convention provided for the adoption, under the auspices of the International Civil Aviation Organization, of international standards and recommended practices which would enter into force as Annexes to the Convention by virtue of approval by the majority of the States parties to it. Annex 14, which so entered into force on November 1, 1951, laid down standards and recommended practices concerning aerodromes.

The respondents contended that the Convention and the Annex in question did not create any rule directly binding on individuals in Belgium. The Convention, which had been given legislative effect in Belgium, merely obliged States, by Article 37, to take the necessary steps to give effect to the international standards and, where appropriate, the recommended practices; and no legislation had ever been passed to give effect to Annex 14. By a decision of January 20, 1956, the Court of Appeal of Brussels found in favour of the respondents. This was an appeal from that decision.

Held: that the decision of the Court below must be quashed, but only in so far as, in assessing the measure of damages, it had left out of account the futility of undertaking reconstruction work if municipal legislation concerning aerodromes was about to be passed. Pending the adoption of such legislation the appellants had no legal basis for interfering with the property rights of the respondents. No such enabling legislation had so far been enacted.

The Court said: " The appellants having contended that their action was justified by the Belgian approval of an international Convention concerning aerial servitudes, the Court below found that the national law which Belgium had undertaken to adopt was still, at the moment when the injunctions were issued, in the form of a Bill. It added that ' the situation has not changed ' and that ' the provisions envisaged, which correspond to the international Convention, do not yet have the force of law and did not have the force of law when the injunction was notified to the respondents '. These arguments constitute a sufficient answer to the contentions of the appellants.

" By the Law of April 30, 1947 [approving the ratification of the Chicago Convention], Belgium assumed the obligation to incorporate in its national legislation certain provisions of the Chicago Convention of December 7, 1944, and of the Annexes supplemental thereto. That Law did not make the servitudes to be established in virtue of that Convention or these Annexes automatically enforceable in Belgium. Nor could the appellants require individuals to comply with them prior to the adoption of appropriate national legislation."

[Report: *Pasicrisie Belge*, 1958, Part I, p. 88.]

International Law—Relation to Municipal Law—Treaty Incorporated *in toto* into Municipal Law upon Ratification—Whether Operative as Municipal Law if in Foreign Language and Indeterminate in Wording—The Law of Italy.

Re MASINI.

Italy, Court of Cassation. June 7, 1956.

THE FACTS.—The appellant was convicted of an offence against the Geneva Convention on Road Traffic concluded on September 19, 1949, which had been ratified by an Italian Law dated May 19, 1952. This Law provided that " the Convention is hereby given full and complete effect from the date of its entry into force ". The schedule to the Law (which formed an integral part thereof) contained the text of the Convention in the French language. The appellant contended that his appeal against conviction should be allowed on the ground that the Convention was devoid of legal effect in Italy because (1) it was in the French language, (2) its wording was too vague and indeterminate, (3) it provided for the future enactment of municipal laws in the Contracting States, (4) some of its provisions were incompatible with Italian Laws already in force, and (5) it failed to provide for any punishment in the event of a violation of its provisions.

Held: that the appellant's contentions must be rejected and the appeal dismissed.

The Court said: "The appellant's contentions can be rejected without difficulty. The French language is the language normally used for international conventions, and the validity of such conventions in Italy cannot seriously be contested once they have been incorporated into the Italian legal system. A distinction must be made between a legislative enactment emanating directly from the Italian State, which must be drafted in Italian, and an international agreement which becomes part of municipal law by virtue of a law incorporating it and which may or may not be accompanied by an official translation into Italian. The vague formulation of some, but not all, of the provisions of the Convention is due to the need to make these provisions applicable to the different legal systems of the Contracting States, which have their own methods of drafting. The custom of providing for the entry into force of certain provisions of a convention at some future date is due to the need to adapt the measures of enforcement to the provisions of the law. The same reasoning applies to a provision such as Article 6 of the Convention, which says that each Contracting State shall take ' all requisite measures ' to assure the observance of the rules laid down in Chapter 2. . . . Lastly, it is evident that an international convention cannot provide for the punishment of offences because this is a duty which devolves upon each individual State. The Convention does not deal exhaustively with the subject-matter as a whole, but only with those matters which are to be uniformly regulated in the interest of international road traffic. In this instance the Geneva Convention has been incorporated into the Italian legal system as a municipal law. By its nature some of its provisions are immediately applicable; they are those in respect of which the Contracting State need not enact any specific legislation. The entry into force of other provisions is deferred until such time as the State enacts the requisite legislation. The entry into force of others again is deferred until a certain date. Where a provision already forms part of existing Italian law (the Highway Code), the latter is not rendered inoperative by reason of incompatibility with the provisions of the Convention as and when these come into force. The provision contained in Article 24 of the Convention is immediately operative because there is no need to enact measures putting it into force. Also, paragraph 6 of that Article extends for a period of five years the operation of the corresponding provisions contained in previous international conventions repealed by Article 30 of the present Convention. Each Contracting State is bound to permit the driving of vehicles on its territory by drivers who hold a driving licence granted in accordance with the laws in force in the country of issue."

[Report: *Rivista di Diritto Internazionale*, XL (1957), p. 257.]

International Law—Relation to Municipal Law—Ratification of Treaty—Subsequent Enactment of Municipal Law—Municipal Law Contrary to Terms of Treaty—Whether Treaty or Municipal Law Applies in Country of Forum—The Law of Italy.

ENTE NAZIONALE PER LA CELLULOSA E PER LA CARTA *v.* CARTIERA ITALIANA *ET AL.*

Italy, Court of Cassation. January 28, 1957.

THE FACTS.—The respondents herein contended that an Italian Law of 1956 whereby Italy levied import duty on imported cellulose was incompatible with a Treaty whereby Italy had undertaken not to introduce protectionist tariffs favouring the national production of cellulose. They argued (1) that the Law of 1956 was not binding in the face of the prior ratification of the Treaty, whose provisions were alone applicable, and (2) that, upon ratification, the terms of the Treaty had been automatically incorporated into Italian law by virtue of Article 10 (1) of the Italian Constitution.[1]

Held: (1) that the source of law applicable to private citizens was not the Treaty as ratified, but the municipal Law, notwithstanding that the contents of that Law might be contrary to the terms of the Treaty; (2) that Article 10 (1) of the Constitution provided only for the automatic incorporation of international customary law, and was therefore not applicable to the present case, which was concerned with treaty law; and (3) that accordingly, the rights and duties of the respondents were exclusively governed by the Law of 1956.

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[1] Article 10 (1) provides that the Italian legal system shall be in conformity with the generally recognized rules of international law.

The Court said: "Article 72 of the Constitution provides that the ratification of treaties must take place in accordance with a procedure requiring the direct approval of both Houses of Parliament. Where, however, the treaty covers subject-matters within the field of competence of the legislative power, *viz.*, involves a change of existing law (in which case it does not become binding except by virtue of a law specifically relating to it), or where the Government, by virtue of delegated power implicit in the ratification, is itself empowered to enact the relevant provisions, the source of municipal law is not the treaty but the decree or law relating to it. The formalities required for a law which authorizes the ratification of an international treaty are not, therefore, those required for a law which renders binding, so far as concerns the internal relations between citizens, the undertakings assumed by the State *vis-à-vis* other States. Nor can reliance be placed on Articles 10 and 11 of the Constitution, because the automatic reception provided for in those provisions applies only in the case of generally recognized rules of international law, that is, the general customs of international law, and not those obligations which become part of positive law by virtue of the ratification of international treaties providing for such obligations. The latter require, as under the old law, the enactment of a municipal measure of enforcement. Where a law or decree provides for something which is contrary to what is required by the international undertaking, the State may become liable to the other Contracting Parties, but the law or decree, as the case may be, cannot become invalid on the ground that it is unconstitutional."

[Report: *Rivista di Diritto Internazionale,* XLI (1958) p. 450.]

International Law—Relation to Municipal Law—Treaties—Treaty Inconsistent with Constitution—The Law of the United States of America.

See p. 549 (*Reid* v. *Covert*).

International Law—Relation to Municipal Law—Treaty Inconsistent with Subsequently Enacted Statute—"Treaty Merchant"—Deportation of—Under Statute Inconsistent with Prior Treaty—The Law of the United States of America.

See p. 577 (*Yee Si* v. *Boyd*).

International Law—Relation to Municipal Law—Prize Courts—National Legislation in Matters of Prize and International Law—The Law of the Netherlands.

See p. 916 (*The Nyugat*).

International Law—Relation to Municipal Law—Supremacy Before International Tribunal of International Law Over Domestic Law.

See p. 654 (*Wollemborg Claim*), at p. 661.

International Law—Relation to Municipal Law—Binding Force of Rules of International Law Not Expressly Reproduced in National Code.

See p. 173 (*Re Bianchi*).

International Law—Relation to Municipal Law—Superiority of Treaties Over Municipal Law— The Law of Holland.

See p. 590 (*Public Prosecutor* v. *A.J.D.*).

International Law—Relation to Municipal Law—Application of Treaty by Municipal Courts—Exclusive Reliance on Municipal Statute Enacted in Pursuance of Treaty—The Law of Mexico.

See p. 596 (*Re Destilería Francesa, S.R.L.*).

International Law—Relation to Municipal Law—Concordat between Holy See and Germany—Alleged Violation of Provisions of Concordat by One of German *Länder*—Whether German Federal Republic Can Compel Compliance with Concordat by *Land*—The Constitutional Law of Germany.

See p. 592 (*Concordat* (*Germany*) *Case*).

International Law—Relation to Municipal Law—Absence of Rules of International Law—International Law as Part of the Law of Sweden—Diplomatic Immunity.

See p. 221 (*Beckman* v. *Chinese People's Republic*).

International Law—Relation to Municipal Law—Acceptance in State Constitution of " Generally Recognized Principles of Internatinal Law "—Whether This Includes Conventions as well as Customary International Law—Whether Legislation Needed to Incorporate Convention in Domestic Law—Primacy of Domestic Legislation.

See p. 420 (*Re O Laighléis* (*Lawless*)).

International Law — Relation to Municipal Law — Effect of Universal Declaration of Human Rights — Compensation for Expropriation of Property—The Law of India.

See p. 425 (*Biswambhar Singh and Another* v. *The State of Orissa*).

V.—International Comity

International Comity—Public Policy—Respect for Law of Foreign Friendly State—Penal, Political and Revenue Laws—Contract for Sale of Goods—Intention of Parties to Obtain Goods in Foreign Country and Deliver Them to Destination Prohibited by Laws of Exporting Country—Whether Contract Enforceable in English Courts.

REGAZZONI *v.* K. C. SETHIA (1944) LTD.

England, House of Lords. October, 21, 1957.

(Viscount Simonds, Lord Reid, Lord Cohen, Lord Keith of Avonholm and Lord Somervell of Harrow.)

THE FACTS.—This was an appeal from a judgment of the Court of Appeal of April 26, 1956, by which they unanimously dismissed the appeal of the present appellant, Regazzoni, from a judgment of Sellers J. given on December 19, 1955, in which he dismissed the action brought by Regazzoni against K. C. Sethia Ltd., an English company, claiming damages for breach of contract.

The appellant alleged that the respondents had agreed to sell and deliver to him in September/October 1948, c.i.f. Genoa, 500,000 jute bags of a certain quality and that they had wrongfully repudiated the agreement. The respondents defended the action on the ground, *inter alia*, that the contract was to the appellant's knowledge an illegal contract and unenforceable because it had for its purpose an object which was illegal and/or contrary to public policy, namely, the shipment of jute goods from India to South Africa in breach of Indian law. It was agreed that the proper law of the contract was English law.

The Central Government of India, under powers conferred by the Sea Customs Act, 1878, had made an order prohibiting the taking " by sea or by land out of British India of goods from whatever place arriving which are destined for any port or place in the Union of South Africa or in respect of which the Chief Customs Officer is satisfied that the goods although destined for a port or place outside the Union of South Africa are intended to be taken to the Union of South Africa."

It appeared from the evidence that both parties knew it was impossible to obtain so large a quantity of jute bags of this kind for early shipment from any source other than India; that to the knowledge of the respondents the appellant intended to sell the goods for eventual shipment to the Union of South Africa; that both parties knew that the law of India prohibited the export from India of goods destined to South Africa directly or indirectly; and that the respondents intended, and the appellant knew they intended, to evade the Indian prohibition by finding a shipper in India who would not ask inconvenient questions about the destination of the goods and who would be able to get the goods out of India. It appeared that there was a great demand for these goods in the Union and large profits could be made by getting them there.

Held: that the contract was unenforceable since an English court would not enforce a contract, or award damages for its breach, if its performance would involve doing an act in a foreign and friendly State which violated the law of that State. This principle was based on public policy and international comity. It was true that the court would not enforce a " revenue " or " penal " law at the suit of the foreign State; but it did not follow that the court would enforce a contract which contemplated the doing of an act in the foreign State which violated such a law. The present case was, moreover, distinguishable from old authorities on revenue laws.

Viscount Simonds, after stating the claim and the defence, and describing the Indian Order and its effect, continued: " The question then arises—and it is, as I say, the only question for your Lordships' consideration—whether the respondents were justified in repudiating the contract. They claim to be justified on the ground that I have already stated. Their broad proposition is that whether or not the proper law of the contract is English law, an English court will not enforce a contract, or award damages for its breach, if its performance will involve the doing of an act in a foreign and friendly State which violates the law of that State. For this they cite the authority of the well-known case of *Foster* v. *Driscoll* ([1929] 1 K.B. 470[1]), and much of the debate in this House has been whether that case was rightly decided, and if so, whether it is distinguishable from the present case. The appellant contends that it was not rightly decided, and further invokes a familiar principle which he states in these wide but questionable terms, 'An English court will not have regard to a foreign law of a penal, revenue, or political character ', and claims that the Indian law here in question is of such a character.

" My Lords, in the consideration of this matter I deem it of the utmost importance to bear in mind that we are not here concerned with a suit by a foreign State to enforce its laws. The recent case in this House of *Government of India* v. *Taylor* ([1955] A.C. 491[2])

[[1] See *Annual Digest*, 1927-1928, Case No. 10.]
[[2] See *International Law Reports*, 1955, p. 286.]

shows beyond all doubt that an English court will not enforce the penal or revenue laws of another country at the suit of that country. That proposition was there exhaustively examined and nothing remains to be said about it except that there is still a question how far, if at all, the doctrine extends to laws which are described as having a 'political' or 'public' character. It is clear at least, as Denning L.J. said in this case, that 'these courts do not sit to collect taxes for another country or to inflict punishments for it' ([1956] 2 Q.B. 490, 515). But, as I say, we are not concerned with such a case, but with a very different question, *viz.*, whether in a suit between private persons the court will enforce a contract which involves the doing in a foreign country of an act which is illegal by, and violates, the law of that country. When I say 'foreign country' I mean a foreign and friendly country and will not repeat the phrase. In the statement of the question I call particular attention to the words 'the doing in a foreign country', for it may well be that different considerations will arise and a different conclusion will be reached if the law of the contract is English and the contract can be wholly performed in England, or at least in some other country than that whose law makes the act illegal (see *Kleinwort, Sons & Co.* v. *Ungarische Baumwolle Industrie Aktiengesellschaft*, [1939] 2 K.B. 678). There are points at which the two questions appear to touch each other, and sometimes the one proposition has been treated as an exception on the other. But there is, I think, a fundamental difference. It can hardly be regarded as a matter of comity that the courts of this country will not entertain a suit by a foreign State to enforce its revenue laws. It is, on the other hand, nothing else than comity which has influenced our courts to refuse as a matter of public policy to enforce, or to award damages for the breach of, a contract which involves the violation of foreign law on foreign soil, and it is the limits of this principle that we have to examine. If the principle is, as I think it clearly is, based on public policy, your Lordships will not hesitate, while disclaiming any intention to create any new head of public policy, to apply an old principle to new circumstances.

"It will be observed that I have said that the appellant's contention is that the English courts will not pay regard to the penal, revenue, or political laws of a foreign State, not merely that they will not enforce such laws at the suit of a foreign State. If he is right, then *Foster* v. *Driscoll* ([1929] 1 K.B. 470) was wrongly decided and nothing stands in the way of the success of this appeal except the counter argument that the Indian law with which we are concerned does not fall within this category.

"But before examining the cases in which the question has been the enforcement of a contract involving the violation of a foreign law, it is perhaps desirable to refer to the analogous cases in which contracts involving the violation of English law have been considered. I say 'analogous cases' because here, too, public policy is involved.

Whether the illegality be robbery on Hounslow Heath or smuggling goods into England contrary to our law (see *Biggs* v. *Lawrence*, (1789) 3 Term Rep. 454) or the hiring of a brougham to a prostitute for the purpose of her trade, a party cannot recover in a court of justice on a contract so tainted. Here the only question will be whether the party suing is to be regarded as a sharer in the transaction (see, for example, *Hodgson* v. *Temple* (1813) 5 Taunt. 181), and refinements have been introduced into this branch of the law which may one day merit examination.

"Just as public policy avoids contracts which offend against our own law, so it will avoid at least some contracts which violate the laws of a foreign State, and it will do so because public policy demands that deference to international comity. The question is what contracts?

"'It occurred to me at the trial that it was contrary to the law of nations', said Best C. J. in *De Wütz* v. *Hendricks* ((1824) 2 Bing. 314, 315-316) '. . . for persons in *England* to enter into engagements to raise money to support the subjects of a Government in amity with our own, in hostilities against their Government, and that no right of action could arise out of such a transaction.'

More than a hundred years later in *De Beéche* v. *South American Stores* (*Gath & Chaves*) *Ltd.* ([1935] A.C. 148, 156) it was said in this House:

"'It cannot be controverted that the law of this country will not compel the fulfilment of an obligation whose performance involves the doing in a foreign country of some thing which the supervenient law of that country has rendered it illegal to do'.

I make two observations on this citation; first, the case is a fortiori if the illegality is not supervenient but, as in the case under appeal, existent and known at the time of the contract; secondly—and I say this in deference to an argument that was vigorously addressed to us—it would, as Scrutton L.J. said in . . . *A. M. Luther* v. *James Sagor & Co.* ([1921]) 3 K.B. 532, 558–559[1]),

'be a serious breach of international comity, if a State is recognized as a sovereign independent State, to postulate that its legislation is "contrary to essential principles of justice and morality".'

Your Lordships were in effect invited to say that the relevant Indian legislation was of such a character. I can only say that there could be no possible justification for such a view, however hardly the Act may bear on the Union of South Africa.

"It is time, then, to turn to those cases in which an exception has been made to the principle thus authoritatively stated. In doing so I repeat that, the principle being based on public policy, exceptions to it must be similarly based. It would, therefore, not be surprising

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[1 See *Annual Digest*, 1919–1922, Case No. 26.]

if a contract, in one age, falls within the proposition, in another, without it. This observation has particular relevance to the first case that I shall cite. In *Boucher* v. *Lawson* ((1734) Cas t. Hard. 85, 89), the trade of exporting gold from Portugal being prohibited by the law of that country, Lord Hardwicke, then Lord Chief Justice, nevertheless upheld a contract which involved the violation of that law, observing that

> 'if it should be laid down, that because goods are prohibited to be exported by the laws of any foreign country from whence they are brought, therefore the parties should have no remedy or action here, it would cut off all benefit of such trade from this kingdom, which would be of very bad consequence to the principal and most beneficial branches of our trade; nor does it ever seem to have been admitted . . .'

I must admit to some doubt whether, if this case had come before the court two hundred years later, so robust an assertion in favour of national interest to the prejudice of international comity would have been made. But, at any rate, in what might be regarded as purely revenue laws the same idea persisted. Thus, in *Pellecat* v. *Angell* ((1835) 2 DrM. & R. 311, 313), where it was held that a foreigner, selling and delivering goods abroad to a British subject and knowing at the time of sale and delivery that the purchaser intended to smuggle them into England, was not debarred from recovering the price of the goods, it was said by Lord Abinger that it would be

> 'most unfortunate if it were so in this country, where for many years, a most extensive foreign trade was carried on directly in contravention of the fiscal laws of several other States.'

The smuggling was in this case a breach of English law but it illustrates the view that was then entertained.

"So, too, in *Emperor of Austria* v. *Day and Kossuth* ((1861) 3 De G.F. & J. 217, 241–242), Lord Campbell L.C., after what may be regarded as a valuable exposition of the general principle, said:

> "'A more specious objection was rested on the class of cases in which it has been held that we take no notice of the "revenue laws" of foreign countries, so that an injunction would certainly be refused to a foreign Sovereign who should apply for one to prevent the smuggling of English manufactures into his dominions to the grievous loss of his fisc. But, although from the comity of nations the rule has been to pay respect to the laws of foreign countries, yet, for the general benefit of free trade, "revenue laws" have always been made the exception; and this may be an example of an exception proving the rule.'

In the case before him the Lord Chancellor was dealing with a claim by the foreign Sovereign himself, and in the earlier part of the passage that I have cited refers specifically to such a claim, but in the latter part his language is more comprehensive and clearly refers to the cases that I have cited, and particularly also to *Holman* v. *Johnson* ((1775) 1 Cowp. 341, 343), and the observation of Lord Mansfield C.J. often repeated and often criticized:

' No country ever takes notice of the revenue laws of another.'

One more example I will give because it was much relied on by counsel for the appellant. In *Sharp* v. *Taylor* ((1848) 2 Ph. 801, 816) Lord Cottenham L.C. said that the courts of this country will not

' refuse to administer justice between joint importers of any article of commerce upon proof that, in the production or exportation of such article, some fiscal law of the country of produce has been violated.'

" Here, my Lords, was a formidable line of authority when in 1920 *Ralli Brothers* v. *Compania Naviera Sota y Aznar* ([1920] 2 K.B. 287) came before the Court of Appeal. In that case the contract in suit was governed by English law but it required the performance in Spain of an act illegal by Spanish law, and it was held that for that reason it could not be enforced. I will cite one passage only from the judgment of Scrutton L.J.

" ' Where ', he said, ([1920] 2 K.B. 287, 304), ' a contract requires an act to be done in a foreign country, it is, in the absence of very special circumstances, an implied term of the continuing validity of such a provision that the act to be done in the foreign country shall not be illegal by the law of that country. This country should not in my opinion assist or sanction the breach of the laws of other independent States.'

In the *Ralli Brothers* case the relevant law was not a revenue law, and I am content to assume that Scrutton L.J. might have qualified his statement if he had had such a law in mind. But I venture to return to what I said earlier in this opinion. It does not follow from the fact that today the court will not enforce a revenue law at the suit of a foreign State that today it will enforce a contract which requires the doing of an act in a foreign country which violates the revenue law of that country. The two things are not complementary or co-extensive. This may be seen if for revenue law penal law is substituted. For an English court will not enforce a penal law at the suit of a foreign State, yet it would be surprising if it would enforce a contract which required the commission of a crime in that State. It is sufficient, however, for the purposes of the present appeal to say that, whether or not an exception must still be made in regard to the breach of a revenue law in deference to old authority, there is no ground for making an exception in regard to any other law. I should myself have said—and this is, I think, the only point upon which I do not agree with the Court of Appeal—that the present case was precisely covered by the decision in *Ralli Brothers*. For when the fact is found that the very thing which the parties intended to do was to export the jute bags from India in order that they might go via Genoa to the Union of South Africa, it appears to me irrelevant that upon the face of the documents that wrongful intention is not disclosed. But, whether this is so or not, it is clearly covered by *Foster* v. *Driscoll*, ([1929] 1 K.B. 470), a decision the correctness of which is not to be doubted. The distinctive feature of the case was that Scrutton L.J. thought that the contract there in question could be carried out legally, and for that reason, differing from Lawrence and Sankey L.JJ., held that it was not invalid. The principle of the decision in *Ralli Brothers* was emphatically reasserted and the apparent innocence of the documents was disregarded, the guilty intention being proved ab extra. So, here, it has been conclusively found that the common intention of the parties was to violate the law of India, and it is of no consequence that the documents did not disclose their intention. I ought not to part from the case without noting that Sankey L.J. observed that the cases relating to the breach of a revenue law were not germane to the issue. Nor are they germane to this appeal. Whether they are still to be regarded as a binding authority is a question that must await determination.

"The appeal should, in my opinion, be dismissed with costs." (At pp. 317–323.)

Lord Reid said: "To my mind, the question whether this contract is enforceable by English courts is not, properly speaking, a question of international law. The real question is one of public policy in English law: but in considering this question we must have in mind the background of international law and international relationships often referred to as the comity of nations. This is not a case of a contract being made in good faith but one party thereafter finding that he cannot perform his part of the contract without committing a breach of foreign law in the territory of the foreign country. If this contract is held unenforceable, it should, in my opinion, be because from the beginning the contract was tainted so that the courts of this country will not assist either party to enforce it.

"I do not wish to express any opinion about a case where parties agree to deal with goods which they both know have already been smuggled out of a foreign country, or about a case where the seller knows that the buyer intends to use the goods for an illegal purpose or to smuggle them into a foreign country. Such cases may raise difficult questions. The crucial fact in this case appears to me to be that both parties knew that the contract could not be performed without the respondents procuring a breach of the law of India within the territory of that country.

"On that question I do not get very much assistance from the older cases. Most of them do not deal with that point, and, further, it must, I think, be borne in mind that they date from a time when international relationships were somewhat different and when theories of political economy now outmoded were generally accepted. Many dealt with revenue laws or penal laws, and I do not wish on this occasion to say more than that probably some re-examination of some of these cases may in future be necessary. The Indian law prohibiting exports to South Africa does not appear to me to be a revenue or penal law any more than was the law of exchange control considered by this House in *Kahler* v. *Midland Bank Ltd.* ([1950] A.C. 24).

" Further, this case does not, in my view, involve the enforcement of Indian law in England. In fact, no breach of Indian law in the execution of this contract was ever committed or attempted because the contract came to an end by its repudiation by the respondents within a few days after it was made.

" The only recent authority which is directly in point is *Foster* v. *Driscoll* ([1929] 1 K.B. 470[1]). There Scrutton L.J. dissented because he took a different view of the facts: if he had held that performance of the contract necessarily involved a breach of American law, I think that he would have agreed with the majority. He said (*ibid.* 496):

" ' I have no doubt that if seller and buyer agreed to ship the whisky into the United States contrary to the laws of that country the contract would not be enforced here: *Ralli's* case, not because it was illegal here but as a matter of public policy based on international comity.'

He then cited with approval Dicey's Conflict of Laws, 4th ed., p. 620:

" ' It must, however, be noted that if a contract is an English contract, it will only be held invalid on account of illegality if it actually necessitates the performance in a foreign and friendly country of some act which is illegal by the law of such country.'

And he also quoted with approval a passage from the judgment of Blackburn J. in *Waugh* v. *Morris* ((1873) L.R. 8 Q.B. 202, 208):

" ' We quite agree that, where a contract is to do a thing which cannot be performed without a violation of the law it is void, whether the parties knew the law or not. But we think, that to avoid a contract which can be legally performed on the ground that there was an intention to perform it in an illegal manner, it is necessary to show that there was the wicked intention to break the law; and, if this be so, the knowledge of what the law is becomes of great importance.'

By ' a thing which cannot be performed without a violation of the law ', I think that Blackburn J. meant a thing which the contract expressly or by clear implication requires to be done. This contract does not require the seller to obtain the goods from India: it is only after investigation of the facts that it appears that he could not have got them anywhere else. And this contract does not disclose the buyer's intention to send the goods to South Africa. On the face of it this contract could be performed without a breach of the laws of any country. I shall also quote from what Lawrence L.J. said in *Foster's* case ([1929] 1 K.B. 470, 510):

" ' On principle, however, I am clearly of opinion that a partnership formed for the main purpose of deriving profit from the commission of a criminal offence in a foreign and friendly country is illegal, even although the parties have not succeeded in carrying out their enterprise, and no such criminal offence has in fact been committed; and none the less so

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[[1] See *Annual Digest*, 1927–1928, Case No. 10.]

because the parties may have contemplated that if they could not successfully arrange to commit the offence themselves they would instigate or aid and abet some other person to commit it.'

These passages cover the present case, and I agree with them.

"Finally, it was argued that, even if there be a general rule that our courts will take notice of foreign laws so that agreements to break them are unenforceable, that rule must be subject to exceptions and this Indian law is one of which we ought not to take notice. It may be that there are exceptions. I can imagine a foreign law involving persecution of such a character that we would regard an agreement to break it as meritorious. But this Indian law is very far removed from anything of that kind. It was argued that this prohibition of exports to South Africa was a hostile act against a Commonwealth country with which we have close relationships, that such a prohibition is contrary to international usage, and that we cannot recognize it without taking sides in the dispute between India and South Africa.

"My Lords, it is quite impossible for a court in this country to set itself up as a judge of the rights and wrongs of a controversy between two friendly countries, we cannot judge the motives or the justifications of governments of other countries in these matters and, if we tried to do so, the consequences might seriously prejudice international relations. By recognizing this Indian law so that an agreement which involves a breach of that law within Indian territory is unenforceable we express no opinion whatever, either favourable or adverse, as to the policy which caused its enactment. In my judgment this appeal should be dismissed." (At pp. 323–326.)

Lord Cohen concurred.

Lord Keith of Avonholm, after briefly referring to the evidence, said: "It is accepted that the proper law of the contract is English law, and the only other question is whether the contract is one which the English courts will enforce. I am clear that it is not. The case is within the ratio of the decision in *Foster* v. *Driscoll* ([1929] 1 K.B. 470[1]), and that case was, in my opinion, rightly decided. I would say a few words about *Foster* v. *Driscoll*. In that case recourse was had to the courts in the form of three separate actions involving rights and liabilities inter se of the members of an English partnership or joint venture. Owing to failure among the partners to achieve the objects of the joint adventure certain of the members brought actions to rescind the agreement and others actions to enforce liabilities incurred under their agreement, including certain bills of exchange drawn by some and accepted by others. The decision of the court was that the agreement constituted an illegal joint adventure, being designed to run whisky into the United States of America during a period of prohibition in that country. Lawrence L.J. stated the matter thus (*ibid.* 510):

[[1] See *Annual Digest*, 1927–1928, Case No. 10.]

" 'On principle, however, I am clearly of opinion that a partnership formed for the main purpose of deriving profit from the commission of a criminal offence in a foreign and friendly country is illegal, even although the parties have not suceeded in carrying out their enterprise, and no such criminal offence has in fact been committed; and none the less so because the parties may have contemplated that if they could not successfully arrange to commit the offence themselves they would instigate or aid and abet some other person to commit it. The ground upon which I rest my judgment that such a partnership is illegal is that its recognition by our courts would furnish a just cause for complaint by the United States Government against our Government (of which the partners are subjects), and would be contrary to our obligation of international comity as now understood and recognized, and therefore would offend against our notions of public morality.'

" In the result, the court refused to entertain the suits between the various partners and all the actions were dismissed. No point can be made of the fact that the decision related to an illegal partnership. It was necessary so to find because the court was concerned with disputes within the partnership. It was for that reason that Lindsay, for instance, one of the co-partners, endeavoured unsuccessfully to make out that his share in the transaction was merely as an independent seller of whisky in the ordinary course of trade to certain parties to the agreement, in which case other considerations might have arisen. If the contemplated object of the adventure had been achieved, and the parties had found themselves forced to sue the purchaser of the whisky for the price in the English courts, it would have been equally impossible for them to succeed against a plea of illegality, even assuming delivery had taken place on the high seas or somewhere outwith the territory of the United States.

" In the present case I see no escape from the view that to recognize the contract between the appellant and the respondent as an enforceable contract would give a just cause for complaint by the Government of India and should be regarded as contrary to conceptions of international comity. On grounds of public policy, therefore, this is a contract which our courts ought not to recognize. It is said that the Indian legislation is discriminatory legislation against a country which is a member of the Commonwealth and with which this country is on friendly terms. But that, in my opinion, is irrelevant. The English courts cannot be called on to adjudicate upon political issues between India and South Africa. The Indian law is not a law repugnant to English conceptions of what may be regarded as within the ordinary field of legislation or administrative order even in this country. It is the illegality under the foreign law that is to be considered and not the effect of the foreign law on another country.

" I have not found it necessary to refer to a number of cases which were much canvassed in the course of the hearing. Apart from those where there were clear violations of English law, as in *Biggs* v. *Lawrence* (3 Term Rep. 454) and *De Wütz* v. *Hendricks* (2 Bing. 314), many of these cases would seem to fall broadly into two categories: (1) cases where a vendor knew or suspected that goods sold and delivered abroad were to be smuggled by the purchaser into England in breach of her customs laws (for example, *Holman* v. *Johnson*, (1 Cowp. 341), *Pellecat* v. *Angell* (2 Cr. M. & R. 311); (2) cases where goods or moneys had been acquired and brought to this country in breach of some foreign law: *Boucher* v. *Lawson* (Cas. t. Hard. 85); *Sharp* v. *Taylor* (2 Ph. 801). I agree with the view entertained by some of your Lordships and by all the Lords Justices in the Court of Appeal that the proposition that 'no country ever takes notice of the revenue laws of another' is too widely expressed. It may require in some other case fuller examination and elucidation. It was but lightly touched on in the case of *Government of India* v. *Taylor* ([1955] A.C. 491[1]). But it is not a proposition that can be invoked in the circumstances of this case. I would reserve my opinion whether, apart from any such supposed rule of law, some of these decisions may not be supported on the view that the transaction in question was unaffected by the illegality, either because in one category of case the transaction was finished and the vendor had no concern, or reason to be concerned, with the intentions of the purchaser, or because in the other category the illegality had been exhausted and new rights and liabilities had emerged which did not call for any recognition of the illegality.

"I would dismiss the appeal." (At pp. 326–328.)

Lord Somervell of Harrow said: "My Lords, a foreign State or prosecuting authority cannot in our courts enforce its criminal law.

"'Crimes, including in that term all breaches of public law punishable by pecuniary mulct or otherwise, at the instance of the State Government, or of someone representing the public, are local in this sense, that they are only cognizable and punishable in the country where they are committed': *Huntington* v. *Attrill* ([1893] A.C. 150, 156).

In the result there are treaties of extradition.

"At the other end of the legal scale our courts, in a dispute between contracting parties, will enforce foreign law of contract if according to the applicable rules it is the proper law by which to determine the issues raised. The fact that the contract was made abroad and to be performed abroad does not affect the jurisdiction.

"Although many revenue laws do not come within the words from *Attrill's* case cited above, they are unenforceable in our courts: *Government of India* v. *Taylor*.

"The principles stated above do not in themselves solve or throw any real light on the present problem, which may be stated as follows: Will our courts enforce a contract if its performance involves a breach of foreign criminal or 'public law'? If the answer is 'No', one has to consider the degree of involvement that will produce unenforceability.

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[1] See *International Law Reports*, 1955, p. 286.]

" It seems to me impossible to suggest that our courts would enforce an agreement to commit in country A a crime such as murder, arson or burglary. Is there any justification for drawing a line between what are evils generally and acts prohibited by the foreign State, no doubt because they are regarded as local evils?

" The statements in the old cases support the view that it is the illegality under the foreign law which is the test and one does not have to distinguish or attempt to distinguish between what is ' wrong ' from what is prohibited. In *Holman* v. *Johnson* (1 Cowp. 341) tea had been sold and delivered in Dunkirk, the seller knowing that the buyer intended to smuggle it into England. The proper law of the contract was the law of Dunkirk, and the illegality had to be considered in the first place under that law. Lord Mansfield, in considering this point, held that the contract was valid not on the ground that illegality under foreign law is never relevant but on the ground that no country ever takes notice of the *revenue* (my italics) laws of another country. He was clearly directing his mind to the law in force in Dunkirk, as the revenue law in question was the law of England. He implies that the law of one country would take notice of illegalities arising under the laws of another country other than revenue laws.

" The principle appears clearly from a paragraph in Lord Campbell L.C.'s judgment in *Emperor of Austria* v. *Day and Kossuth* (3 De G.F. & J. 217, 241–242):

> " ' A more specious objection was rested on the class of cases in which it has been held that we take no notice of the " revenue laws " of foreign countries, so that an injunction would certainly be refused to a foreign sovereign who should apply for one to prevent the smuggling of English manufactures into his dominions to the loss of his fisc. But, although from the comity of nations the rule has been to pay respect to the laws of foreign countries, yet, for the general benefit of free trade, " revenue laws " have always been made the exception; and this may be an example of an exception proving the rule.'

That is the principle rightly applied in *Foster* v. *Driscoll*. It is a principle of our municipal law. Its aim is no doubt to preserve comity with other friendly States, but it is in no sense dependent on proof of universality or reciprocity.

" In the present case, for reasons which have been stated by your Lordships, the performance of the contract to the knowledge and intention of both parties involved a breach of Indian law. *Prima facie* that is sufficient to make it unenforceable in our courts. Your Lordships were invited to make an exception to the principle on the ground that the law in question was directed against the Union of South Africa arising out of a dispute between the two States. I do not think this would justify taking the case out of the rule.

" The statement that in this field one country takes no notice of the revenue laws of another seems to have been based on the principle that smuggling and freedom 'gang thegither' and had its high water mark in *Boucher* v. *Lawson* (Cas. t. Hard. 85). Scrutton L.J., in *Ralli Brothers* v. *Compania Naviera Sota y Aznar* ([1920] 2 K.B. 287), reserved the issue for consideration should it arise. It was submitted that the prohibition in the present case of export to a particular destination was a revenue law, and one can imagine such a prohibition being a revenue law. On the evidence in the present case it would seem not to fall within the ordinary meaning of the phrase, but in any event I myself think that the courts of this country should not today enforce a contract to smuggle goods into or out of a foreign and friendly State.

" There may, of course, be laws the enforcement of which would be against 'morals'. In such a case an exception might be made to the general principle. The point can be dealt with if it arises.

" In conclusion, I would like to say a word as to the scope of the word 'involves' in my statement of the question raised in the present appeal. One has, at one end of the scale, a contract which on its face necessitates a breach of the foreign law; a contract to deliver prohibited goods in the territory. At the other end one may have a contract of sale legal on its face at a normal market price, the vendor suspecting or knowing that the buyer intends to use the goods for an illegal purpose in a foreign country. The same problem arises when a contract is said to be unenforceable as immoral or illegal under our own law: *Pearce* v. *Brooks* ((1866) L.R. 1 Ex. 213). In *Foster* v. *Driscoll* ([1929] 1 K.B. 470) the majority found that the evidence established a joint enterprise to import whisky into the United States. 'It is not a case' said Sankey L.J., 'where one or other of them merely knew that the whisky was going to the States' [*ibid.* 515]. I am never very clear as to the effect of 'mere' and 'merely', though I may have used one or other myself. If the question is one of illegality under our law, the contract is unenforceable if the defendant knew that the goods or money or other consideration were to be used for a purpose immoral or illegal under our law.

" It would be convenient if the same principle was applied but it does not arise directly in this case.

" I would dismiss the appeal." (At pp. 328–331.)

[Report: L.R. [1958] A.C. 301.]

International Comity—Courts of Receiving State Following Courts of Sending State in Regard to Recognition of an Organization as a Government Instrumentality.

See. p. 226 (*Masatoshi Suzuki et Al.* v. *Tokyo Civilian Open Mess*).

PART II

STATES AS INTERNATIONAL PERSONS

A—IN GENERAL

II.—Sovereignty and Independence

i.—In Foreign Relations

[*See also below*, IV, Recognition of Acts of Foreign States and Governments; PART IV, JURISDICTION; *and* PART VIII, TREATIES: D, Interpretation of Treaties, II, Principles and Rules of Interpretation.]

Sovereignty—In Foreign Relations—Limitations on—Limited Recognition of, by International Courts.

See p. 101 (*Lake Lanoux Arbitration*), at p. 127.

iii.—Conduct of Foreign Relations. Conclusiveness of Statements of the Executive

Conclusiveness of Statements of Executive—Immunity from Jurisdiction—The Law of the United States of America.

See p. 202 (*Knocklong Corp.* v. *Kingdom of Afghanistan et Al.*).

Sovereignty—Conduct of Foreign Relations—Certificate of Foreign Office—As to Status of Instrumentality of Foreign Government.

See p. 226 (*Masatoshi Suzuki et Al.* v. *Tokyo Civilian Open Mess*).

IV.—Recognition of Acts of Foreign States and Governments

[*See also below*, D, Recognition of States, Governments, Belligerency; *and* PART IV, JURISDICTION: I, TERRITORIAL.]

Recognition of Legislative Acts of Foreign States—Confiscatory Decree—Effect of Decree in Country of Forum—Debt Owed to Victim of Confiscation—Debtor in Country of Forum—Assignment of Claim by Victim of Confiscation to Assignee in Country of Forum—Whether Assignee Entitled to Payment—The Law of Germany.

ASSIGNMENT OF DEBT (EASTERN SECTOR OF BERLIN) CASE.

German Federal Republic, Federal Supreme Court. February 18, 1957.

THE FACTS.—Some time before the end of hostilities in the Second World War the defendants, a limited partnership, had been given an overdraft by the branch of a bank whose office was situate in what subsequently became the Eastern Sector of Berlin. The registered office of the defendants was at that time in the same part of Berlin. Shortly before the end of the war, the defendants moved part of their business to Bavaria, which subsequently became part of the German Federal Republic. In 1949, the bank was expropriated by a decree of the authorities of the Eastern Sector of Berlin and some time thereafter it assigned its claim against the defendants to the plaintiffs herein, whose registered office was in the German Federal Republic. Notwithstanding the expropriation of the bank, no step had been taken by the entity to which the assets of the bank had been transferred to assert any claim to the debt against the defendants. In an action by the plaintiffs as assignees of the bank's claim, the defendants contended that, as the debt was situate in the Eastern Sector of Berlin and had there been expropriated, the plaintiffs were not entitled to succeed.

Held: that the plaintiffs were entitled to judgment. Quite apart from the question as to whether the expropriation of the assets of the bank had any exterritorial effect, the defendants were not entitled to rely on the expropriation of the assets of the bank as long as the entity benefiting from the expropriation had not made a claim against the defendants; the expropriation was not yet complete, and the Court would not lend its assistance towards its completion.

The Court said: " The decisive question is whether the defendants can rely on the contention that by reason of the expropriation the bank was no longer the creditor of the debt at the time of the assignment, *viz.*, that the plaintiffs were no longer in a position to acquire rights from the bank. This question must be answered in the negative. In point of time, the assignment took place after the confiscation of the assets of the bank. It is recognized as law that a confiscatory measure taken by a State does not produce any effect beyond the territorial limits of that State. What is decisive is the *situs* of the confiscated asset at the time of confiscation. If the contention of the plaintiffs were correct, that the debt here in issue was already situate in the Federal Republic at the time when the expropriation of the bank took effect, then the debt could no longer have been affected by the expropriation and the defendants would for that reason alone not be entitled to rely on the expropriation. However, we need not decide this question because the defendants could not even rely, as against the plaintiffs, on the expropriation of the bank if the debt had still been situate in East Berlin or the Soviet zone of occupation and had for that reason been affected by the expropriation according to the law there in force. In the present case we need not decide the question whether the debt was validly confiscated according to the law of the confiscating State, and whether such a confiscation is entitled to recognition. What is alone decisive is the question whether, and if so, in what manner, the confiscation has any legal effect as between parties who at the time when proceedings were instituted, as well as at the time when judgment is given, were exclusively domiciled or resident within the sphere of operation of the law which has to be applied by the adjudicating tribunal.

" Nor need we decide the question as to how far any legal effect may be derived from the fact that a foreign measure of expropriation has resulted in a factual position which this Court cannot ignore. Such a factual position would not arise—where, *e.g.*, a claim for the return or delivery of corporeal property is made—merely by virtue of the fact that a foreign Law has deprived the debtor of the right to dispose of such property when in fact he is in possession thereof outside the territory of the confiscating State. Where a claim is made to the payment of money, such a factual position certainly does not arise as long as the person who benefits from the confiscatory measure does not approach the debtor as a new creditor by demanding payment from him. We need not therefore decide the question whether the decisive result arises from a demand for payment, or whether the institution of proceedings is required, or whether even a judgment or actual payment is necessary for the purpose. The defendants have not provided any proof that they have been asked for payment by the entities appointed in the relevant Decree concerning Claims Vested in Expropriated Banks and Insurance Companies. If one of these entities were now to demand payment from the defendants, an action for payment could not be regarded as the consequence of a factual situation resulting from the confiscation but as an attempt to give full effect to a confiscation not yet carried out. Such an attempt, and such an action, would be barred by the consideration that it is not the task of a court to lend its aid to the completion of a foreign act of confiscation not yet carried out. This is the reasoning underlying the jurisprudence of the Swiss Appeal Tribunal for German Assets which caused that Tribunal to unblock certain assets. Beitzke (in *JZ*, 1956, p. 674) uses the descriptive phrase that one State does not act as the bailiff of another to assist the sovereign power of the latter. This point of view . . . has nothing to do with the question of recognition of measures taken by another State, or with the question of *ordre public*. Such aid by a State towards the completion of a confiscation as yet unaccomplished would be implicit not only if a court were to assist the ' new ' creditor who derives benefit from the confiscation, but also if the court were to permit the debtor to rely on the confiscation as against his former creditor, without the confiscation having as yet produced any other effect *vis-à-vis* the debtor. It cannot be right, on the one hand, to protect the debtor against the new creditor and, on the other hand, to deduce from the act of confiscation a plea that can be raised as against the old creditor and which invalidates the latter's claim. If the debtor—as in the present case the defendant partnership—has himself been adversely affected by a similar measure of confiscation or other loss of property, he may well be entitled to rely on the defences provided by law. The defendants have not adduced any proof that they are in danger of being sued twice, and we need not therefore consider the effect which proof of such danger might produce. It follows that there is nothing to prevent the plaintiffs from claiming as against the defendants the debt assigned to them by the bank."

[Report: *B.G.H.Z.*, vol. 23, p. 333.]

Recognition of Legislative Acts of Foreign States—Confiscatory Legislation—Confiscation of Debt—*Situs* of Debt in Country of Forum—Interpretation of Specific Treaty Provisions—Convention of October 23, 1954, on the Settlement of Matters Arising out of the War and the Occupation—Chapter 6, Article 3—The Law of Germany.

ASSIGNMENT OF CONFISCATED DEBT (GERMANY) CASE.

German Federal Republic, Federal Supreme Court. July 11, 1957.

THE FACTS.—The plaintiffs were a limited company incorporated under the law of the Netherlands while that country was occupied by Germany during the Second World War. By a Netherlands Decree dated October 20, 1944, the assets of the company were seized as enemy property and the company was put under the control of the Netherlands authorities.

One N., a German national, had been appointed by the German Government during the occupation of the Netherlands to liquidate property owned by persons of the Jewish faith, and as and when he sold such property he paid the proceeds into his account with the plaintiffs. On September 4, 1944, he instructed the plaintiffs to remit all moneys standing to the credit of his account to a bank in Germany, which was the predecessor in title of the defendants herein, whose registered office was also in Germany. Eventually, N.'s account with the defendants was credited with the moneys remitted in accordance with N.'s instructions.

After the departure of the German occupying forces from the Netherlands, the Netherlands authorities seized N.'s assets in the Netherlands as enemy property, and appointed a sequestrator to administer it. Some time later, the Netherlands Restitution Commission (a tribunal established for the purpose of adjudicating upon claims by persons of the Jewish faith for the restitution of their property) declared null and void N.'s instructions to the plaintiffs to remit to Germany moneys standing to his credit with the plaintiffs, and ordered the plaintiffs to pay to the sequestrator of N.'s property in the Netherlands a sum equivalent to the moneys remitted to Germany on N.'s behalf. An agreement subsequently made between the sequestrator of N.'s property and the administrator of the plaintiffs' business in the Netherlands provided for the assignment to the plaintiffs of all claims vested in N. against the defendants' predecessor in title and arising from the remittance of N.'s moneys by the plaintiffs to the defendants' predecessor in title during the war. In the present action the plaintiffs claimed part of these moneys, and in support of their claim relied on the assignment here referred to.

Held: that the action must be dismissed. As Germany was the *situs* of the debt owed by the defendants to N., the sequestration of N.'s property in the Netherlands and its administration by a sequestrator appointed by the Netherlands authorities were without legal effect in Germany. It followed that the sequestrator of N.'s property had no power, so far as concerned the debt, to make an assignment to the plaintiffs which could be regarded as valid in Germany.

The Court said: "The plaintiffs contend that by virtue of the assignment made by the Dutch administrator of N.'s property they have acquired N.'s claim against the defendants arising from the remittance. The Court of Appeal decided against the vesting of N.'s claim in the plaintiffs, on the ground that N.'s claim against the defendants was situate in Germany, and could not, for that reason, have been affected by the seizure based on the Netherlands Decree on Enemy Property and could accordingly not have become subject to the control of the Dutch administrator. In the result, we agree with this view. The measures taken in pursuance of the Dutch Decree on Enemy Property against German property constitute sovereign confiscatory acts of the State of the Netherlands. According to the constant jurisprudence of the Federal Supreme Court, from which we have no reason to deviate, the effect of such sovereign acts of a State does not—in principle—extend beyond its territory, *viz.*, expropriation and seizure affect only such property as is subject to the territorial sovereignty of the State concerned, and not property which according to German law is situate in Germany. N.'s claim against the defendants and their predecessors in title was situate in Germany from the beginning. The defendants and their predecessors in title are both resident in the territory of the Federal Republic. The manner in which N. procured the means with which to acquire the claim against the defendants is immaterial for the question of the *situs* of the debt. N.'s claim against the defendants has therefore remained unaffected by the confiscation or seizure of his property by the State of the Netherlands unless it can be said that the effect of the measures taken by the Netherlands has been extended to German territory by means of an order of the former Occupying Powers or a State treaty. The automatic blocking of assets by virtue of Military Government Law No. 52 does not suffice to justify an extension of the territorial effect of the measures taken by the State of the Netherlands against N.'s property. It is true that in some cases the blocking of assets served the purpose of securing assets originating abroad for purposes of restitution or reparation, but even in these cases the blocking of assets was a measure based on the powers exercised by the Occupant in Germany and independent of foreign seizures or confiscations. Where it was intended to make effective in Germany confiscations or seizures decreed abroad, there was always required an express declaration of the wish of the Occupying Power in each individual case. In fact, the Occupying Powers have in many instances caused the transfer of assets from Germany to foreign countries. In the present case, however, it is undisputed that nothing was done which would indicate such an intention on the part of the Occupant. The occupation authorities and the competent German office for the control of property have taken no steps to enable the State of the Netherlands to gain control of N.'s claim against the defendants. On the contrary, N.'s property which was blocked in accordance with Military Government Law No. 52 was released in 1949. Nor did Control Council Law No. 5 or Law No. 63 of the Allied High Commission for Germany extend the effect of seizures and confiscations decreed by the State of the Netherlands to property situate in Germany. Both Laws are expressly stated to be applicable only to German assets situate abroad.

"Finally, an extension of the effect of Dutch confiscations or seizures to German territory cannot be deduced from Article 3 of Chapter 6 of the Convention on the Settlement of Matters arising out of the War and the Occupation. According to paragraph 1 of this Article,

> 'the Federal Republic shall in the future raise no objections against the measures which have been, or will be, carried out with regard to German external assets or other property, seized for the purpose of reparation or restitution, or as a result of the state of war, or on the basis of agreements concluded, or to be concluded, by the Three Powers with other Allied countries, neutral countries or former allies of Germany.'

The wording and meaning of this provision do not indicate that the Federal Republic recognized the validity of foreign acts of sovereignty in respect of assets situate in Germany, or undertook to accord such recognition. It is true that Article 3 (1) of Chapter 6 of the Convention also applies to German assets in Germany (*cf.* the judgment of this Court of December 13, 1956[1]), but the Federal Republic only waived the right to raise objections to certain measures carried out or to be carried out against German assets. Accordingly, Article 3 (3) provides that no claim or action shall be admissible against persons who shall have acquired or transferred title to property on the basis of the measures referred to in Article 3 (1) and (2),[1] or against international organizations, foreign Governments or persons who have acted upon instructions of such organizations or Governments. Thus, no proceedings can be brought in the German courts in respect of claims which throw doubt upon the legality and efficacy of sovereign measures taken by foreign States against German assets. The German courts, on the other hand, are under no obligation to lend their assistance, at the instance of those favoured by such measures, towards the accomplishment of the efficacy of these measures. This follows clearly from the wording of Article 3 (1), because according to this provision the waiver of the right of the Federal Republic to raise objections presupposes that German assets have already been seized (for certain purposes or by reason of the state of war). The law of the foreign State concerned determines the German assets against which the sovereign measures of that State are directed. Whether there exists a valid seizure as a precondition of the waiver to raise objections must be determined in accordance with the law which is applicable according to the rules of conflict of laws of the Federal Republic. As a rule, this is the law of the seizing State as far as assets situate in the territory of that State are concerned. Where, on the other hand, we are concerned with assets which according to German law are situate in Germany, it is not sufficient if, according to the law of the foreign State concerned, the seizure was intended to apply also to assets situate in Germany. What would be required in addition would be an extension of the validity of the seizure to German territory by means of a treaty or the actual exercise of power, as *e.g.*, by the former Occupying Powers. Article 3 (1) does not provide for such an extension. On the contrary, it presupposes such an extension in so far as it relates to the waiver of the right to raise objections against the seizure of German property situate in Germany. No other interpretation would be in conformity with the meaning of Article 3. Article 3 is apparently intended to dispose once and for all of past interference with German assets and of disputes concerning them. Without recognizing as lawful past interference, the Federal Republic is prepared to recognize *ex post facto* the measures carried out, or to be carried out, against German assets already seized but not to recognize seizures which, according to the previous position, were not valid in Germany, and thus to provide the first opportunity to seize German assets situate in Germany. There is no conflict between the view here expressed and the view expressed in the judgment given by the Second Senate of this Court on December 13, 1956 [*AKU* case *supra*]. The latter judgment was concerned with the admissibility of an action under Article 3 (3) of Chapter 6 of the Convention, and not with an action based on a foreign confiscatory law and brought by a foreign creditor against a German debtor.

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[1] Reference is to the *AKU* case, reported in *International Law Reports*, 1956, p. 21.]

[[1] This paragraph is concerned with German external assets in Austria.]

The previous case was concerned with the validity of the expropriation by the Netherlands of shareholders in a Dutch company. It is at least doubtful—and this question was not decided by the Second Senate—whether and to what extent those shares and the rights inherent in them were situate in Germany. In the present case, on the other hand, N.'s claim was undoubtedly an asset situate in Germany. It is true that the Second Senate stated that, according to Article 3 (1), the question whether a foreign confiscatory measure is valid had to be decided in accordance with the law of the confiscating State, but the judgment did not intend to lay down the proposition that according to Article 3 (1) the confiscation of an asset situate in Germany must be regarded as valid where the confiscating State merely intended confiscation, but where nothing was done to extend the effect of the confiscation beyond its territory. The judgment of the Second Senate shows that the confiscation and seizure of the shares by the State of the Netherlands were completed in Germany by the action taken by the occupying authorities, namely, the handing of the share certificates in Germany to the Government of the Netherlands. In that case, therefore, the Occupying Power gave effect, within the territory of Germany, to the measures taken by the State of the Netherlands. This element, however, is lacking in the present case. Accordingly, the confiscation or seizure of N.'s assets according to Dutch law did not affect N.'s claim against the defendants in Germany. Therefore the Dutch administrator of N.'s property was not in law capable of dealing for the benefit of the plaintiffs with N.'s claim against the defendants—which is situate in Germany—with valid effect in Germany."

[Report: *B.G.H.Z.*, vol. 25, p. 127.]

Recognition of Legislative Acts of Foreign States—Confiscatory Legislation—Territorial Effect of—Expropriation of Sudeten-German Co-operative Society in Czechoslovakia—Removal of Seat of Society to Germany—Debt Owed to Society in Germany—Whether Society Established in Germany Entitled to Recover Debt—Persons Entitled to Represent Society in Legal Proceedings—The Law of Germany.

EXPROPRIATION OF SUDETEN-GERMAN CO-OPERATIVE SOCIETY CASE.

German Federal Republic, Federal Supreme Court. July 11, 1957.

THE FACTS.—A Sudeten-German co-operative society founded in 1936 in a part of Czechoslovakia which was subsequently incorporated into the German Reich, was expropriated by the Czechoslovak authorities after the end of hostilities in the Second World War. At the same time, the members of the board of the society were dismissed and two Czechoslovak liquidators appointed. The society had assets in the German Federal Republic, and W. and K., two of the dismissed members of the board, called a meeting of members of the society to be held in Münich in November 1947. The meeting resolved that the registered office of the society should henceforth be in the German Federal Republic. As far as here material, the assets of the expropriated society included a debt owed to it by the defendants in the Federal Republic, and in the present action W. and K., acting on behalf of the newly established society, claimed payment of part of that debt. The defendants contended, *inter alia*, that as the society was a legal entity of Czechoslovak law, it had been validly dissolved by the relevant confiscatory decrees of the Czechoslovak Republic and that accordingly the newly established society had no *locus standi*. They further contended that in any event W. and K. were not entitled to act on its behalf, and that they were not entitled to claim the debt.

Held: that the defendants' contentions must be rejected. The Czechoslovak decrees were incapable of producing any effect in the German Federal Republic and accordingly, so far as concerned the assets of the expropriated society in Germany, including the debt here in issue, the newly established society was entitled to bring an action for their recovery, and W. and K. were entitled to act in that behalf.

The Court said, in part: "The debtor is resident in the Federal Republic. It follows that the dispute is concerned with an asset situate in the Federal Republic. The question thus arises whether the confiscation enacted in the Czechoslovak Republic produces any effect in the Federal Republic. Even if the Court had to proceed on the premise that this question must be judged in accordance with Czechoslovak law and that the debt here in question was intended to be included in the confiscation of the assets of the society, this result would not follow. The effect of sovereign acts is limited to the territorial sphere of the sovereign authority which decrees such acts. Thus a Czechoslovak decree for confiscation or seizure was capable of affecting only property situate in the territory of Czechoslovakia. The only way in which a sovereign act can be given exterritorial effect is by recognition on the part of the State affected by it. In so far as concerns an occupied country, the Power wielding actual soveriegn authority can grant such recognition. The means at the disposal of an Occupying Power for this purpose are laws and specific decrees which can be enacted for the benefit of foreign States. The Western Occupying Powers have not availed themselves of these means. [Here followed a review of the laws enacted by the Allied High Commission in occupied Germany and of Article 3 of Chapter 6 of the Convention on the Settlement of Matters Arising Out of the War and the Occupation. None of these enactments, in the opinion of the Court, justified the conclusion that the Occupying

Powers intended to give effect to foreign decrees of confiscation. The Court continued:]

" We need not determine the question whether the complete expropriation of a co-operative society according to Czechoslovak law results in the extinction of the legal entity. Public international law as well as private and administrative international law recognize the rule that the effect of sovereign Acts of State does not extend further than the territorial limits of the sovereign authority responsible for them [rule of territoriality]. Measures of confiscation taken by a State, whether they are in the form of laws or administrative acts, or are mere emanations of power, affect only such property as is subject to the territorial sovereignty of the country concerned, and do not extend beyond its frontiers. The result is that a legal entity whose property is confiscated in its country of residence continues to exist elsewhere, even though it may continue to exist only for the purpose of liquidation . . . A Sudeten-German legal entity affected in this way continues to exist so far as concerns its assets which are not covered by the Czechoslovak measure of compulsion and which are situate in the Federal Republic. [The Court then dealt with the question whether, in view of the fact that the confiscatory decrees of the Czechoslovak Republic were designed to cover not only the assets of the society itself but also the shares of its members, the confiscation of the shares of the members of a society affected the proposition that confiscatory legislation was devoid of exterritorial effect. The Court continued:]

"According to Czechoslovak law either nobody took the place of the expropriated Sudeten-German members, or the Czechoslovak Republic itself became the beneficiary of the confiscation, *viz.*, in Czechoslovakia the society became a co-operative society which had no members at all or whose only member was the Czechoslovak State itself. Regardless of whether the society, according to the law of Czechoslovakia, became a ' no man's society ', or a State society, the Czechoslovak entity cannot have remained the beneficiary of a debt through the instrumentality of the confiscation of the members' rights when the debt remained unaffected by the expropriation of the legal entity (*viz.*, the society). By reason of the sharp distinction between the society and its members, the assets of the society are not the assets of the members. If we were to admit that the assets of the society which are situate in the Federal Republic were included in the confiscation because the confiscation was concerned not only with the assets of the legal entity but also with all the assets of the members, such an admission would be tantamount to a negation of the fundamental rule that sovereign Acts of State are territorially limited. The expropriation of the members, therefore, did not affect the continuing existence of the legal entity and its position as a creditor of the debts situate in the Federal Republic which have remained free from confiscation . . . Nor can the right of W. and K. to act on behalf of the society be doubted. Their dismissal by a Czechoslovak Act of State is valid only within the territory of the Czechoslovak Republic and is without effect so far as concerns the assets situate in the Federal Republic . . . In its judgment of May 27, 1957, this Court held that the dismissal of members of the board brought about by compulsory measures is of no effect with regard to the exterritorial assets of the legal entity concerned. This follows from the rule of territoriality, which not only precludes any direct but also any indirect legal effect of compulsory measures in the territory of another State. The board which was dismissed by a Czechoslovak Act of State has thus remained entitled to deal with the assets of the society which are situate in the Federal Republic, and the liquidators appointed by an Act of State of the Czechoslovak Republic have not acquired any rights to deal with these assets."

[Report: *B.G.H.Z.*, vol. 25, p. 134.]

Recognition of Acts of Foreign Governments—Recognition of Foreign Law—Whether Consistent with National Sovereignty—Enforcement in Holland of Belgian Decree Providing for Restitution to Belgian State of Money Paid in Pursuance of Illegal Acts of Occupying Power in Belgium.

DE V. *v.* BELGIAN STATE.

Holland, Court of Appeal at The Hague. November 3, 1955.

THE FACTS.—See *International Law Reports*, 1954, p. 23, *sub nom. Kingdom of Belgium* v. *Mrs. De V.* This was an appeal from that judgment. The appellant's grounds of appeal were: (1) The Belgian Decree-Law of June 2, 1944, could not be applied by Netherlands courts since it was a foreign Law to which no written or unwritten rule of Netherlands private international law anywhere referred, and in particular because the appellant was of Netherlands nationality, had always lived in the Netherlands and was never subject to Belgian legislation; moreover, the payment was made to her in the Netherlands. (2) Even if it were permissible in principle for the Netherlands courts to apply the Decree-Law, such application would be unlawful in this case because the Belgian Legislature sought in the Decree-Law to impose obligations on persons of other than Belgian nationality and on non-residents. In so doing that Legislature acted *ultra vires* and arrogated to itself sovereignty beyond its proper jurisdiction. (3) In any event, the Court below was wrong in holding that the application of the Decree-Law in this case would not contravene public policy in the Netherlands. The pension instalments paid to the appellant must be deemed to have been due to her.

Held: that the appeal must be dismissed on all three grounds.

The Court said, as regards (1): " This particular Belgian Decree-Law must be applied in the Netherlands because there is a rule of international law under which co-operation must, or alternatively may, be given to the Belgian State for the purpose of undoing a certain measure of the Occupying Power in Belgium which was illegal under international law because it consisted in forcing the Belgian State to pay moneys which were not owing by it. A refusal by the Netherlands courts to apply that Decree-Law would result in preventing the wrong from being undone. That would not be in accordance with the above-mentioned rule of international law, to the existence of which, moreover, the Inter-Allied Declaration of January 5, 1943,[1] expressly refers. The fact that the appellant is of Netherlands nationality, had always resided in the Netherlands and had received the money in the Netherlands, is of no relevance. What is decisive is that, owing to unlawful interference by the German authorities occupying Belgium, the appellant received a sum of money from the Belgian State to which she had no claim as against that State."

As regards (2): " The provisions of the Decree-Law are couched in general terms, and a restriction to Belgian nationals and residents of Belgium cannot be read into it. That the author of the Decree did not rule out the possibility of its provisions taking effect even outside Belgian jurisdiction—for which, of course, the co-operation of the foreign country concerned has to be asked and obtained—is not an improper arrogation of sovereignty."

As regards (3): " The repeal of the German Occupation Ordinance by the lawful Belgian Government, entailing the abrogation of the pension rights of the appellant's husband, was not a confiscatory measure. Under Belgian law, payments of this nature had never been obligatory on the Belgian State. The Belgian Decree-Law of June 2, 1944, is therefore not confiscatory in nature. Its purpose—the wiping out of the results of unlawful interference by the German Occupant in the affairs and at the expense of the Belgian State—is in accord with the Netherlands sense of justice. It is immaterial that the appellant, when she profited by that interference, was of Netherlands nationality."

[Report: *N.J.*, 1956, No. 1235.]

NOTE.—This is the third case of the kind in which the Netherlands Courts applied the relevant Belgian legislation. For the previous cases see *Kingdom of Belgium* v. *E.M.J.C.H.* (*N.J.*, 1953, Nos. 435 and 589; *International Law Reports*, 1953, p. 26) and *Kingdom of Belgium* v. *Albrecht and Willem Wanniin* (*N.J.*, 1954, No. 301; *Tijdschrift*, vol. I, p. 427; *International Law Reports*, 1953, p. 28).

[[1] Inter-Allied Declaration against Acts of Dispossession Committed in Territories under Enemy Occupation or Control.]

Recognition of Acts of Foreign Governments—Recognition of Judgments—Relevance of Intention to Circumvent Legislation of State Asked to Recognize Judgment.

In re KLINGER.

Holland, Judicial Chamber of the Council for the Restoration of Legal Rights, The Hague.

March 21, 1957.

THE FACTS.—An Austrian woman was married on February 6, 1941, in the Netherlands to a German national who was killed in action on June 7, 1941. By a decision of the *Landgericht* of Vienna of March 30, 1955, the marriage contracted in Holland in 1941 was declared to be invalid because it had been a " *Namensehe* " [marriage in name] only. Under an informal Netherlands-Austrian Agreement of July 28, 1951, it was provided that Austrian assets in the Netherlands should no longer be considered "enemy property", but should be restored to their owners. In proceedings relating to the status of Friederike Klinger's property in the Netherlands, the question of the recognition in Holland of the Austrian judgment had to be decided.

Held: that the judgment must be recognized unless it was intended to circumvent Netherlands legislation. There being no evidence, however, of such an intention, the petitioner must in consequence be deemed at all times to have retained her Austrian nationality.

[Report: *Rechtsherstel* No. 57/574, XI, p. 1429.]

Recognition of Acts of Foreign States—Foreign Legislation Nationalizing Company Incorporated Abroad—Nationalized Company as Mortgage Creditor—Whether " Successor Company " Entitled to Institute Proceedings for Recovery of Mortgage Debt in Country of Forum—Rights of Former Shareholders of Nationalized Company When Resident in Country of Forum—The Law of Austria.

NATIONALIZATION OF CZECHOSLOVAK SAVINGS BANK CASE.

Austria, Supreme Court. January 5, 1955.

THE FACTS.—A savings bank incorporated in Czechoslovakia which had granted mortgages to the defendants in 1925, was nationalized after the Second World War. Its assets were vested in a State enterprise, which now brought an action in the Austrian courts for recovery of the mortgage debts, the contention being that the State enterprise was the "universal successor" of the nationalized savings bank. The defendants contended that the nationalization of the savings bank had no exterritorial validity, and that accordingly the State enterprise was not entitled to institute proceedings in the Austrian courts.

Held: that the contention of the defendants must be upheld and the action dismissed for want of *locus standi*. The former shareholders of the nationalized savings bank who were resident outside Czechoslovakia were co-owners of the Austrian assets of the bank (including the mortgage debts here in issue), in proportion to their shareholdings in the total assets of the former savings bank.

The Court said: " We cannot share the view of the Courts below that we are here concerned with a case of universal succession which is valid in Austria . . . According to the rules of private international law, foreign measures of nationalization cannot claim exterritorial validity, not even if such validity is claimed by the confiscating State itself. Any measure taken by a foreign State for the purpose of depriving a person of his economic or legal rights—by whatever name that measure of nationalization may be called—has only territorial validity. The jurisprudence of the Supreme Court has solved this problem by the rigorous application of the principle of territoriality and by applying the Austrian rules governing dissolution [of companies]. The disappearance of the legal personality of a foreign nationalized company has the effect of substituting for that company a *communio incidens*. The latter is subject only to the *lex rei sitae*. The former members, *viz.*, in this case, the former shareholders of the company which has been liquidated abroad, do not carry on the company, but are to be treated as co-owners of the assets situate in Austria. Accordingly, they are entitled to deal with these assets in proportion to their shareholdings in the total assets. If, therefore, a *communio incidens* consisting of the former shareholders is alone entitled to deal with the Austrian assets of the original creditor, it follows that the plaintiff has no *locus standi* to claim the mortgage debt here in issue."

[Reports: 3 Ob 435/54; SZ, XXVIII (1955), No. 1.]

Recognition of Acts of Foreign Governments—Confiscatory Decree of Foreign Government—Nationalization of Foreign Company—Substitution of State Enterprise—Business of Nationalized Company Continued by Former Directors Elsewhere—Whether State Enterprise Liable to be Restrained from Trading under Original Name in Country of Forum—The Law of Austria.

JENAER GLASWERK SCHOTT & GEN. *v.* WALDMÜLLER (CARL ZEISS FOUNDATION CASE).

Austria, Supreme Court. December 18, 1957.

THE FACTS.—The plaintiffs were a so-called "foundation" established under a special domestic statute at a time when the German Reich was still in existence. For many years, and until the end of the Second World War, this foundation had been carrying on business under the style and name of "Jenaer Glaswerk Schott & Gen." in Jena, Germany. The goods manufactured by the foundation in Jena were well known in many parts of the world and certain trade-marks in respect of them had been registered, as far as here material, in Austria. After the end of the Second World War Jena became part of Eastern Germany and was occupied by the armed forces of the Soviet Union. The directors of the foundation thereupon left Jena and took up residence in the Federal Republic of Germany and from there continued to carry on business under the style and name originally adopted in respect of the business in Jena. The firm so established in the Federal Republic were the plaintiffs in the present case.

The business of the foundation in Jena was continued after 1945 and goods were manufactured there under the original name. In 1948, the enterprise in Jena was nationalized by order of the Soviet occupation forces and henceforth became known as "VEB (People's Enterprise)—Jenaer Glaswerk Schott & Gen.", that is, its name was identical with that of the plaintiffs except for the addition of the initials "VEB". In 1956, the "People's Enterprise" registered certain trade-marks in Austria which, as found by the Court, so nearly resembled those of the plaintiffs as to be likely to cause confusion with the plaintiffs' marks.

The defendant was the sole agent in Austria of the People's Enterprise, and he sold and offered for sale in Austria goods manufactured by the People's Enterprise and bearing the trade-marks registered by the latter in 1956. He also traded generally as the agent of "VEB—Jenaer Glaswerk Schott & Gen." and used advertising material containing that name. The plaintiffs claimed injunctions to restrain the defendant from advertising or offering for sale goods under the name here referred to or any name forming part thereof, and from offering for sale any goods bearing the trade-marks registered in 1956 by the People's Enterprise.

Held: that the appeal must be dismissed. (1) The nationalization of the enterprise in Jena, though lawful by international law as having been decreed by the military authorities of occupied territory, was of no legal effect in Austria, which had not been a belligerent country in the Second World War. (2) So far as concerned Austria, the original " foundation " established in Jena continued to exist, wherever its registered office might now be situate. (3) Accordingly, the plaintiffs were entitled to an injunction restraining the defendant from advertising or offering for sale goods under the style and name (or any part thereof) of the plaintiffs. (4) Similarly, the plaintiffs were entitled to an injunction restraining the defendant from using the trade-marks registered by the People's Enterprise, on the ground that the use of such marks was likely to cause confusion with the plaintiffs' marks.

The Court said: " What is decisive in the present case is the fact that the Carl Zeiss Foundation (which had originally established the plaintiffs' business in Jena) is still in existence, and not the fact as to whether or not the seat of the Foundation has been moved from Jena (in Eastern Germany) to Heidenheim (in the Federal Republic) by the directors who in June 1945 were taken from Jena to Western Germany. It is immaterial that the People's Enterprise which is represented by the defendant is an independent enterprise, which was created by means of the expropriation of the former Foundation and which now bears the same name as the former enterprise with the addition of the initials ' VEB ' (People's Enterprise). The patents and trade-marks owned by the original enterprise in Jena have also been expropriated. This expropriation, though valid in international law, must be regarded as invalid in the Republic of Austria, which was not a belligerent State. The expropriation of the former foundation ' Jenaer Glaswerk Schott & Gen.' in Jena was brought about by Order No. 64 of the Supreme Commander of the Soviet occupation forces in Germany on April 17, 1948, and is thus based on a decree of the Occupant. In its leading judgment of May 10, 1950,[1] this Court held that a measure of this kind, even though it may be valid in international law, cannot be treated as valid in a country such as Austria which was not a belligerent [in the Second World War]. This Court, in the judgment here referred to, expressly adopted the view that war measures have no exterritorial effect and cannot therefore be recognized in a non-belligerent State, even though they are permitted by international law. The Court, in its previous judgment, referred to judgments of the Court of Monaco of May 24, 1917 (*Clunet*, 1917, p. 1508), the Court of Chancery of New Jersey of August 3, 1915 (*Revue*, 1918, p. 122), the Swiss Federal Tribunal of December 17, 1914 (BGE, 40, I, 486), and April 17, 1916 (BGE, 44, II, 170), the Higher

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[[1] See *Hoffman* v. *Dralle*, reported *sub nom. Dralle* v. *Republic of Czechoslovakia* in *International Law Reports*, 1950, Case No. 41.]

Court of Zürich of November 11, 1942, and January 15, 1940 (*Schweizerische Juristenzeitung*, vol. XXXIX, pp. 367 and 302) and the Swedish Supreme Court of September 25, 1944 (reported by Seidl-Hohenveldern in ÖSZ, 1949, p. 535). This Court also then said that as Austria had never taken part in the war and had been forced to suffer the belligerency of third States in a purely passive capacity, the confiscation in the previous case, which was concerned with the expropriation of a German enterprise in Czechoslovakia and all its trade-marks, could not be recognized. The confiscation, it was said, could have no legal effect so far as concerned assets situate in Austria. The Court sees no reason why this view should be departed from, the more so as neither the Potsdam Declaration of August 2, 1945, nor the Paris Agreement of December 21, 1945, changed the legal position in any way. Austria cannot therefore accord any validity to the expropriation of the foundation enterprise in Jena so far as concerns Austrian territory. It must base itself on the premise that the Carl Zeiss Foundation is still legally in existence and that the enterprise 'Jenaer Glaswerk Schott & Gen.', from wherever it may be carrying on its business, is still owned by the Foundation and properly represented by the directors previously appointed, and that the plaintiffs therefore have legal personality because they are merely the name under which the Carl Zeiss Foundation is conducting a business enterprise. The plaintiffs are therefore undoubtedly entitled to protest against the illegal use of their firm name.

"So far as concerns the use of the trade-marks owned by the plaintiffs and thus the second prayer of the plaintiffs' submissions, the judgment above referred to held—rejecting the doctrine of unity of trade-marks and their localization in the country of origin—that measures taken for the assignment of trade-marks in the country of origin which are not recognized in Austria cannot have the result that the trade-marks, even though belonging to the enterprise, can be regarded as valid, *viz.*, that the compulsory assignment of the trade-mark registered in the country of origin can result in a valid assignment of a foreign trade-mark registered in Austria. It follows that the defendant cannot derive any benefit from the trade-marks originally registered by the former foundation enterprise. So far as concerns the trade-marks registered in Austria by the People's Enterprise after the confiscation, the defendant must be restrained from using them because they are likely to lead to confusion and they were in any event registered later than the trade-marks belonging to the Zeiss Foundation.

"The matter may be summed up as follows: The Zeiss Foundation had assets in eastern and western Germany. The legal personality of the Zeiss Foundation was not extinguished by the expropriation of its assets in Eastern Germany. The Zeiss Foundation therefore remained the owner of the western assets and of the assets acquired in Austria after 1945. Whether the seat of the Foundation is now in western or eastern Germany is of no legal interest, because the seat as such is irrelevant. In any case the Zeiss Foundation, by reason of its continuing existence, was entitled to be registered again in the Federal Republic of Germany. The Foundation is therefore the plaintiff in this case even though it has another name. Nor can it be said that the directors who went to Western Germany have lost their right to act on behalf of the Foundation. The removal of the organs of a legal entity by the Occupant cannot have the result of depriving them of the right to act on behalf of the entity. Their removal can only be justified, if at all, on the basis of belligerent occupation, and as such it cannot be recognized in Austria. The directors are therefore still the agents of the Zeiss Foundation. Moreover, they have never given up their right to act on behalf of the Foundation, and they are accordingly entitled to represent the plaintiffs in the present case. As Austria does not recognize the confiscation, the agent appointed by the confiscating authority is not entitled to use the trade-marks registered in the name of the Zeiss Foundation. Similarly, he must refrain from the use of marks which are so similar as to be likely to cause confusion, that is, he must refrain from using the marks of the People's Enterprise in Jena. If, nevertheless, he persists in their use he will be guilty of unlawful competition, and an injunction may be obtained in accordance with sections 9 (1) and 3 of the Law against Unlawful Competition. The Austrian State Treaty does not preclude this action because only the trade-mark registered in 1933 vested in the Austrian State, and not the trade-marks registered after 1945. The latter are vested in the Zeiss Foundation, notwithstanding the State Treaty.

" The only matter that remains to be considered is whether the plaintiffs have lost their rights by distributing between 1948 and 1954, through their establishment in Heidenheim (western Germany), the goods of the People's Enterprise, without objecting to the use of the trading name or the trade-marks. This question also must be answered in the negative. This was an arrangement on which the defendant could rely only as long as it was operative. The defendant can rely on this arrangement only as being the grant of a licence terminable at any time. In view of the fact that this licence was terminated, the People's Enterprise in Jena has no right whatever to use the trading name or the trade-marks. . . ."

[Report: 3 Ob 529/57.]

Recognition of Acts of Foreign States and Governments—Nationalization Decrees—Effect on Trade-Marks and Trade Names Registered Abroad.

KOH-I-NOOR BLEISTIFT FABRIK L. & C. HARDTMUTH *v.* FABRIQUE DE CRAYONS KOH-I-NOOR L. & C. HARDTMUTH, S.A.R.L. AND KOH-I-NOOR BLEISTIFT FABRIK L. & C. HARDTMUTH.

Switzerland, Federal Tribunal. September 13, 1957.

THE FACTS.—By Decree No. 100 of October 24, 1945, a number of industrial companies in Czechoslovakia were nationalized. They included the company " Koh-i-noor Bleistift Fabrik L. & C. Hardtmuth ", which owned a pencil factory in Budweis. The nationalized undertaking to which the property of the Company was transferred on January 1, 1946 transferred to its own name twenty-one trade-marks which were registered in the name of the Company with the International Bureau in Berne, as well as a trade-mark registered in Switzerland.

The partners of the original Company left Czechoslovakia in 1950 and decided to transfer the seat of the Company to Paris, where they transformed it into a limited liability company under the name of " Fabrique de Crayons Koh-i-noor L. & C. Hardtmuth, S.a.r.l. ". They then sued in Switzerland for a judicial declaration that both the international trade-marks and the Swiss trade-mark belonged to them, and must be transferred to their name. In a judgment of March 29, 1957, the Commercial Court found in their favour. This was an appeal from that decision. The appellant undertaking relied on the Czechoslovak Nationalization Decree No. 100, while the respondent Company maintained that the trade-marks at issue remained its property on Swiss territory despite that Decree.

Held: that the appeal must be dismissed. The Czechoslovak expropriation decrees could not transfer assets situate in Switzerland. Trade-marks and trade names constituted such assets.

The Court said: " In so far as the entitlement to the Swiss trade-mark No. 108.471 is concerned, the appeal founders on the considerations by reference to which it was decided in *B.G.E.*, vol. 82, Part I, pp. 197 ff., that a foreign State cannot expropriate title to a trade-mark registered in Switzerland. The appellant contends that the earlier decision was based on Article 6 (D) of the Paris Convention on the Protection of Industrial Property as amended in London in 1934, which provides that the validity of national trade-marks is, as from the date of their registration, independent of the trade-mark in the country of origin. Czechoslovakia, however, had not ratified the London version of the Convention but remained bound by the Hague version of 1925, which did not contain such a provision. This objection must fail. The decision published in

B.G.E., vol. 82, Part I, pp. 197 ff., was based on the consideration that the Czechoslovak expropriation decrees could not be applied to property situate in Switzerland since they constituted foreign public law in the enforcement of which Switzerland could, as a matter of principle, lend no assistance, and that title to a Swiss trade-mark constituted property situate in Switzerland seeing that it could not be renewed or transferred without the intervention of Swiss authorities. In this connection the Tribunal explained why title to a trade-mark was not situate at the place of residence of the owner and was not dependent on the place where the owner utilised the trade-mark. It stated that current doctrine and judicial decisions agree that a trade-mark, whether it be national or registered with the International Bureau, gives rise to a particular right in every country, and is thus independent in every country where it is protected; only the country protecting it can expropriate it on its own territory. . . .

" The same is true of Article 4, para. 1, of the Madrid Convention concerning the International Registration of Trade-Marks. That Article provides that registration by the International Bureau gives the trade-mark the same protection in every contracting State as if it had been registered there. Registration by the International Bureau does not create an independent, supra-national right, but serves solely to simplify procedures. . . .

"The Commercial Court concluded on the basis of Czechoslovak and French law that the Budweis Company still existed on April 3, 1950, that it was legally in the position to transfer its seat to Paris on that day and did so, and that at the same time the partners transformed it into a limited liability company under French law. It stated at the same time, again in application of foreign law, that even if the Company had ceased to exist before 1950 and had been unable to transfer its seat, assets lying outside Czechoslovakia (including the disputed trade-marks) would belong to the French Company, since by the will of the partners they constituted assets which were brought into that Company on its foundation. . . .

" The applicant contests the prohibition of the use, in its commercial dealings with Switzerland, of the description ' Koh-i-noor ' or ' L. & C. Hardtmuth '. It claims to derive the right to use its name unchanged in its relations with Switzerland from the considerations that the Czechoslovak nationalization extended to that name, that the validity of a trade name falls to be determined according to the law applicable at its seat, and that Switzerland was bound, by Article 13 of the Commercial Agreement with Czechoslovakia of November 24, 1953, to recognize the applicant and to protect its name in conformity with Article 8 of the Paris Convention on the Protection of Industrial Property.

" This view cannot be upheld. The appellant is indeed recognized in Switzerland as a legal person, as agreed in Article 13, para. 2, of the above-mentioned Commercial Agreement. That provision does not, however, lay down under what name the appellant may appear. In particular, it does not exempt legal persons of Czech law from complying with Swiss law in Swiss territory like all firms resident in Switzerland. Nor is the appellant entitled to special treatment in virtue of Article 8 of the Paris Convention. In virtue of that provision trade names are protected in Switzerland, but only to the extent to which protection is accorded to natural and legal persons resident in Switzerland. It is immaterial whether the validity of a trade name is determined according to the law applicable at its seat, which was in any case not decided in the judgment published in *B.G.E.*, vol. 79, Part II, p. 90. Even where the name is valid under the law of the seat, this does not give the owner authority to use it in Switzerland if it violates existing rights of other persons. Nor could Czechoslovakia grant the appellant, with effect on Swiss territory, an authority incompatible with Swiss law by way of expropriation of the name used by the [Paris] company. This would run counter to the principle, explained above, that the Czechoslovak expropriation decrees, being public law, cannot be carried out in Switzerland, and cannot deprive the Company of any rights situate and protected there.

" If, then, the appellant, like any other legal person resident in Switzerland, may not violate the existing rights of others on Swiss territory, the Commercial Court correctly prohibited its use of the descriptions ' Koh-i-noor ' and ' L. & C. Hardtmuth '. The descriptions used by the appellant violate the rights of the [Paris] Company, and accordingly of the first respondent, in various trade-marks registered with the International Bureau, as well as in the Swiss trade-mark No. 108.471, which was acquired before the appellant was established. Those descriptions give rise to misconceptions, they violate the principle of good faith and credit, and they constitute unfair competition."

[Report: *Entscheidungen des Schweizerischen Bundesgerichtes*, 83 (1957), Part II, p. 312.]

Recognition of Foreign Legislative Acts—Foreign Monetary Laws—Whether Manufacture of English Gold Sovereigns in Italy Constitutes Criminal Offence of Counterfeiting under Italian Law—The Law of Italy.

Re PARIS AND OTHERS.

Italy, Court of Cassation. October 31, 1957.

THE FACTS.—The appellants had been convicted of the offence of counterfeiting foreign currency in that, contrary to Article 453 of the Italian Penal Code, they had manufactured English gold sovereigns. On appeal, they contended that English gold sovereigns were no longer legal tender in the United Kingdom and that they were accordingly not guilty of the offence of counterfeiting "money which is legal tender in the country of origin".

Held: that the appeal must be affirmed. According to the relevant legislation of the United Kingdom, gold coins remained legal tender in that country, and the appellants were therefore guilty of an offence under Article 453 of the Italian Penal Code.[1]

The Court said: "First it is contended that the gold sovereign is no longer legal tender in the United Kingdom or the territories under that country's sovereignty. Thus, it is said, there is lacking one of the elements of the offence charged, contrary to what the Court of first instance has found. This contention, it seems to this Court, cannot be accepted. In so far as concerns the application of Article 453 (1) of the Penal Code, all money must be considered legal tender which, from the point of view of the competent State authority, performs the function of a means of payment in discharge of financial obligations. Here we are concerned with a sovereign act performed by the State which issues the currency in question through its competent organs and in accordance with its law. This competence of the State, which, in order to result in legal validity, must be exercised by means of an express decision taken by the competent State organs, must also be exercised expressly if, in the contrary sense, it is intended to deprive such decision of its normal efficacy. It follows that a currency at a certain point of time acquires and retains its character as legal tender by virtue of the will expressed by the State concerned unless and until that State makes an express decision to the contrary. It must also be observed that if such currency has been expressly declared legal tender by the competent authorities it can remain legal tender, notwithstanding that it has been withdrawn from circulation. There can be no doubt that once a sovereign State has decided to issue a specific means of payment, the latter must be accorded legal protection irrespective of whether or not it is already in circulation. It is equally certain that once the withdrawal of a means of payment has been expressly decided, with or without a final date being fixed, that means of payment continues to enjoy legal protection as long as it is kept in regular circulation.

One last general observation may be made. Where the coinage of a State consists of precious metal it may sometimes happen that, by reason of exceptional factors caused by special and transitory measures of an economic and financial nature, the value of the raw material is higher than the nominal value of the currency itself. Such a phenomenon, however, which is due to fluctuating circumstances and as such subject to constant change, does not in any way affect the legality of the currency as legal tender, which subsists in accordance with the essential rules of the law in force. As far as the exceptional régime in the present case is concerned, no price has been fixed in accordance with the higher market value of this means of payment, and the metal coin must therefore be accepted in accordance with legal rules as such, so that it must be accorded the status of an effective means of payment, *viz.*, legal tender. In the light of these general observations we must now consider this case. The Coinage Act, 1870, which is fundamental in the present case, provides, *inter alia*, that the gold sovereign is legal tender unless and until called in by any proclamation made in pursuance of the Act. That Act, which has never been expressly repealed, was included in the special collection of Statutes still in force in the United Kingdom, published in 1950 ["The Statutes Revised"]. The Act has been applied in recent times, and was extended to Cyprus—which is under British sovereignty—so as to make the gold sovereign legal tender there. There is also the proclamation of Queen Elizabeth II which expressly refers to the Coinage Act, 1870, and provides for the new design of the gold sovereign. It may also be observed that the British Mint coined substantial quantities of gold sovereigns in 1948, 1949, 1951 and 1952. This obviously presupposes that in the United Kingdom the Coinage Act, 1870, is considered as having full legal validity. The gold sovereign is thus legal tender according to English law.

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[1] See, to the same effect, the judgment of the Court of Turin of July 10, 1957, *In re Febo and Others* (*Giurisprudenza italiana*, 110 (1958), Part II, col. 281), and the judgment of the Court of Appeal of Milan of September 22, 1956, *In re Borzaghi and Others* (*Rivista di Diritto Internazionale*, XL (1957), p. 281).

The appellants contend that as the United Kingdom has enacted in the course of the last few years a number of statutes designed to prevent the circulation of gold sterling, the latter has practically ceased to be legal tender, with the result that it cannot benefit from the legal protection of our Penal Code, which refers only to money which is legal tender in the country of origin or outside it. This contention is ill-founded, for two reasons. It is true that the essential characteristics of the English monetary system have substantially changed as a result of international events in the last few decades, but this does not provide any reason why the contention of the appellants should be accepted. According to the original provisions of the Coinage Act, everybody was entitled to demand gold coin or the conversion of paper money into gold coin. As a result of the difficulties arising from the first World War, an amendment of the existing law became necessary. The Gold Standard Act, 1925, repealed the provision whereby everyone was entitled to gold coin in the form of sovereigns and provided that the Bank of England was not to be bound to convert into gold coin paper money tendered by the holder. It was nevertheless provided that the Bank of England was bound to sell gold against any legal tender. The Currency and Bank Notes Act, 1928, provided that anyone in the United Kingdom who was in possession of gold coins in excess of £10,000 was liable to give particulars in writing of such holdings, and on demand to sell the same to the Bank of England. The Gold Standard (Amendment) Act, 1931, repealed the provision whereby the Bank of England was under a legal duty to sell gold against any money which was legal tender. After the Second World War the Exchange Control Act, 1947, was enacted. This Act was designed to increase gold reserves and protect the rate of the paper currency. It provided, *inter alia*, that gold coins and foreign currency could not be bought or sold without the permission of the Treasury. It also provided that persons subject to this prohibition were under a duty to offer gold and foreign currency to authorized depositaries unless the Treasury had permitted other uses. These various statutes show that a change occurred in the co-existence and interchangeability of gold and paper money. The latter became subject to a compulsory rate which was substituted for the pre-existing legal rate. These vicissitudes, although they affected the rate of paper sterling fundamentally and brought about a transformation of the British financial system, did not in any way affect the character, as legal tender, of the gold sovereign which had been conferred on the latter by the Coinage Act, 1870, and had never been expressly repealed. We can conclude from the legal provisions which we have cited that the sovereign remained in circulation and was intended to function as legal tender within the ambit of certain private and international transactions. This is confirmed by the fact that gold sterling continues to be minted. This would be devoid of meaning if this gold coin had been intended to be deprived *in toto* of its character as a means of payment. The appellants are wrong in contending that as gold sterling has a higher value than paper sterling the former cannot rightly be regarded as legal tender. We have already pointed out that this criterion cannot be relied upon . . .

" In conclusion, we can say that in the territories under the sovereignty of the United Kingdom gold sterling is today legal tender, either because the Law which provided for its issue has not been expressly repealed or because gold coin continues to perform its essential function, notwithstanding certain limitations."

[Report: *Giurisprudenza italiana*, 110 (1958), Part II, col. 81.]

Recognition of Acts of Foreign Governments—Whether Consideration of Legislation of Revolutionary Government Constitutes Recognition of that Government—Italian Socialist Republic.

See p. 303 (*Levi Claim*).

Recognition of Legislative Acts of Foreign States—Confiscatory Legislation—Whether Confiscation of Foreign Assets Affects Action against Victim of Confiscation in Courts of Forum—The Law of France.

See p. 228 *Ex-King Farouk of Egypt* v. *Christian Dior, S.a.r.l.*).

Recognition of Acts of Foreign States—Foreign Confiscatory Legislation—Extraterritorial Effect of—The Law of Italy.

See p. 211 (*Pauer* v. *Hungarian People's Republic*).

Recognition of Acts of Foreign States—Exterritorial Effect of Legislation—Confiscatory Decrees—Enemy Trade-Marks—*Situs* of Trade-Marks.

See p. 435 (*Amato Narodni Podnik* v. *Julius Keilwerth Musikinstrumentenfabrik*).

V.—Continuity of States

[*See also below,* E, State Succession.]

States—Continuity of—Application in Holland of Treaties Concluded by Russia Prior to Revolution of 1917—Applicability of Hague Convention of 1905 on Civil Procedure to Citizens of U.S.S.R.

In re Petition of S.

Holland, Cantonal Court of The Hague. June 19, 1957.

The Facts.—Iwan S., a Russian national, filed a petition to be permitted to sue *in forma pauperis.* Opposing the petition, the respondent to the proposed proceedings contended that Article 855 (2) of the Netherlands Code of Civil Procedure grants that privilege only to subjects of those States with which the Netherlands has entered into an international agreement to that effect. Since the petitioner was a Russian and there was no such agreement between the Netherlands and the U.S.S.R., he should be denied that privilege.

Held: that the petition must be dismissed. The Hague Convention on Civil Procedure did not apply to Russian nationals.

The Court said: " The petitioner admitted that he had Russian nationality. The Netherlands and the Russian Empire were among the States which in 1905 concluded and subsequently ratified the Hague Convention on Civil Procedure. After the Russian Revolution in 1917, doubts arose as to whether the treaties entered into by Russia prior to 1917 were still operative. From a Note of April 2, 1924, addressed by the Soviet Government to the International Juridical Institute at The Hague (published in the Netherlands *Tractatenblad* [*Collection of Treaties*], 1952, No. 50) regarding the recognition of treaties concluded by the Russian Empire, it appears that the Soviet Government deemed it advisable to consider the matter with respect to each treaty and each contracting State separately. No such recognition has taken place with regard to the

Convention on Civil Procedure of 1905. Therefore the Convention is not applicable to Russian subjects."

[Report: *N.J.*, 1957, No. 668.]

NOTE.—There are a small number of other Dutch decisions to the same effect: see, *e.g.*, *N. and M. Shipoff* v. *Elte*, decided by the Cantonal Court of The Hague on July 6, 1931 (*Annual Digest*, 1931–1932, Case No. 17); *C.J.H.* v. *D. van P.*, decided by the District Court of Amsterdam on May 27, 1937 (*ibid.*, 1935–1937, Case No. 16). In the majority of cases, however, the Netherlands courts held with regard to Russian nationals that the Convention of 1905 on Civil Procedure was still in force: see, *e.g.*, *Wirbelauer* v. *De Handelsvennootschap onder de Firma Lippman Rosenthal en Co.*, decided by the District Court of Amsterdam on October 16, 1925 (noted by Professor J. H. W. Verzijl in *W.* 11443—see *Annual Digest*, 1927–1928, Case No. 36); *Lowinsky* v. *Receiver in Bankruptcy of the Egyptisch-Türksche Handwerksigarettenfabriek "Jaka", Ltd.*, decided by the same Court on June 7, 1932 (*ibid.*, 1931–1932, Case No. 16); *Paszthy* v. *Kasulakoff*, decided by the Cantonal Court of The Hague on February 9, 1940 (*ibid.*, 1919–1942 (Supplementary Volume), Case No. 41); and *In re Tatarko*, decided by the District Court of Rotterdam on October 7, 1949 (*ibid.*, 1949, Case No. 110). See also the article by Professor Tammes, "Netherlands Courts and International Recognition", in *Symbolae Verzijl* (1958), p. 367.

VI.—Extinction of States

States — Extinction of — Germany — Effect of Surrender After Second World War—The Law of Poland.

See p. 77 (*L. and J.J.* v. *Polish State Railways*).

B—COMPOSITE AND DEPENDENT STATES AND TERRITORIES

I.—Unions of States

i.—Federal States and Confederations

Composite States—Federal States—Concordat between Holy See and Germany—Alleged Violation of Provisions of Concordat by One of German *Länder*—Whether German Federal Republic Can Compel *Land* to Comply with Terms of Concordat—The Constitutional Law of Germany.

See p. 592 (*Concordat* (*Germany*) *Case*).

iii.—Miscellaneous

Composite States — Miscellaneous — Dependent Territories — Operation of Treaties Ratified by and Promulgated in Mother Country — Absence of Promulgation in Dependent Territory — Applicability in French West Africa of Chicago Convention on International Civil Aviation of December 7, 1944.

Public Prosecutor and Customs Administration *v.* Schreiber and Air-France.

French West Africa, Court of Appeal of Dakar. May 15, 1957.

The Facts.—The first appellant was a passenger in an aircraft owned by the second appellants and bound from Liberia to Switzerland. The aircraft landed at the airport of Dakar, in French West Africa, where the first appellant's luggage was inspected by local customs officers and found to contain raw diamonds the importation of which into French West Africa was prohibited without special authority. The first appellant was found guilty of offences against two local customs ordinances providing for the punishment of persons who imported diamonds without such authority, and he now appealed against his conviction on the ground that, as France was a party to the Chicago Convention on International Civil Aviation of December 7, 1944, which provided that luggage on mere transhipment was not subject to customs inspection, he was entitled to be acquitted.

Held: that the appeal must be allowed. As France was a party to the Convention the latter applied in the dependent territories of France, notwithstanding that local ordinances might contain provisions contrary to the Convention and that the Convention had not been separately promulgated in the territory concerned.

The Court said: " With regard to the customs offence, the appellants contend that this is not a case of importation or ordinary transit but merely a transhipment of luggage, and that the first appellant, as an international transit passenger, was exempt from local customs formalities by virtue of the Chicago Convention of December 7, 1944. The Customs authorities contend that the Convention does not apply in French West Africa because it was not promulgated there. However, Article 2 of the Chicago Convention provides that

> ' for the purposes of this Convention the territory of a State shall be deemed to be the land areas and territorial waters adjacent thereto under the sovereignty, suzerainty, protection or mandate of such State.'

It follows that this Convention, which was ratified by France and published in the Official Gazette (*Journal Officiel*) of the French Republic, must be applied in overseas territories and in particular in French West Africa, without the need for local promulgation. In accordance with Annex 9, Chapter 5–3, to the Convention, the luggage of the first appellant, who was an international transit passenger, should not have been subjected to a customs examination. The first appellant was under no duty to make any declaration to the local customs officers, and the seizure of his luggage, in pursuance of local law, was unlawful."

The Court then dealt with the exceptional cases in which an inspection may take place, *viz.*, cases affecting security, and held that the present was not such a case. The Court accordingly quashed the conviction and ordered the release of the first appellant's diamonds.

[Report: *Revue Française de Droit Aérien*, October–December 1957, p. 355.]

States as International Persons—Composite States—Miscellaneous —Division of Financial Responsibilities in Succession to Debts— Responsibility of Netherlands for Obligations of Netherlands Indies.

See p. 69 (*Poldermans* v. *State of the Netherlands*).

II.—British Commonwealth of Nations

British Commonwealth of Nations—Commonwealth Citizenship —[Indian] Foreigners Act, 1946.

MOHD. ABDUL GHANI *v.* THE STATE.

India, High Court of Andhra Pradesh. December 27, 1956.

(Subba Rao C.J. and Srinivasa Chari J.)

THE FACTS.—The petitioner had left India for Pakistan and returned to India in 1954 on a Pakistani passport. He preached the Deendar creed, one of the central ideas of which is that Moslem supremacy would be established in India. As he engaged in objectionable communal activities which as an alien he was not supposed to do, he was subjected to preventive detention under s. 3 (1*a*) of the Preventive Detention Act. He applied for a writ of habeas corpus and argued that the detaining authority had no power to proceed against him on the basis of s. 3 (1*a*), which in his view applied only to Indian citizens. He argued further that preventive detention against foreigners should be applied on the basis of s. 3 (1*b*), which provides for their detention for the purpose of making arrangements for their expulsion from India (see *Müller* v. *Superintendent, Presidency Jail, Calcutta*: *International Law Reports* 1955, p. 497). The Public Prosecutor contended, *inter alia*, that the petitioner was not a foreigner within the meaning of the Foreigners Act, but a Commonwealth citizen.

Held: that the petition must be dismissed on the ground that s. 3 (1*a*) applied to foreigners as well as to Indian citizens. As to the argument of the Public Prosecutor, the Court came to the conclusion that though the petitioner had the status of a Commonwealth citizen, no rights could be derived from such status in the inter-State sphere without their express enactment in the municipal law of the Commonwealth country concerned (India).

The Court said: " In support of the contention [that the petitioner is not a foreigner] reliance is placed upon a proclamation issued by the President under Article 367 of the Constitution of India declaring the Pakistan State not to be a foreign State for the purpose of the Constitution. The Proclamation does not state that a citizen of Pakistan is not a foreigner for the purpose of the Foreigners Act (XXXI of 1946). Nor does the Citizenship Act of 1955 advance the argument of the learned Prosecutor. That Act makes a distinction between a Commonwealth citizen and a citizen of India. Under s. 11, every person who is a citizen of a Commonwealth country specified in the First Schedule shall, by virtue of that citizenship, have the status of a Commonwealth citizen in India. One of the countries specified in the First Schedule is Pakistan. Under s. 12

the Central Government may, by Order notified in the Official Gazette, make provision on a basis of reciprocity for the conferment of all or any of the rights of a citizen of India on a citizen of any country specified in the First Schedule, and no such notification has been brought to our notice conferring rights of a citizen of India on citizens of Pakistan. As neither the Proclamation issued by the President under Article 367 of the Constitution nor the provisions of the Citizenship Act, 1955, confer rights of citizenship of India on citizens of Pakistan, the question is whether the petitioner is 'a foreigner' within the meaning of the Foreigners Act. The relevant portion of the definition of foreigner under the Act reads

> "Section 2 (*a*): Foreigner means a person who . . . (iii) is not a citizen of India."

Though in the petition it is stated that the petitioner is a citizen of India the argument proceeded before us on the basis that he is a citizen of Pakistan. As he is not a citizen of India, he is a foreigner within the meaning of the Foreigners Act and therefore he is liable to be proceeded against under s. 3 (1*b*) of the Preventive Detention Act."

[Report: A.I.R. 1957 Andhra Pradesh 143.]

British Commonwealth of Nations—Nationality and Citizenship —[Indian] Foreign States Order, 1950—Whether Conferring Special Rights Upon Citizens of Commonwealth.

See p. 429 (*Naziranbai* v. *The State*).

IV.—Mandated and Trust Territories

i.—Sovereignty over Mandated and Trust Territories. Status of Mandated and Trust Territories

Trust Territories — Sovereignty Over — Status of — Whether "Foreign Country" in Relation to Administering Authority—Admission of Inhabitants of Trust Territory into Territory of United States—The Law of the United States of America.

ARADANAS *v.* HOGAN.

United States, District Court, District of Hawaii.

October 11 *and* 29, 1957.

THE FACTS.—This was an action to review the issue of an order for the deportation of the plaintiff, a native and citizen of the Republic of the Philippines. He had resided in Hawaii from 1924 until May 1951, at which time he went to Kwajalein Island, Trust Territory of the Pacific Islands, to work on a construction project. He returned to Hawaii in November 1951. In 1955, a Special Inquiry Officer of the United States Immigration Service entered an order for the deportation of the plaintiff on the ground that he had been convicted of counterfeiting in 1934 and was therefore not eligible for entry into the United States in November 1951. The Immigration Act of 1917 (§ 1, 39 Stat. 874, as amended (in effect in 1951)), defined the United States as " the United States, and any waters, territory, or other place subject to the jurisdiction thereof . . ." The Board of Immigration Appeals confirmed the order of the Special Inquiry Officer. The plaintiff thereupon brought this action against the District Director of the Immigration and Naturalization Service.

Held: that the deportation order was according to law and that judgment must be rendered for the defendant. Kwajalein Island, as part of a Trust Territory, was primarily under the sovereignty and jurisdiction of the United Nations and was accordingly foreign territory for immigration purposes. A person coming into the territory of the United States from that Island made an " entry " into the United States within the meaning of the law of that country.

The Court said: " However, the question for decision is whether or not in point of law in terms of the Immigration Act then applicable in 1951, to wit, the 1917 Act, whether this alien when he left for Kwajalein under contract left the United States, as that term is defined in the 1917 Act, and did so intentionally and voluntarily, so that when he returned, his return and admission may be deemed a re-entry. If it be a re-entry, then the order of deportation for cause made to appear on this record is justified in point of law; but if his return from Kwajalein was not a re-entry within the meaning of the Immigration Act then in force, the authorities have no right to deport this man.

" This case, of course, must be distinguished from a naturalization case. It must be distinguished from cases where the departure was involuntary or unintentional, or to be more exact, where the touching of a foreign port or place beyond the jurisdiction of the United States was unintentional and involuntary. I have in mind in saying this the cases of the shipwrecked seaman[1] and of the man going by train from one part of the United States to another through Canada.[2] And, too, this case must be distinguished from problems which have arisen with respect to other areas of the Pacific over which the United States has a different kind of control or to which it has a different relationship, such as Wake or Guam or Okinawa and others that might be mentioned, for this case involves an area known as Kwajalien Island which is presently an area within the Trust Territory under the United Nations, and the relationship of our country to this particular territory is one of an administrating authority under the United Nations Charter.

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[1] *Delgadillo* v. *Carmichael*, 1947, 332 U.S. 388, 68 S.Ct. 10, 92 L.Ed. 17 [*Annual Digest*, 1947, Case No. 57].

[2] *Carmichael* v. *Delaney*, 9 Cir., 1948, 170 F.2d 239 [*Annual Digest*, 1948, Case No. 82].

" The question is, under the 1917 Act, whether or not with respect to Kwajalein in 1951 it comes within the definition of the United States, any waters, territory or other place subject to the jurisdiction thereof. Despite the control of this area by the Navy for the United States as the administering authority under the trusteeship of the United Nations, despite the fact that the American flag and American law there obtains, I do not believe that in point of law for immigration purposes that Kwajalein is within the definition of the United States as used in the 1917 Act.[1] Quite clearly it is not within the definition of the United States as that term is defined in the 1952 Act, 8 U.S.C.A. § 1101 (a) (38) and which point has already been decided by this Court, at least for the purposes of naturalization, by Judge Wiig in the *Reyes* case found in 140 F.Supp. 130.[2] And it is said, and I believe for this proposition the Chief Justice of the United States is quoted in the *Gonzales* case,[3] that the 1952 Act is but a codification of the pre-existing law relating to entry. If it is, of course, clearly my ruling is doubly sound. But, in any event, if the 1952 Act is different than prior law, I am still, nevertheless, satisfied that under the 1917 Act Kwajalein was not within the meaning of the word ' United States,' as defined by that Act. Indeed, our country's relationship to Kwajalein is wholly at variance with the jurisdictional concept expressed, in the 1917 Act, for despite the broad powers given to our country with respect to Kwajalein by the United Nations Charter, it is still something different and apart from the jurisdiction which this nation exercises as of independent right over its own lands, people and waters.

" So it is that I hold that when this man who voluntarily and intentionally went to Kwajalein, which is outside of the United States, that when he returned, he made a re-entry, thus giving to the Immigration authorities a legal foundation upon which to cause to order his deportation."

In its " Conclusions of Law ", the Court said in part: " Kwajalein is foreign for immigration purposes, and for all purposes is primarily under the sovereignty and jurisdiction of the United Nations."

[Report: 155 F. Supp. 546.]

NOTE.—This case is noted in *Tulane Law Review*, 32 (1957), p. 778. In *Callas* v. *United States*, 253 F.2d 838 (2d Cir. 1958), *certiorari* denied, 357 U.S. 936, 2 L.Ed. 1550, 78 Sup. Ct. 1384 (1958) (to be reported in the *International Law Reports* for 1958), Kwajalein Island was *held* to be a " foreign country " within the meaning of the United States Federal Tort Claims Act.

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[1] Former 8 C.F.R. 176.101 (b) and former 22 C.F.R. 42,101 (b) effective May 11, 1949 (14 F.R. 2435, 2437).

[2] In *Application of Reyes*, D.C. 1956, 140 F.Supp. 130 [*International Law Reports*, 1956, p. 35].

[3] *Barber* v. *Gonzales*, 1954, 347 U.S. 637, 74 S.Ct. 822, 98 L.Ed. 1009 [*International Law Reports*, 1953, p. 276].

D—RECOGNITION

[*See also above*, A, IV, Recognition of Acts of Foreign States and Governments; *and* PART IV, JURISDICTION: A, I, Territorial.]

I.—Of States

Recognition—Of States—Position of Puppet Authority in Territory Under Enemy Control—Status of Italian Social Republic—Whether Legislation of Italian Social Republic " laws in force " for Purposes of Treaty of Peace with Italy.

See p. 303 (*Levi Claim*).

II.—Of Governments

Recognition—Of Governments—Whether Consideration of Legislation of Revolutionary Government Constitutes Recognition of That Government—Italian Socialist Republic.

See p. 303 (*Levi Claim*).

E—STATE SUCCESSION

I.—Succession to Rights

State Succession—Succession to Rights—Federal Republic of Germany as Successor to Weimar Republic.

See p. 771 (*Steinberg et Al.* v. *Custodian of German Property*).

II.—Succession with Regard to Contractual and Other Obligations, and Concessions

State Succession—With Regard to Contractual Obligations—Effects of Liquidation of Enemy Property—Transfer of Sovereignty from Former Dutch East Indies to Indonesia.

NEDERLANDS BEHEERS-INSTITUUT *v.* HANDELS-VEREENIGING AMSTERDAM.

Holland, Court of Appeal of The Hague. November 20, 1957.

THE FACTS.—Before the Second World War a German national living in the Netherlands Indies had a claim against Handels-Vereniging Amsterdam, a company operating in the Netherlands Indies but registered in the Netherlands with limited liability and having its head office there. After the outbreak of war in Europe between Germany and the Netherlands, this claim came under the control of a Netherlands Indies Commission created for that purpose as a juridical person under Article 46 of the Netherlands Statute of June 7, 1940 (London *Staatsblad* A 6), which was operative for the whole of the Kingdom of the Netherlands. In 1941, the Commission agreed with Handels-Vereniging Amsterdam that payment of the claim should be made in Batavia. After the war, the claim came under the control of the Netherlands Indies Institute for the Administration of Enemy Property, created under another Statute dated October 20, 1944 (Emergency Decree on Enemy Property), which was similarly operative throughout the Kingdom of the Netherlands (London *Staatsblad* E 133). However, after the transfer of sovereignty in Indonesia the Netherlands Institute for the Administration of Enemy Property claimed the right to liquidate this particular " enemy property " for the benefit of the Kingdom in Europe, and instituted proceedings against Handels-Vereniging Amsterdam with a view to having the amount of the claim paid out to the State.

The District Court of The Hague having dismissed the action, the Institute appealed.

Held: that the decision of the Court below must be confirmed. The Netherlands Institute had no longer any rights in respect of the claim.

The Court said: " The administration of the claim was duly entrusted to the Netherlands Indies Institute, which is competent to decide that the amount due shall be paid out in Batavia. The place for the enforcement of the claim is the place where payment is due. In consequence, since the transfer of sovereignty in December 1949, the claim is no longer enemy property within the Kingdom [of the Netherlands], but falls within the legal orbit of the Republic of Indonesia. It does not, therefore, come under the administration of the Netherlands Institute, despite the fact that the Netherlands Indies Institute is of the opinion that it has no concern with the claim."

[Report: *N.J.*, 1958, No. 508.]

See also a similar decision, given by the Council for the Restoration of Legal Rights on April 16, 1956 (*Rechtsherstel* No. 56/529, X, p. 1321.)

State Succession—Succession to Obligations—Partition of States —India and Pakistan—Indian Independence (Rights, Property and Liabilities) Order, 1947—Defence Order, 1947.

UNION OF INDIA *v.* M/S. CHAMAN LAL LOONA AND CO.

India, Supreme Court. April 30, 1957.

(S. R. Das C.J.; Imam, S. K. Das, Govinda Menon and Sarkar JJ.)

THE FACTS.—The respondents entered in 1945 into a contract for the supply of bhoosa (fodder) to the military department of the then undivided India through the Manager, Military Farms, Lahore Cantonment. Disputes between the parties which arose out of the contract were tried by a Subordinate Judge, who found that the Union of India was not liable under the contract and that he had no jurisdiction. On appeal, the High Court of Punjab reversed the decision of the Subordinate Judge on the ground that though the Lahore Military Cantonment is now situated in Pakistan and thus the contract was, according to Article 8 of the Indian Independence Order, 1947, exclusively for the purpose of the Dominion of Pakistan, which has consequently all rights and liabilities under the contract, the goods supplied to the military farm in Lahore constituted military stores which were kept joint and under the exclusive control of the Joint Defence Council (set up under the Defence Order, 1947), which had the power of allocating stores among the two Dominions.

On appeal to the Supreme Court,

Held: that the appeal must be allowed. According to the Indian Independence (Rights, Property and Liabilities) Order, 1947, where a cause of action arose in territory which after the partition of India became Pakistan territory, the action lay only against the Government of Pakistan. The provisions of the Joint Defence Council Order (Defence Order) made no difference in the legal position.

The Court, after quoting the relevant portions of the Defence Order, said: " The point which is to be emphasised is that what is saved by Clause 2 of Article 3, Independence Order, 1947, is ' powers of control ' of the Joint Defence Council with regard to certain essential military equipment, etc., including stores. There is no provision in the Defence Order, 1947, which affects the rights and liabilities of any of the two Dominions arising out of a contract, and those rights and liabilities are dealt with by the Independence Order, 1947.

" The learned Judges of the High Court thought that the Defence Order, 1947, made a difference in the legal position in so far as the purpose of the contract was concerned. They realized and said that ordinarily the purpose of supplying fodder to the military farm at Lahore was a purpose exclusively for the Dominion of Pakistan, but they thought that on the assumption that ' bhoosa ' was military stores, the Joint Defence Council had powers of control over it and could send it wherever they wanted it to be sent; therefore they said that the purpose of the contract was not a purpose exclusively for the Dominion of Pakistan.

" We say this with great respect, but this line of reasoning appears to us to be due to a lack of proper appreciation of the distinction between the ' purpose of the contract ' and the ' ultimate disposal of the goods ' supplied under the contract. The purpose of the contract is not determined nor modified by the ultimate disposal of the goods supplied under the contract nor even by the powers of control exercised over the goods after the contract has been performed by the respondent.

" Wherever the goods might be ultimately sent, the purpose of the contract remained what it was, that is, to supply fodder to the Manager, Military Farms, Lahore, which, on the test laid down by us, was clearly a purpose exclusively for the Dominion of Pakistan. The Independence Order, 1947, determines the respective rights and liabilities under contracts. If under the Defence Order, 1947, some goods the liability for the price of which under the Independence Order, 1947, falls on, say, India, are allotted to Pakistan, then the value thereof will have to be adjusted in accounts.

" Such allotment does not alter the rights or liabilities determined under the Independence Order, 1947. We are therefore of the view that the High Court of Punjab was in error in inferring that on the strength of certain provisions of the Defence Order, 1947, the contract in question came within Clause *b* of Article 8 (1) and not Clause *a*. We think that the learned Subordinate Judge correctly held that Clause *a* applied and the Union of India had no liability under the contract."

[Report: A.I.R., 1957, S.C. 652.]

State Succession—Succession to Obligations—Partition of States—India and Pakistan—Indian Independence (Rights, Property and Liabilities) Order, 1947.

UNION OF INDIA *v.* BALWANT SINGH JASWANT SINGH.

India, High Court of Punjab. March 5, 1956.

(Bhandari C.J.; Falshaw and Bishan Narain JJ.)

THE FACTS (in part as stated by the Court).—On February 25, 1947 a Karachi firm consigned a case of sewing needles by the North Western Railway from Karachi to Peshawar City. . . . The consignor made himself the consignee, but the railway receipt was ultimately purchased by Messrs. Balwant Singh Jaswant Singh, then of Peshawar. The case of needles was never delivered and on April 26, 1948

Messrs. Balwant Singh Jaswant Singh, giving a Dehra Dun address, instituted the present suit against the Dominion of India in a Court at Delhi claiming damages for non-delivery. . . . The suit was contested by the defendant, who challenged the plaintiff's *locus standi* to bring the suit . . . and raised the plea that the Delhi Court has no jurisdiction to entertain the suit. The liability of the Government of India for any damages was also denied. After August 15, 1947, both Karachi and Peshawar were in that part of the Dominion of India which became Pakistan. The trial Court gave judgment for the plaintiff. An appeal from that judgment to the District Judge was dismissed, and the case came before the High Court on further appeal.

Held: that the appeal must be allowed.

The Court considered the application of the Indian Independence (Rights, Property and Liabilities) Order, 1947, to the case and, referring, *inter alia*, to *Union of India* v. *Chinubhai Jeshingbhai* (A.I.R. 1953 Bombay 13), said: " It was held [in the above case] that, on a true construction of both the Independence Act and the Indian Independence (Rights, Property and Liabilities) Order, 1947, it was clear that when it was found that there were goods originally belonging to the Government of India lying at the place which formed part of the Dominion of Pakistan on August 15, these goods fell under the control of that Dominion and that Dominion was entitled to exercise rights of ownership with regard to those goods, and that, when a contract had been entered into with respect to those goods prior to August 15, 1947, all liabilities in respect of that contract devolved upon the Dominion of Pakistan, and any rights that a citizen of India had in respect of that contract could only be asserted against the Dominion of Pakistan and not against the Dominion of India. The following passage appears at p. 16 in the judgment:

" ' Therefore Article 8 (1) deals with contracts which were entered into on behalf of the Governor-General in Council before 15th August 1947 and the provision was that if the contract was exclusively for the purposes of the Dominion of Pakistan then the contract was deemed to have been made on behalf of the Dominion of Pakistan. Therefore it is clear that although in fact the Governor-General in Council might have entered into a contract with a citizen of India and although he may have undertaken liabilities under that contract and although certain rights might accrue to the citizen under that contract, if the contract was found to be on 15th August 1947 exclusively for the purposes of Pakistan, then the contract was deemed to be a contract made by the Dominion of Pakistan. Therefore the actual making of the contract by the Governor-General in Council prior to 15th August 1947 was immaterial. What was material was whether on 15th August 1947 it could be considered that the contract was for the purposes of the Dominion of Pakistan. If it was for the purposes of the Dominion of Pakistan then it became a contract made by the Dominion of Pakistan and all rights and liabilities which might have accrued or which may accrue in future in respect of such contract would accrue to the Dominion of Pakistan again notwithstanding the fact that the contract was originally entered into by the Governor-General in Council.'

"Agreeing . . . with these views [the Court expressed] the opinion that the contract in the present case is one which is covered by the provisions of Article 8 (1*a*) of the Order and that therefore no liability remained with the Government of India in respect of the contract."

[Report: A.I.R. 1957 Punjab 27.]

State Succession—Succession to Obligations—Partition of States —India and Pakistan—Indian Independence (Rights, Property and Liabilities) Order, 1947—Joint Defence Council Order, 1947.

PANNALAL MUKHERJEE *v.* UNION OF INDIA.

India, High Court of Calcutta. June 6, 1956.

(Mitter J.)

THE FACTS.—In November 1943, that is, before the partition of India, the plaintiff, a contractor, entered into a contract with the Governor-General of India in Council to carry out certain work in connection with a military hospital at Dacca (now in Pakistan). The work was completed in 1944. Disputes arose out of this contract after the partition of India, and the plaintiff commenced proceedings against the defendant. His case was that in or about the month of July 1947 the Governor-General in Council invited contractors having claims against the Military Engineering Service to notify particulars thereof to the Chief Engineer, Eastern Command, and the plaintiff submitted his claim, which was investigated in detail and ultimately accepted on or about March 31, 1948. The plaintiff relied on a notification alleged to have been published by the defendant, the State of India, on or about May 23, 1948, inviting all contractors to submit to it by July 1, 1948, claims arising whether in areas then in India or in Pakistan in respect of supplies and services rendered to the Government of India up to and inclusive of August 14, 1947. The plaintiff also alleged that by the notification the Government of India undertook to meet the claims of contractors residing in India.

Held: that the claim must fail. The purposes of the contract were not exclusively purposes of the Dominion of Pakistan.

The Court referred to the Indian Independence (Rights, Property and Liabilities) Order, 1947, which provided in Article 8 as follows:

> "Any contract made on behalf of the Governor-General in Council before the appointed day shall as from that day—(a) if the contract is for purposes which as from that day are exclusively purposes of the

> Dominion of Pakistan be deemed to have been made on behalf of the Dominion of Pakistan instead of the Governor-General in Council, and (b) in any other case, be deemed to have been made on behalf of the Dominion of India instead of the Governor-General in Council; and all rights and liabilities which have accrued or may accrue under any such contract shall to the extent to which they would have been rights or liabilities of the Governor-General in Council be rights or liabilities of the Dominion of Pakistan or the Dominion of India as the case may be."

In regard to the provisions of Article 8, the Court said: "It is now practically settled that in order to find out whether [a] contract is for purposes which became exlusively purposes of the Dominion of Pakistan as from August 15, 1947, one or two tests will have to be applied, namely, (a) imagining the date when the contract was entered into to find out if it would be a contract for the purposes of Pakistan, or (b) imagining that the contract was brought about on August 15, 1947, to find out whether its purpose was exclusive to Pakistan. The Dominion of Pakistan would only be liable if the answer be in the affirmative." Applying the above test, the Court came to the conclusion that the contract in question was for the purposes of Pakistan.

The plaintiff having argued that besides the provisions of the Indian Independence (Rights, Property and Liabilities) Order, 1947, the provisions of the Joint Defence Council Order also applied, the Court considered the two Orders and said: "The Rights, Property and Liabilities Order was made in order to divide between the two Dominions the joint assets as also the liabilities which the Governor-General in Council was under an obligation to meet up to August 14, 1947. As regards the army and the navy, it was felt that it would take some time to divide the same and it would be necessary to continue the joint control thereof for some time, and to achieve this purpose the Joint Defence Council Order was made by the Governor-General. The Council was to consist of the Governor-General of India, the Defence Minister of India, the Defence Minister of Pakistan and the Supreme Commander of His Majesty's Forces in India and Pakistan. By clause 8 of the Order the Joint Defence Council was to be in exclusive control of the division of the Indian Forces between the Dominions [including] . . . such naval, military and air force establishments as the Joint Council may specify. . . . In the absence of evidence to show that the military hospital at Dacca was one of the establishments specified by the Joint Defence Council, [the Court could not] uphold the contention that the Joint Defence Council Order is attracted at all to the facts of the case. . . . Thus the only provision of law applicable is Article 8 of the Indian Independence (Rights, Property and Liabilities) Order, and under the said Order the purpose of the contract must be held to be exclusive to that of Pakistan."

The plaintiff also contended that the defendant State had as a result of the notifications published after partition waived its rights under the Indian Independence (Rights, Property and Liabilities) Order. Dismissing this argument, the Court said: "The Government of India was merely trying to help the contractors by voluntarily paying their claims and in its turn seeking to recover the same from Pakistan. There is no admission anywhere in the notification that the contract entered into in respect of areas then situate in Pakistan was not for purposes exclusive to Pakistan, or, in other words, there is no admission that the purpose of the contract was one which could be said to be a purpose of the Dominion of India. The notification referred to does not amount to any agreement between the Dominion of India and the plaintiff or any other contractor."

[Report: A.I.R. 1957 Calcutta 156.]

State Succession—Succession to Obligations—Obligation to Pay Liquidated Sum—Nature of Obligation—Whether Failure to Pay Is a Breach of Contract or a Tort—Partition of India—Indian Independence (Rights, Property and Liabilities) Order, 1947.

STATE OF WEST BENGAL *v.* BRINDABAN CHANDRA PRAMANIK AND ANOTHER.

India, High Court of Calcutta. July 24, 1956.

(Lahiri, P. N. Mookerjee and Sen JJ.)

THE FACTS.—In 1944 the sub-divisional officer at Contai in the District of Midnapur requisitioned, under R. 75A of the Defence of India Rules, certain paddy (growing rice) belonging to the plaintiffs, who accordingly, between June 25 and July 2, 1944, delivered the paddy to the Contai Civil Supply Department. The compensation payable to the plaintiffs under Clause 4 of Rule 75A of the Defence of India Rules was duly assessed but the then Government of the Province of Bengal had not paid the compensation by August 15, 1947, when the Province of Bengal was partitioned and the Indian Independence (Rights, Property and Liabilities) Order, 1947, came into operation. In 1948 the plaintiffs sued the Province of West Bengal for the amount of their compensation. The trial Judge gave judgment for the plaintiffs; the defendant Province appealed to the High Court.

The Judges of the Divisional Bench which heard the appeal, however, differed on the interpretation of Articles 9 and 10 of the Indian Independence (Rights, Property and Liabilities) Order, 1947. P. N. Mookerjee J. held that the liability which the plaintiffs sought to enforce in the present action was governed by Article 10 (2) (*b*) of the Order, which provides:

> "Where immediately before the appointed day the Province of Bengal is subject to any liability in respect of an actionable wrong

> other than breach of contract the liability shall be the liability of the Province of West Bengal if the cause of action arose wholly within territories which as from that day are the territories of that Province."

The liability in the present case, he said, was therefore that of the Province of West Bengal (India). Sen J., on the other hand, held that the liability was governed by Article 9, the material part of which is as follows:

> "All liabilities in respect of [such] loans guarantees and other financial obligations . . . of a Province as are outstanding immediately before the appointed day shall as from that day . . . (*b*) in the case of the liabilities of the Province of Bengal be liabilities of the Province of East Bengal."

It consequently was a liability of the Province of East Bengal (Pakistan).

The case was therefore referred to a third Judge (Lahiri J.) for a decision on the question whether the plaintiffs' claim came under Article 9 or Article 10.

Held: that the appeal must be dismissed. The liability to pay compensation for requisitioned commodities was an actionable wrong within Article 10 of the Order and was that of the Province of West Bengal.

The Court said: "There is no dispute that the cause of action in the present case arose wholly within the territories which as from the appointed day are the territories of the Province of West Bengal (India) because both the requisition and the delivery of the paddy took place in the District of Midnapur. The controversy centres round the exact nature of the liability of the Province of Bengal. [In this respect the Court came to the conclusion that the appellant's failure to pay statutory compensation for requisitioned goods was an actionable wrong, and continued:] It is impossible to hold that the statutory obligation of the State to pay compensation to the plaintiffs in the present case is a financial obligation in that technical sense or that it arises out of arrangements or agreements relating to State finance. Consequently, I am constrained to hold that the appellant has failed to prove either of the elements which are required to bring the case under Article 9 (*b*) (liabilities in respect of loans guarantees and other financial obligations). My conclusion accordingly is that the case is governed by Article 10 (2) (*b*) of the Indian Independence (Rights, Property and Liabilities) Order 1947, and not by Article 9 (*b*)."

[Report: A.I.R. 1957 Calcutta 44.]

State Succession — Succession with Regard to Obligations — Succession to State Debts on Territorial Changes—Supremacy of Treaty Provisions Over Rules of International Law.

See p. 602 (*Franco-Ethiopian Railway Company Claim*), at p. 629.

III.—The Public Debt. Pensions

State Succession—Succession to Debts—On Break-up of Composite State—Explicit Transfer of Responsibility for Debts—Responsibility of Holland for Obligations of Netherlands Indies.

POLDERMANS *v.* STATE OF THE NETHERLANDS.

Holland, Court of Appeal of The Hague (*First Chamber*).

December 8, 1955.

Supreme Court. June 15, 1956.

THE FACTS.—When war broke out between the Netherlands and Japan, the appellant was employed as a civil servant—a schoolmaster—by the Government of the then Netherlands Indies. When the Netherlands Indies was occupied by Japan, Poldermans, together with virtually all other officials, was interned by the Japanese occupation authorities. His internment lasted from May 1, 1942, to August 1, 1945. Although his contract of service had not been terminated or cancelled, he received no salary during this period. He sued the State of the Netherlands for payment of that salary. The District Court of The Hague dismissed his claim.

On appeal to the Court of Appeal, Poldermans contended that the Netherlands Indies Government was under a legal obligation to pay him his salary for the period of his internment; that the Government of the "Kingdom of the Netherlands", *i.e.*, the Kingdom as a whole, in its capacity of former sovereign over the Netherlands Indies must be held liable for non-compliance with that obligation; and that the same applied to the "State of the Netherlands", *i.e.*, the Realm in Europe, which, although not identical in law with the Kingdom, nevertheless had the same Government. His other contentions appear from the *Held* below.

Held (by the Court of Appeal of The Hague): that the appeal must be dismissed. The Court first dealt with the question whether the Kingdom of the Netherlands as a whole or the Realm in Europe was to be considered the defendant in these proceedings, and said in this regard: "Although the Kingdom of the Netherlands, as defined in Article 1 of the Constitution[1] which obtained in the years 1942–1945, was the real subject of international law and was also a distinct legal entity under Netherlands constitutional law, it was not a separate body corporate under private law because it had no

[[1] Article 1 of the Constitution provided as follows:

"The Kingdom of the Netherlands comprises the territory of the Netherlands, the Netherlands Indies, Surinam and Curaçao.

"Whenever in the Constitution the term 'the Realm in Europe' is used, it refers to the component part which is the territory of the Netherlands."]

property of its own which could be severed from that of the component parts, in particular from that of the Realm in Europe, and also because there were no rules under which [separate] property could be acquired. No action based on the liability of the Kingdom as a whole for tort or wrongful acts alleged to have been committed by it could therefore have been brought. This does not, however, imply that the present action must be declared inadmissible on that ground, since the defendant was summoned in the present proceedings as ' the State of the Netherlands ', which, in accordance with settled judicial practice, is equivalent to ' the Realm in Europe '. In fact, Poldermans contended in the alternative that the Realm in Europe was liable for the wrongful act alleged by him, on the grounds that the Government of the Realm in Europe in the years 1942–1945 was also an organ of the Kingdom as a whole and that the legal relationship between the Realm in Europe and the former Netherlands Indies as parts of the Kingdom of the Netherlands did not bear the marks of a pure co-ordination, since the mother country, through the Netherlands Legislature and the Netherlands Government, in many respects exercised an important influence on the administration and government of that other part of the Kingdom [the former Netherlands Indies]."

On the merits, the Court said: " The former Netherlands Indies Government was indeed under a legal obligation to continue payment of the salaries of its officials during the period of their internment, but this did not involve any responsibility on the part of the State of the Netherlands. There is no substance in the plaintiff's proposition that the Government of the Kingdom, which at the same time was also the Government of the Realm in Europe, ought to have directed the Governor-General of the Netherlands Indies to ensure that the Netherlands Indies Government paid the salaries of its officials who had been interned."

On the plaintiff's contention that the Kingdom of the Netherlands had not fulfilled the obligation as guarantor which it retained as the former sovereign of the Netherlands Indies, the Court said: " The notion of sovereignty as an expression of the highest authority is not a useful criterion for the determination of the rights and obligations either of the composite entity, the Kingdom of the Netherlands, as a whole, in regard to its component territories, or of those component territories *inter se*. Those rights and obligations can only be ascertained from the relevant rules of positive law. The first paragraph of Article 1 of the Netherlands Indies Accountability Act provided that the Netherlands Indies were a legal entity; to this the second paragraph added that ' The property, assets and obligations of the Netherlands Indies are distinct from those of the Netherlands.' This provision puts beyond doubt the fact that in law the finances of the Netherlands Indies and the Netherlands were completely separate. This entailed in principle the obligation of the

Government of the Netherlands Indies to pay the salaries of its officials and left no scope for any obligation of the Kingdom as guarantor."

The Court further held that there was no obligation on the State or the Kingdom of the Netherlands to guarantee the plaintiff's salary after the transfer of sovereignty to the Republic of the United States of Indonesia in 1949. The Court said: "As a consequence of the transfer of sovereignty, the legal person known as ' Indonesia ', as it had existed previously under Netherlands rule, ceased to exist because that particular part of the Kingdom was thereby transformed into a new State which then took shape for the first time. There was no question, then, of a mere change of government or of form of government. It would be a fallacy to hold the point of view of the defendant that Indonesia, in its capacity of a legal entity under civil law, simply continued to exist in another form, [*viz.*] as the Republic of the United States of Indonesia. The question to what extent, by way of succession of States in this particular form, the rights and obligations of a formerly dependent territory pass to the new sovereign State under the general principles of the law of nations does not arise in the present case because the parties have regulated this matter by express agreement: under Article 4 of their Agreement on Transitional Measures,[1] both parties recognized that all the rights and obligations of Indonesia were transferred to and vested in the Republic of the United States of Indonesia. This must have applied to the debts in question." [Report: *N.J.*, 1956, No. 120.]

Poldermans appealed further.

Held (by the Supreme Court): that the appeal must be dismissed.

The Court said: " The appellant's argument that the State of the Netherlands must be held responsible, after the transfer of sovereignty, for the failure by the Netherlands Indies to apply Indonesian law regulating the legal relations between the then Government and its employees, has been rejected by the Court of Appeal by reference to Article 4 of the Netherlands-Indonesian

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[[1] The relevant paragraph 1 of Article 4 of the Agreement on Transitional Measures runs as follows:

" The Kingdom of the Netherlands and the Republic of the United States of Indonesia recognize and accept that all rights and obligations of Indonesia, under private and public law, are *ipso jure* transferred to the Republic of the United States of Indonesia, unless otherwise provided for in the special agreements included in the Union Statute."

Paragraph 2 contains an analogous provision as regards the responsibility of the Republic of the United States of Indonesia for the fulfilment of the obligations of the public bodies which previously had a legal status in Indonesia and which were now merged in that Republic or in its component parts, and establishes an Indonesian guarantee of the fulfilment of the obligations of public bodies which continued to exist as such.

According to Article 25 (D) of the Financial and Economic Agreement, " the Republic of the United States of Indonesia shall assume the following debts: D. All internal debts of Indonesia at the date of transfer of sovereignty."]

Agreement on Transitional Measures and Article 25 (introductory words) and paragraph D of the Financial and Economic Agreement. The appellant has argued that the Netherlands Indies Government which was in power prior to the transfer of sovereignty and which had created an illegal situation through its failure to pay its debts to the employees concerned, was no longer in existence; that it would run counter to the said transfer for the Republic of Indonesia to bear the responsibility for the illegal situation thus created; that it was impossible to assume that there was no Government at all left on which that responsibility rested, and that it must, in consequence, be borne by the State of the Netherlands. That argument has rightly been rejected by the Court of Appeal. The terms used, in particular in Article 4 of the Agreement on Transitional Measures, make it clear that it was intended to lay down, by the application of the accepted rules of international law, that the Republic—which succeeded to all the rights of the former Netherlands Indies—should also have to bear all its obligations. Since no specification of those obligations was given at the time, the provision must be construed as covering all debts which at the time of the transfer of sovereignty existed according to the Indonesian law then in force.

" The appellant has invoked rules of international law to support his contention that the debt under consideration could not be regarded as coming within the definition of Article 4 because it was a debt arising from tort—the kind of debt which, owing to its so-called ' odious ' character, cannot be held to come under that provision. Whatever the value of this theory, its invocation in the present action is not warranted. The question is whether there existed a rightful claim to payment, based upon a public law relationship. Even the fact that the former Indonesian Government contested its financial responsibility prior to the transfer of sovereignty cannot of itself be regarded as a tort which created an independent claim in addition to the claim based on a public law relationship. The debt, if it exists at all, has therefore, as the Court of Appeal decided, passed to the Indonesian Republic."

[Report: *N.J.*, 1959, No. 7 (with Notes by Boltjes).]

NOTE.—A few days before the judgment of the First Chamber of the Court of Appeal of The Hague reported above, judgment had been given by the Third Chamber of the same Court in a similar case (*Stichting tot Opeising Militaire Inkomsten van Krijgsgevangenen* (*Foundation for Claiming Military Income of Prisoners of War*) v. *State of the Netherlands*, decision of November 30, 1955: *N.J.*, 1956, No. 121). The question at issue in that case was whether the payment of the pay of a professional non-commissioned officer in the Royal Netherlands Indies Army should have been continued during the whole time that he was in Japanese captivity. In this case the Court of Appeal *held*, on grounds similar to those of the Court of Appeal in the *Poldermans* case, that the State of the Netherlands was not responsible for the debts of the Netherlands Indies.

The appellant in this action also attempted to base the liability of the Netherlands on particular "Acts of State" (the transfer of sovereignty), as a consequence of which the Netherlands Indies were lost as a part of the Kingdom of the Netherlands. The Court dismissed this argument on the ground that "the acts or course of conduct to which the appellant referred concerned the conduct of government, and specifically in the field of international relations—such conduct cannot be impugned before a civil court."

Subsequently, in *Froeling* v. *The State*, certain former members of the Royal Netherlands Indies Army (K.N.I.L.) put forward claims for pay while prisoners of war, on other grounds, *viz.*, the provisions of a special "Members of the K.N.I.L. Guarantee Act" of 1951 (*Staatsblad* No. 239), which safeguarded all the rights and claims of the persons concerned "under the Regulations in force on December 26, 1949", *i.e.*, the eve of the transfer of sovereignty. The District Court of The Hague found, on March 26, 1956, for the plaintiff, but its finding was reversed by the Court of Appeal on October 28, 1957. This decision was affirmed by the Supreme Court on March 28, 1958 (*N.J.*, 1958, No. 259). The Supreme Court regarded the Act as being intended to guarantee to this category of claimants any rights and claims which had accrued to them after the transfer of sovereignty for the period during which a service contract continued to exist between them and the State, but not those which related to the period during which they had been prisoners of war in Japanese hands.

See also *Van Os* v. *State of the Netherlands* (*N.J.*, 1954, No. 599; *International Law Reports*, 1954, p. 77).

V.—Respect for Private Rights

State Succession—Effect on Private Rights—Currency of Successor State—Transfer of Sovereignty from Former Netherlands Indies to Indonesia.

KILIAN *v.* HAGEMAN.

Holland, Supreme Court. January 14, 1955.

THE FACTS.—In July 1925, at Modjokerto (Java), Hageman borrowed from Kilian 4,000 Netherlands Indies guilders; in 1928 he paid back 2,500 guilders, and in 1950, after the transfer of sovereignty to the United States of Indonesia, he paid the balance, with interest, in Indonesian rupiahs which had in the meantime depreciated in value. Kilian now sued in respect of the loss he had thus sustained. He succeeded in the District Court, but the decision was reversed on appeal.[1]

On further appeal,

Held: that the appeal must fail. The debt could validly be paid off in the new Indonesian currency, which had replaced the former Netherlands Indies guilder.

[Report: *N.J.*, 1959, No. 109.]

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[1] *N.J.*, 1954, No. 139.

NOTE.—This was one of a number of cases which arose as a consequence of the transfer of sovereignty in December 1949 from the Netherlands to the United States of Indonesia, in which the Netherlands courts had to decide what effect, if any, the emergence of the Indonesian rupiah from the former Indonesian guilder as an independent currency and its rapid depreciation produced on existing financial obligations contracted in guilders before the transfer of sovereignty.

Cf. in the same sense *Van 't Hullenaar* v. *Eerste Nederlandse Verzekeringsmaatschappij op Leven en tegen Invaliditeit*, decided by the Supreme Court on January 18, 1957 (*N.J.*, 1959, No. 110). In that case the plaintiff, the beneficiary under a life assurance policy taken out some years previously in the Netherlands Indies, but containing an option for future payment in Holland, was *held* to be entitled to payment there in Netherlands guilders to the equivalent value of the depreciated rupiahs. *E contra*, in *Vermandel* v. *Amstleven*, decided by the Court of Appeal on December 19, 1957 (*N.J.*, 1958, No. 486), also a case of an Indonesian life assurance policy dating from 1936, the amount due was *held* to be payable only in Indonesia and in Indonesian rupiahs.

See also the somewhat contradictory judgments of the Supreme Court given on February 13, 1953 (*Heineman* v. *Senembah Company: N.J.*, 1953, No. 480; *International Law Reports*, 1953, p. 81) and February 19, 1954 (*Van Maren* v. *Eerste Nederlandse Verzekering Maatschappij*: *N.J.*, 1953, No. 480; *International Law Reports*, 1954, p. 63 and Note thereto citing *Boonekamp* v. *Vredenburgh*, decided by the District Court of Haarlem on May 29, 1951—*N.J.*, 1952, No. 300, and *Kuilman* v. *ten Haage*, decided by the District Court of Leeuwarden on June 26, 1952—*ibid.*, 1953, No. 503). *Cf.* also the earlier case of *Hausmann* v. *Koninklijke Rotterdamse Lloyd*, decided by the District Court of Rotterdam on May 16, 1952 (*N.J.*, 1953, No. 427; *International Law Reports*, 1952, Case No. 29).

State Succession—Respect for Private Rights—Annexation of Territory—Act of State—The Law of India.

RAJA RAJINDER CHAND *v.* MST. SUKHI AND OTHERS.

India, Supreme Court. October 23, 1956.

(Jagannadhadas, Venkatarama Ayyar, Sinha and S. K. Das JJ.)

THE FACTS.—These were six appeals by the plaintiff, Raja Rajinder Chand, landlord of Nádaun Jagir[1] in the District of Kangra. He brought six suits in the Court of the Subordinate Judge of Kangra for a declaration that he was the owner of all pine trees on the land of the defendants within the said Jagir. The defendants, who were the owners in possession of the land on which the trees stood, maintained that the trees were their property and that the plaintiff had no right to the trees. Raja Rajinder Chand claimed, *inter alia*, that the sovereign rights of the former independent Rulers of Kangra in respect of all royal trees within the Nadaun

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[1] See *International Law Reports*, 1955, p. 131, n. 2.

Jagir had descended to him. This claim was refuted by the defendants. The Subordinate Judge held that the plaintiff failed to prove his ownership of the trees. The plaintiff then appealed to a District Judge, who reversed the judgment of the Subordinate Judge. From this judgment appeals were brought by the defendants to the High Court of Punjab, which allowed them; and the plaintiff then appealed to the Supreme Court.

Held: that the appeal must be dismissed. The rights of the plaintiff's predecessor, the last independent Ruler of Kangra, had come to an end with the annexation of his territory by the Sikhs, who became rulers of Kangra and who granted him a Jagir without any sovereign rights. The Court considered the acquisition of the Kangra territory by the Sikh sovereign to be an Act of State, in consequence of which the inhabitants of the territory or their successors could claim in municipal courts established by the new sovereign only such rights as the latter had recognized. Rights enjoyed under the rule of predecessors could no longer be enforced. The Court recalled certain events from the history of the State of Kangra, whose last independent Ruler (Raja Sansar Chand) died in 1824. By 1827–8, Kangra had ceased to be an independent Principality and was to all intents and purposes annexed to the Sikh Kingdom. Raja Jodhbir Chand, an illegitimate son of the last Ruler and an ancestor of the plaintiff, received from the new sovereigns the grant of a Jagir.

The Court said: " Raja Sansar Chand had a right to all royal trees, including pine trees, within his territory; but it is clear to us that neither Raja Jodhbir Chand nor the present appellant succeeded to the rights of the independent Ruler of Kangra . . . The rights of the last independent (Katoch) ruler, under the system of land tenure which prevailed at the time, passed first to the Sikhs, who became the rulers of Kangra, and then to the British after the Sikh wars. The learned District Judge failed to appreciate the distinction between the sovereign rights of an independent Ruler and the rights of the grantee under a grant made by the sovereign Ruler (Jagir)."

The Court quoted the following observation of Lord Dunedin in *Vajesingji Joravarsingji* v. *Secretary of State* (A.I.R. 1924 P.C. 216 at 217):

> " When a territory is acquired by a sovereign State for the first time that is an Act of State. It matters not how the acquisition has been brought about. It may be by conquest, it may be by cession following on treaty, it may be by occupation of territory hitherto unoccupied by a recognised ruler. In all cases the result is the same. Any inhabitant of the territory can make good in the municipal courts established by the new sovereign only such rights as that sovereign has through his officers recognised. Such rights as he had under the rule of predecessors avail him nothing."

The Court then referred to the Sanad granted in 1848 by the British Government (East India Company), the successor to the Sikh Kingdom, to the predecessor of the plaintiff and asked " whether the aforesaid Sanad was a grant primarily of land revenue; or . . . made a grant of other royal rights including the right to all pine trees which is the particular right under consideration in the six suits brought by the appellant ". The Court replied to the question as follows: " The grant was primarily an assignment of land revenue, and whatever other rights might have been included, the right to all pine trees on cultivated lands of the subjects was not within the grant. We agree, therefore, with the High Court that on a true and proper construction of the Sanad it is impossible to spell out of its terms a grant in favour of Raja Jodhbir Chand of the right to all pine trees on cultivated and proprietary lands."

[Report: A.I.R. 1957 S.C. 286.]

IX.—Continuity of the Law. Judgments of Courts. Pending Actions

State Succession—Judgments of Courts—Bankruptcy Pronounced in Netherlands—Change of Domicile to Indonesia—Legal Effects There.

VAN HEYNSBERGEN *v.* NEDERLANDSCHE HANDELSMAATSCHAPPIJ.

Holland, District Court of Amsterdam. February 26, 1957.

THE FACTS.—On May 27, 1948, B. was declared bankrupt by the District Court of Amsterdam and the plaintiff was appointed trustee. Towards the end of 1948 B. went to the then Netherlands Indies, where he took up residence. In December 1948, he opened an account with the branch office of the respondent Bank at Semarang (Java). The trustee brought an action against the Bank's Head Office in Amsterdam and claimed that as the whole of B.'s property was subject to the bankruptcy, the Bank should pay her not only the balance standing to the credit of B. at the Semarang Branch but also all amounts which that Branch had paid to B. or to third parties on the order of B. The respondent pleaded that bankruptcy has territorial effect only and that the Indonesian authorities and courts did not recognize the enforceability or legal force of judgments such as a bankruptcy order pronounced by a Netherlands court before the transfer of sovereignty.

Held: that the claim must succeed. The bankruptcy ordered by the Netherlands Court retained its force despite the transfer of sovereignty.

The Court said: " On the basis of the general principle of law that a change in the international legal status of a territory shall not, or shall as little as possible, infringe upon the private law relations of its inhabitants, it must be accepted that the judgment ordering the bankruptcy of B. preserved its 'non-foreign' character, and thus retained the enforceability which it possessed, by virtue of Article 159 of the Constitutional Act of the Netherlands Indies, and therefore after the transfer of sovereignty on December 27, 1949. There is no evidence that, even if Article 159 has by now become obsolete as a result of the transfer of sovereignty, that obsolescence has a retroactive . . . effect."

[Report: *N.J.*, 1957, No. 553.]

State Succession—Continuity of Law—Private Law—Territories Detached from Germany after Second World War—Position between Moment of Occupation by Poland and Formal Introduction of Polish Law.

L. AND J.J. *v.* POLISH STATE RAILWAYS.

Poland, Supreme Court. June 11, 1948.

THE FACTS.—The agreement on the Western frontier of Poland reached by the Heads of Governments of Great Britain, the Soviet Union and the United States of America, and embodied in the Report of the Potsdam Conference of August 2, 1945, placed under the "administration" of Poland the territory of the former Free City of Danzig and certain former German territories. These territories, situated east of the Oder and Neisse rivers, have since been referred to in Polish legislation as "the Recovered Territories". The government of these territories was regulated by the Polish Decree of November 13, 1945. Article 4 of the Decree dealt with the problem of the law in force in the Territories and provided that the whole body of law binding in the circuit of the District Court in Poznań should take effect in the Recovered Territories. The Decree entered into force on the day of its publication, November 27, 1945. From that time on there could be no doubt in Polish law as to the law to be applied in the Recovered Territories. However, the Decree left open the question as to what was the law binding in the Territories in the period between their occupation by Poland and the entry into force of the Decree on November 27, 1945.

The judgment of a special bench of seven Judges of the Supreme Court in the present case was delivered in reply to a general question of law submitted by the division of the Supreme Court to which the case came on appeal from the Polish courts in the Recovered Territories. The particular facts giving rise to the case do not appear in the judgment of the Supreme Court. The question submitted to the Court was in the following terms:

> "What were the provisions of civil law binding in the Recovered Territories, and particularly in the circuit of the

Court of Appeal in Wrocław,[1] after the taking over of these Territories by the Polish State but before the entry into effect of the Decree of November 13, 1945? "

Held: that " legal consequences of events which took place in the Recovered Territories after the taking thereof by the Polish State and before the entry into force of the Decree of November 13, 1945, should be determined upon the basis of the provisions of civil legislation referred to in Article 4 of the said Decree."

The Court said: " I. Article 4 of the Decree of November 13, 1945, on the government of the Recovered Territories[2] provides that ' in the Recovered Territories there shall take effect legislation binding in the circuit of the District Court in Poznań.' This Article does not, however, decide the question what provisions should be applied in judging legal relationships existing in these territories in the period from the fall of the German State and the taking over of these Territories by the Polish State to the entry into force of the said Decree.

" After surrender the German State lost its sovereignty, while the Recovered Territories were submitted to the sovereign possession and authority of the Polish State on the basis of the agreement concluded among the victorious Powers, and the whole German population of the said Territories was subject to transfer in so far as this population had not already, of its own accord, abandoned the Territories in question.

" In exercising its rights the Polish State introduced without delay in the Recovered Territories its own public administration and its own administration of justice, and very rapidly re-settled the said Territories, leaving on the spot only the indigenous population of Polish origin. The German population, to the extent that it continued to remain in that territory, has been abandoning it *en masse*. For all practical purposes this population no longer plays the role of a subject of law as it has lost any organizational bonds whatsoever.

" From the moment that the civil administration was taken over and organs of administration were set up on the spot, the Recovered Territories became united with the rest of the territory of the Polish State on a basis of complete equality. Since that time, all provisions of law issued for all the Polish State have also had binding force in the Recovered Territories, whilst all provisions contrary to the legal order recognized by the Polish State ceased to be binding.

" The above principle follows from the very notion of State sovereignty. In the case of the private law aspects of the legal order, this principle is even more understandable, since the provisions of law are issued solely for, and are binding in, an organized social

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[[1] A Silesian city in one of the Territories involved.]

[2] *Dziennik Ustaw Rzeczypospolitej Polskiej*, No. 51, item 295.

group. Such provisions cannot have an existence separate from the group as if they were somehow ' bound ' to the territory which has been abandoned by the social group formerly residing therein or where the group previously inhabiting it was subject to an obvious and evident process of dissolution.

" German law was in force in the Recovered Territories until they were put under the authority of the Polish State. The express provision of Article 3 of the Decree of March 30, 1945,[1] on the establishment of the Danzig *voivodship*[2] recognized that law to be incompatible with the legal order existing in the Polish State. That provision reads as follows:

> " ' All provisions of the legislation heretofore in force, in view of their being contrary to the system of government of the Polish democratic State [*i.e.*, the German legislation binding in Danzig], shall cease to have effect on the day on which the present Decree enters into force ' (*i.e.*, on April 7, 1945).

" Thus the Polish State in a most categorical way declared all German legislation to be incompatible with the legal order which it (the Polish State) regarded as absolutely binding. It is hardly possible to think that the very State which declined in so definite a manner to recognize the German legislation in one territory (' all provisions . . . in view of their being contrary . . .'), could continue to tolerate the same provisions in another territory over which it also extended, though somewhat later, its sovereign authority.

" In the light of the provision declaring all German legislation to be contrary to the legal order existing in Poland, there also becomes clear the conception behind the above-mentioned Decree of November 13, 1945, on the government of the Recovered Territories, in which there are no provisions invalidating German legislation in the Recovered Territories. Since the same legislator already recognized in such a definite and express manner that German law was contrary to the Polish legal order, it would have been superfluous to invalidate it again in the said Decree because at the moment that the latter was issued the law in question had already ceased to be in force in the territories over which the sovereignty of the Polish State had been extended.

" II. The same conclusion, namely, that it is imperative to reject the possibility of applying German law in the Recovered Territories from the moment that the sovereignty of the Polish State had been extended thereto, follows equally when one considers the rules of the social interpretation of law—an interpretation already expounded by scholars in pre-war times. One of the fundamental rules of such interpretation, of which Professor Gény (*On the Interpretation of Law*) was, among others, a partisan in the

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[1] *Dziennik Ustaw Rzeczypospolitej Polskiej*, No. 11, item 57.

[[2] This *voivodship* included a part of pre-war Polish territory as well as the former Free City of Danzig.]

French science of law, consists of taking into consideration 'group consciousness'. This rule, which must be taken into account in view of the uniform Polish legislation, may also be applied in connection with Article 3 of the General Principles of Civil Law of November 12, 1946,[1] ordering the Judge, if need be, 'to be guided by the group interest'.

"Now the group consciousness of the Polish nation objects, in a most decided manner, to applying German law to Poles and legal relations between Poles. German law was the very law which, during the whole war period, constituted in the hands of the Occupant one of the most effective and unscrupulous tools used for the purpose of exterminating the Polish nation. How vital and strong this consciousness is can best be judged from the fact that, before the entry into force of the Decree in question, there were no cases where any Polish organ or court acting in the Recovered Territories applied German law with respect to Poles, or where Poles agreed to the application of such law in their reciprocal relations. Moreover, the Penal Chamber of the Supreme Court pronounced itself several times on the subject (decision of March 26, 1946, N. 73/46: *Zbiór urzędowy*, No. I & II, item 51, p. 105[2]) when it stated that Polish citizens in the Recovered Territories were subject to Polish law, regardless of whether it had been formally introduced therein.

"III. After having adopted the thesis that in the Recovered Territories one has to apply Polish law in judging legal relationships and acts which occurred before the entry into force of the Decree of November 13, 1945, one must consider the question, which of the systems of law then binding in Poland should be applied. At that time Polish legislation had not yet been made wholly uniform. In particular, there was a lack of uniformity in such important branches of the civil law as the law of real property, the law of succession, and family law. Although in many specific cases doubts can be removed by reference to the provisions of the Law of 1926 relating to internal conflicts of law, one cannot, however, deny that several doubtful points remain and that difficulties could arise in the course of resolving them. In resolving these difficulties the Polish courts must take into account the above-mentioned Article 3 of the General Principles of Civil Law, on the necessity of being guided by the social interest in deciding cases where neither statutory law nor customary law supply a sufficient basis for finding a solution. The Polish courts must consider, within the limits dictated by the said interest, what was the aim of the Decree of November 13, 1945 (teleological interpretation).

"This aim consisted above all in setting in order the legal situation obtaining in the Recovered Territories and in introducing therein such provisions of law as would correspond to the Polish legal system and as would also approach, so far as possible, the law hitherto binding in the Territories. Thus, on the one hand, the legislator wished to meet the needs of the incoming Polish population which, before the arrival of the great wave of Polish displaced persons from the Eastern borderland, consisted chiefly of Poles coming from the adjoining Western areas (*i.e.*, the Provinces of Poznań, Silesia and Pomerania). On the other hand, the legislator also took into account the interests, legal consciousness and habits of a quite numerous group of indigenous residents of Polish origin who remained in the Recovered Territories and who intended to stay there, after declaring their Polish nationality, as members of the Polish community.

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[1] [*Dziennik Ustaw Rzeczypospolitej Polskiej*, No. 67, item 369.]

[2] [For the relevant passage from that decision see the Note to this report, *infra*.]

" The law which, among all the legal systems then in force in Poland, was best suited for the above purposes was that binding in the Western part of the country. This was so because at that time this law still included a considerable part of the old (pre-Nazi) German law, in particular the law of real property, the law of succession, and family law, all of them constituting—together with the law of contract—the basis of the juridical life of the community. The Polish courts must take into account the aim of the abovementioned Decree, which concerns equally the period preceding the entry into force of the Decree as well as the period subsequent to it. Therefore, by applying the teleological method of interpretation one must arrive at the conclusion that in judging legal acts and occurrences which took place before the entry into force of the Decree of November 13, 1945, one should apply the same provisions of law as those which were introduced by virtue of that Decree.

" Thus both the aim of the enactment by the legislator of the Decree of November 13, 1945, and social interest (especially that of the Polish indigenous population and of a considerable number of Poles from the old territories who came to reside in the Recovered Territories) show with logical necessity that the most appropriate solution of the problem lies in applying the provisions binding in the Recovered Territories by virtue of Article 4 of the said Decree also to legal acts, occurrences and relationships which took place before the Decree entered into force. In view of this, the question submitted to the decision of the bench of seven Judges had to be decided as above."

[Report: *Państwo i Prawo*, 3 (1948), No. 9–10, p. 144 (in Polish).]

NOTE.—I. In its decision of March 26, 1946, cited in the above case, the Supreme Court said, in part: " By virtue of the publicly promulgated declaration of the will of the Polish nation, that nation acting through its lawfully existing Government, the *Land* of Mazury[1] has been incorporated *de facto* into the Polish State on equal terms with other areas liberated from the rule of the German Reich. This incorporation has for the citizens of the Polish State the legal effect . . . that in these areas also they are subject to the laws which are in force in the Polish Republic, and especially the penal laws, regardless of whether the binding force of such laws has been formally extended to the incorporated territories. " [Report: *Zbiór orzeczeń Sądu Najwyższego. Orzeczenia Izby Karnej*, 1945–1946, No. I & II, p. 105, at p. 106 (in Polish).]

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[1] Part of the former German Province of East Prussia.]

II. The above decision in *L. and J.J.* v. *Polish State Railways* now renders obsolete the decision of the same Court in *Ryszard N.* v. *City of Wrocław* given on September 5, 1946 (*Państwo i Prawo*, 2 (1947), No. 2, p. 123). In that case, the Supreme Court dealt with an employee–employer relationship in the Recovered Territories under Polish rule. The contract between the parties had been dissolved on July 14, 1945, *i.e.*, before the formal introduction of Polish law by virtue of the Decree of November 13, 1945. Thus the Court had to decide what law ought to be applied in order to adjudicate on the relationship involved.

The Court said, in part: " This recovered land had already been within the power of the Polish administration, but the regulation therein, by Polish law, of private law relationships took place only by virtue of the Decree of November 13, 1945, which entered into force on the day of its publication, *viz.*, November 27, 1945 (Article 10). The Decree does not contain any provision which would regulate private law relationships which existed between the day on which the Polish administration took over the city of Wrocław and the day on which the Decree entered into force. The question arises whether the principle of Roman Law *lex retro non agit* could and should be applied to the full extent when deciding a case which arises under a legal relationship that came into existence in that period.

" Private law relationships which have been created in the course of everyday life before the Decree of November 13, 1945, entered into force must, in case of conflict, be subject to such provisions of the law as, at the moment of the taking over of the administration in this area by the Polish civil authorities, could correspond to the legal order that was brought into existence by the taking over of the said territories by the Polish State. Provisions that were binding under the rule of the German war legislation might have been contrary to that legal order."

It should be noted that in this case the Supreme Court did not state that the whole body of German law was inconsistent with the Polish legal order. Thus, under the decision, the way remained open, at least at theory, for applying in the Recovered Territories some of the provisions of German law when deciding on cases to which the law prior to November 27, 1945, was applicable. This possibility is now excluded by the judgment reported above.

State Succession—Cession of Territory—Effect on Continuance of Laws and on Jurisdiction of Courts—The Law of India.

STATE OF MADHYA BHARAT *v.* MOHANLAL MOTILAL.

India, High Court of Madhya Bharat. October 23, 1956.

(Nevaskar and Samvatsar JJ.)

THE FACTS.—The accused, Mohanlal Motilal, a former Railway employee, was tried by a Special Judge for offences under the Prevention of Corruption Act, 1947, and Section 420 of the Indian Penal Code. These offences were alleged to have been committed at the railway station at Mandsaur during the period between November 1947 and May 1948. The accused objected to the jurisdiction of the Court on the following ground: " Railway lands at Mandsaur were retroceded to the former Gwalior State on August 15, 1947. After this retrocession the British Indian Laws ceased to be enforced in that area and the Laws of the former Gwalior State became applicable. Therefore, neither the Prevention of Corruption Act, 1947, nor the Indian Penal Code were applicable or were in force in that area. Accordingly, the Court, whose jurisdiction was confined to the trial of cases under the Prevention of Corruption Act and the Indian Penal Code, could not try the case, even assuming that on the facts on record any other offence under the penal law of Gwalior is said to have been committed." The Special Judge considered the question of " the continuance of the penal laws in question during the material period in the railway lands at Mandsaur ", which alone would give him jurisdiction to try the case. He held, upholding the contention of the defence, that these penal laws were not in force at Mandsaur at the relevant time. He therefore dismissed the charge.

The State of Madhya Bharat appealed to the High Court. The Government Advocate relied on " the case reported in *Shiv Bahadur Singh* v. *The State of Vindhya Pradesh* (A.I.R. 1952 S.C. 394), which approved the principle laid down in . . . *Mayor of Lyons* v. *East India Co.* (1 Moo. Ind. App. 175), that when a new territory is acquired by conquest or cession and that territory had a custom of law in force, then that law continues to operate until it is changed by the new sovereign who acquired the territory. It was therefore urged that the Prevention of Corruption Act which was in force in the railway lands at Mandsaur prior to its retrocession continued as if the Ruler of the former Gwalior State, who was the sovereign during the material period, or any Legislature set up by him had not changed the same." The Government Advocate also maintained that the mere application of Gwalior law such as the Gwalior Penal Code could not have the effect of repealing the special law, *i.e.*, the Prevention of Corruption Act, 1947.

Held: that the appeal must be dismissed. The Ruler of Gwalior had extended all his laws to the retroceded territory in order to establish uniformity of law throughout his State. Thus the general presumption with regard to the continuance of laws in case of cession of territory in international law had been displaced by a positive legislative enactment. The Court referred to the following passage from *Mayor of Lyons* v. *East India Co.* (*supra*) relied on by the Government Advocate:

> " It is agreed, on all hands, that a foreign settlement obtained in an inhabited country, by conquest, or by cession from another Power, stands in a different relation to the present question, from a settlement made by colonizing, that is, by peopling an uninhabited country.
>
> " In the latter case, it is said, that the subjects of the Crown carry with them the laws of England, there being of course no *lex loci*. In the former case, it is allowed, that the law of the country continue until the Crown, or the legislature, change it." (At p. 270.)

The Court recalled that these observations of the Privy Council were approved by the Supreme Court of India (in [*Shiv Bahadur Singh* v. *The State of Vindhya Pradesh*] A.I.R. 1952 S.C. 394) which stated as follows:

> " In the normal course and in the absence of any attempts to introduce uniform legislation throughout the State, the pre-existing laws of various component States would continue to be in force on the well accepted principle laid down in 1 Moo. App. 175."

The Court drew the following conclusions from the above observations of the Privy Council and of the Supreme Court of India: " (1) The pre-existing state of law in the ceded territory would continue until the new sovereign or legislature changed it; and (2) where the new sovereign expresses his intention to introduce uniform legislation throughout the State, then that intention will prevail. . . . The will of the new sovereign to change the pre-existing law in a ceded territory will have the effect of repealing the said law and the principles applicable to the case of repeal will be applicable in such cases. While applying these principles culled from the aforesaid decision of the Supreme Court we must bear in mind certain broad principles bearing on the question of repeal. [In this respect the Court referred, *inter alia*, to Maxwell's *Interpretation of Statutes* and observed that " repeal by implication is not favoured and that the Court will lean against implied repeal." However, in the present case there was no such repeal by implication, as the Ruler changed the law by Ordinance. The Court continued:] It appears from the entire scheme of the Ordinance that the Maharaja Scindia, with perfect comprehension of his power, authority and jurisdiction, was anxious to bring about legislative homogeneity between his pre-existing territories and the newly acquired territories. With that idea he extended all his laws to the new territory . . . and the general presumption with regard to the continuance of laws of ceded territory until altered, is displaced in this case by the terms of the Ordinance. There is no doubt no specific section expressly repealing all the pre-existing British Indian laws, but if one were to assume that the two systems of law were intended to operate side by side and the applicability of each were to be decided on consideration of repugnancy, it would mean that the Ordinance had brought about the very state of things which it sought to avoid . . . In this view of the matter the general principles with regard to repeal by implication cannot be called in aid to support the validity of the Prevention of Corruption Act, 1947, in the railway lands at Mandsaur during the material period."

[Report: A.I.R. 1957 Madhya Bharat 58.]

G—MISCELLANEOUS

The Holy See—Roman Catholic Church in Argentina—Whether a Foreign State.

SCALISE *ET AL. v.* BISHOP OF MERCEDES.

Argentina, Supreme Court. November 30, 1956.

THE FACTS.—The Bishop of the Diocese of Mercedes, Province of Buenos Aires, was sued by Emilia I. Scalise and another for recovery of wages. It was argued on behalf of the plaintiffs that the Roman Catholic Church was the actual defendant, and that as a temporal State it was liable to suit before the Supreme Court in its original jurisdiction. The case was brought to the Supreme Court on extraordinary appeal.

Held: that the judgment under appeal must be affirmed.

The Supreme Court said: " This action for the recovery of wages has not been brought against the Roman Catholic and Apostolic Church but rather, as was held in the judgment under appeal, against the Diocese of Mercedes, Province of Buenos Aires, as represented by its Bishop, who is one of the juridical persons to whom reference is made in Articles 33, 2345 of the Civil Code and in the note to Article 41 thereof. Consequently, the question before this Court as to whether the Church is to be considered a foreign State within the context of Article 34 of the Civil Code is irrelevant. Moreover, the plaintiff's effort to bring this action within the original jurisdiction of the Supreme Court must fail in view of the provisions of Articles 100 and 101 of the Constitution,[1] of Article 2, clause 1, of Law 48,[2] as well as the jurisprudence of this Court (*Fallos de la Corte Suprema*, vol. 123, p. 58; *ibid.*, vol. 141, p. 127)."

[Report: *Fallos de la Corte Suprema*, vol. 236, p. 341.]

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[1] *Anales de Legislación Argentina*, 1852–1880, p. 79.

[2] *Ibid.*, p. 364.

Holy See—Concordat with Germany—Alleged Violation of Provisions of Concordat by One of German *Länder*—Whether German Federal Republic Can Compel *Land* to Comply with Terms of Concordat—The Constitutional Law of Germany.

See p. 592 (*Concordat (Germany) Case*).

Holy See—Status of—Action by Employees of Hospital Owned by Holy See and Situate Outside Vatican—Claim by Hospital Administration to Immunity from Jurisdiction of Italian Courts—Lateran Treaty of February 11, 1929—The Law of Italy.

See p. 215 (*Baronci* v. *Ospedale del Bambino Gesù*).

Holy See—Lateran Treaty of 1929 between Holy See and Italy—Immunity of Certain Church Property in Italy—Status of Basilica of St. Paul—Whether under Sovereignty of Holy See or Italy.

See p. 214 (*Padri Benedettini della Basilica di S. Paolo* v. *Nunzi*).

PART III

STATE TERRITORY

A—IN GENERAL

II.—Acquisition of Territorial Sovereignty

iii.—Cession. Plebiscite

State Territory—Acquisition of Territorial Sovereignty—Cession —Nature of.

See p. 602 (*Franco-Ethiopian Railway Company Claim*), at p. 616

v.—Conquest and Annexation

State Territory—Annexation—Refusal to Recognize Effects of Unlawful Annexation—Free City of Danzig—Annexation by Germany—Questions of Acquisition and Loss of Nationality.

See p. 434 (*In re Wetzel*).

State Territory—In General—Acquisition of Territorial Sovereignty—Annexation—Territories Detached from Germany—Effect of Potsdam Agreement of August 2, 1945—Effect on Municipal Law in Force—Replacement of German Law.

See p. 77 (*L. and J. J.* v. *Polish State Railways*).

Annexation of Territory—Act of State—State Succession—The Law of India.

See p. 74 (*Raja Rajinder Chand* v. *Mst. Sukhi and Others*).

III.—Loss of Territorial Sovereignty

State Territory—Loss of Territorial Sovereignty—Continuation of *status quo* on Failure to Reach Agreement as to New Political Status of Territory—Status of Western New Guinea.

ETNA BAY CASE.

Netherlands New Guinea, Court of Justice. March, 21, 1956.

THE FACTS.—In October 1954 a party of Indonesians equipped with arms and munitions landed on the coast of Etna Bay in Netherlands (Western) New Guinea with the intention of bringing a part of that territory under the control of Indonesia. The whole party was arrested and prosecuted. In their defence they pleaded that they were entitled to consider Netherlands New Guinea as being part of the territory of the Republic of Indonesia.

Held: that the defence must fail and the accused must be convicted.

The Court said: "Agreement on Article 2[1] of the Charter concerning the Transfer of Sovereignty to Indonesia was reached at the Round Table Conference of 1949. That Article must be read in conjunction with the Exchange of Notes of November 2, 1949,[2] between the Chairman of the Netherlands Delegation and the Chairmen of the Indonesian Delegations. Under Article 2 of the Charter, in conjunction with the Exchange of Notes, the *status quo* of the Residency of New Guinea was maintained. In 1949 this Residency was geographically part of the territory of Indonesia (the Netherlands Indies), and by virtue of Article 1 of the Constitution of the Kingdom part of the territory of the Netherlands State. The purpose of the provision that within a year from the date of transfer of sovereignty the question of the political status of New Guinea should be determined through negotiations between the Republic of the United States of Indonesia and the Kingdom of the Netherlands, was to indicate that the Government of the Netherlands would continue to exercise power over New Guinea. The negotiations having failed to lead to an agreement, the *status quo* of New Guinea has remained the same as before. The continuation of the exercise of power over New Guinea by the Government of the Kingdom of the Netherlands has been regulated by Netherlands legislation."

[Report: *N.J.*, 1956, No. 512, with a Note by Röling.]

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[1] The text of Article 2 of the Charter reads as follows:

" With regard to the Residency of New Guinea it is decided:

" (*a*) in view of the fact that it has not yet been possible to reconcile the views of the parties in New Guinea, which remain, therefore, in dispute;

" (*b*) in view of the desirability of the Round Table Conference concluding successfully on November 2, 1949;

" (*c*) in view of the importance of the factors which should be taken into account in settling the question of New Guinea;

" (*d*) in view of the limited research that has been undertaken and completed with respect to the problems involved in the question of New Guinea;

" (*e*) in view of the heavy tasks with which the Union partners will initially be confronted; and

" (*f*) in view of the dedication of the parties to the principle of resolving by peaceful and reasonable means any differences that may hereafter exist or arise between them;

that the *status quo* of the Residency of New Guinea shall be maintained with the stipulation that within a year from the date of transfer of sovereignty to the Republic of the United States of Indonesia the question of the political status of New Guinea be determined through negotiations between the Republic of the United States of Indonesia and the Kingdom of the Netherlands."]

[2] The Notes exchanged on this date are worded (in part) as follows:

" The clause in Article 2 of the Draft Charter of Transfer of Sovereignty reading: the ' *status quo* of the Residency of New Guinea shall be maintained ', means ' by continuing under the Government of the Netherlands '.

NOTE.—For an earlier decision of the same Court in a case arising out of a raid by a party of Indonesians on territory of Netherlands New Guinea see *In re B.P.Z.S. and Others* (*N.J.*, 1955, No. 256; *International Law Reports*, 1955, p. 208).

IV.—Effects of Changes of Sovereignty

[*See also* PART II, STATES AS INTERNATIONAL PERSONS: E, State Succession.]

State Territory—Effects of Changes of Sovereignty—Cession—Effect on Debts Owing to Persons in Ceded and Ceding Territories Respectively.

See p. 602 (*Franco-Ethiopian Railway Company Claim*), at p. 628.

V.—Occupation of Foreign Territory in Time of Peace

State Territory—Occupation of Foreign Territory in Time of Peace—The Ryukyu Islands—Occupation Under Peace Treaty with Japan—Residual Sovereignty of Japan—Whether Okinawa a Possession of United States or a " Foreign Country "—The Law of the United States of America.

BURNA *v.* UNITED STATES.

United States, District Court, Eastern District, Virginia.
July 13, 1956.

Court of Appeals, Fourth Circuit. January 7, 1957.

THE FACTS.—This was an action under the Federal Tort Claims Act (28 U.S.C. §§ 1346, 2671 *et seq.*), wherein the plaintiff alleged that she had been injured by a vehicle owned by the United States and operated by its agent on the Island of Okinawa in the Ryukyu Islands. The United States moved to dismiss under the provisions of 28 U.S.C. § 2680 (k), excluding the application of the Federal Tort Claims Act as to " any claim arising in a foreign country ".

Held (by the District Court): that the motion to dismiss must be granted. The fact that Japan retained " residual sovereignty " over the Ryukyu Islands under Article 3 of the Japanese Peace Treaty meant that Okinawa was a " foreign country " within the meaning of the Federal Tort Claims Act. [Report: 142 F. Supp. 623.]

On appeal,

Held (by the Court of Appeals): that the judgment of the District Court must be affirmed. While the Japanese Peace Treaty conferred on the United States certain authority over Okinawa, it did not make the island a part of the United States. Okinawa accordingly remained a foreign country in the sense in which that expression was used in the United States Federal Tort Claims Act.

The Court said: " By conquering Japan in World War II, the United States came into possession of Okinawa and the rest of the

Ryukyu archipelago. In Article 3 of the Treaty of September 8, 1951, which became effective on the following April 22, Japan agreed to concur in any proposal of the United States to the United Nations to place the Ryukyu Islands under its trusteeship system. It was further agreed that 'pending the making of such a proposal and affirmative action thereon, the United States will have the right to exercise any and all powers of administration, legislation and jurisdiction.'

"In his capacity of United States delegate to the Japanese Peace Conference, on September 5, 1951, Mr. John Foster Dulles declared:

> 'Several of the Allied Powers urged that the treaty should require Japan to renounce its sovereignty over these islands in favor of United States sovereignty. Others suggested that these islands should be completely restored to Japan.
>
> 'In the face of this division of Allied opinion, the United States felt that the best formula would be to permit Japan to retain residual sovereignty. . . .'

"The Record contains a memorandum, prepared by the Far Eastern Law Section of the Library of Congress in which it is set forth that:

> 'As of September, 1955, there is no arrangement made between the United States and the United Nations regarding the trusteeship of the Ryukyu Islands. Okinawa, therefore, is under the provisional administration of the United States Government.'

"Terms like 'provisional administration' and 'residual sovereignty', invested with *ad hoc* meanings, may serve usefully to express certain ideas in particular contexts, but they are, after all, not the precise limits Congress prescribed for the application of the F.T.C.A. Such terms of special coinage are interesting to examine, and sometimes they may shed light on an inquiry; but we must not be deluded into substituting them for entirely different statutory words which have clear meaning and were apparently used in a common, non-technical sense. We must conclude that while the Treaty conferred certain authority upon the United States over Okinawa, it by no means made the island a part of the United States, and it remains a foreign country in the sense of the F.T.C.A.

"The pertinent decisional literature is not extensive, but what there is fortifies us in our conclusions. While the appellant is doubtless correct in drawing certain distinctions between this case and others in which recovery was disallowed, and though it is true that some of the reasons given for denying recovery in those cases are inapplicable to the present situation, the cases taken as a whole, do furnish guidance here.

"In *United States* v. *Spelar*, 1949, 338 U.S. 217, 70 S.Ct. 10, 94 L.Ed. 3, it was held that the Act had not given consent to suits for torts occurring on an air base in Newfoundland territory occupied by the United States under a long-term lease. Appellant maintains that the reasons assigned by the Court, namely, that it was ' territory subject to the sovereignty of another nation ' and that ' liability would depend upon the laws of a foreign power,' are inapplicable here, because ratification of the Treaty has transferred broad powers and a measure of sovereignty to the United States, and Congress can now, by fiat, at any time nullify all Japanese laws on this Island.

" Even if we were to accept the appellant's premise that some of the reasons cited in *Spelar* are inapplicable here, this would not necessarily require us to conclude the converse in this case, that the F.T.C.A. does apply to Okinawa. Though the absence of any United States sovereignty was a sufficient answer in *Spelar*, the transfer temporarily of a measure of sovereignty here is not sufficient to dissolve Okinawa's status as a foreign country. The reasons assigned by the Supreme Court were pertinent and sufficient to dispose of the case then before it; they do not necessarily exhaust the concept that underlies the statute. The Court's reasons should be read as the bases, within the statute, for the decision in that case, and we do not think that they were meant to be treated as comprehensive and exclusive, or to establish a rigid formula for all cases. The fact that in the *Spelar* case the Treaty had not been concluded is no indication that when the Treaty was later concluded Okinawa ceased to be a foreign country.

" The Treaty cannot be considered as anything more than a transitional arrangement, and for our purpose it is not a conclusive test that under the Treaty attributes of sovereignty can be exercised for the time being by the United States. This may indeed be the arrangement effected in order to maintain public order until a final disposition of the islands shall have been made; it still does not provide the touchstone of our inquiry, which is whether or not Okinawa is a foreign country. That the United States could at any time set aside Japanese laws does not, as we see it, signify that Okinawa has lost its foreign character.[1]

" A half century ago, following the Spanish War, by treaty with Spain, the Philippine Islands were ceded to this country. This was nevertheless held not to have extended the right of trial by jury to residents of the Islands, because in the absence of Congressional action these Islands were ' deemed not to have been incorporated ' into the United States. *Dorr* v. *United States*, 195 U.S. 138, 24 S.Ct. 808, 49 L.Ed. 128. In that instance the United States was made absolute master of the territory by cession, and was not merely a caretaker for other nations, as in the present instance, pending creation of an international trusteeship. There is even less reason for thinking that Okinawa has been incorporated into the United States or that it has ceased to be foreign in the sense in which that word is used in the F.T.C.A.

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[1] Even after the United States was made the United Nations trustee for Saipan, that island was held nevertheless a foreign country in the sense of the F.T.C.A. *Brunell* v. *United States*, D.C.S.D.N.Y., 77 F.Supp. 68 [*Annual Digest* 1948, Case No. 168].

" In refusing to relinquish sovereign immunity from suit in foreign countries, the reasons suggested in *Spelar* may not be the only ones that influenced Congress. It is easy to think of other possible reasons, such as the absence of United States courts in such countries, with resulting problems of venue, and the difficulty of bringing defense witnesses from the scene of the alleged tort to places far removed; and there may have been a reluctance to extend the Act's benefits to foreign populations and to have issues of liability decided according to theories foreign to our system of law. The latter consideration was also alluded to in *Spelar*, 338 U.S. at page 221, 70 S.Ct. 10. Regardless of where such speculations might lead us, not they, but the Statute, must prescribe the rule.

" The case of *Cobb* v. *United States*, 9 Cir., 191 F.2d 604,[1] which, like *Spelar*, was decided before the Japanese Treaty, also uses arguments which, as appellant points out, may not be fully applicable since the adoption of the Treaty; but we find nothing in the opinion which supports the appellant's position, which, for her to prevail, must be that Okinawa is not now a foreign country. The fact that before the Treaty Okinawa was held to be foreign, does not compel an inference that the Treaty reversed its status. We agree with the observations in Judge Pope's concurring opinion in the *Cobb* case.

" We find persuasion in the language of Judge Yankwich, in *Hichino Uyeno* v. *Acheson*, D.C.W.D.Wash.N.D., 96 F. Supp. 510, 515. In interpreting a similar phrase, he said:

' . . . it is obvious that the words " foreign state " are not words of art. In using them, the Congress did not have in mind the fine distinctions as to sovereignty of occupied and unoccupied countries which authorities on international law may have formulated. They used the word in the sense of " otherness." When the Congress speaks of " foreign state," it means a country which is not the United States or its possessions or colony,—an alien country,—other than our own, bearing in mind that the average American, when he speaks of a " foreigner " means an alien, non-American . . . So here, the interpretation called for is that of common speech and not that derived from abstract speculation on sovereignty as affected by foreign military occupation.'

" The facts alleged present an appealing human problem, and if we were free to grant relief in such a case there would be every moral basis for doing so. However, the Supreme Court has repeatedly indicated ' that suit may not be maintained against the United States in any case not clearly within the terms of the statute by which it consents to be sued.' *United States* v. *Michel*, 282 U.S. 656, 659, 51 S.Ct. 284, 285, 75 L.Ed. 598; see also *Eastern Transportation Co.* v. *United States*, 272 U.S. 675, 686, 47 S.Ct. 289, 71 L.Ed. 472.

[[1] See *International Law Reports*, 1951, Case No. 173.]

This general principle is applicable to the Federal Tort Claims Act. The remedy lies with Congress, not the courts."

[Reports: 240 F.2d 720, 63 A.L.R. 2d 993.]

NOTE.—The above case is noted in *American Law Reports Annotated, Second Series*, 63 (1959), p. 997.

VII.—Sovereignty Over the Air

Air Law—Jurisdiction with Regard to Death on Aircraft Over High Seas—The Law of the United States of America.

See p. 267 (*Fernandez et Al.* v. *Linea Aeropostal Venezolana*).

i.—Air Navigation Conventions

Air Law — Warsaw Convention of 1929 on International Air Transport—Article 22 of Convention—Whether Consistent with Constitution of United States of America.

See p. 553 (*Pierre* v. *Eastern Air Lines, Inc*; *Pierre* v. *Foxworth*).

Air Law—Warsaw Convention of 1929 on International Carriage by Air—Whether Convention of Itself Creates Right of Action.

See p. 580 (*Noel et Al.* v. *Linea Aeropostal Venezolana*).

Air Law—Transit of Air Passengers—Customs Inspection of Passengers' Transhipment Luggage—Whether Permissible under Chicago Convention on International Civil Aviation of December 7, 1944.

See p. 54 (*Public Prosecutor and Customs Administration* v. *Schreiber and Air-France*).

B—PARTS OF STATE TERRITORY

I.—Boundaries

i.—Land Boundaries

Boundaries—Frontier Districts—Property Intersected by Frontier—Export Regulations—" Mixed Owners "—Servitude of Free Passage Over Connecting Dyke—Relation of Municipal Legislation to Treaty (Foreign Exchange Control)—Boundary Treaty of Maastricht, 1843, between Netherlands and Belgium.

PUBLIC PROSECUTOR *v.* DE M.

Holland, Court of Appeal of 's-Hertogenbosch. January 13, 1955.

THE FACTS.—For the earlier proceedings in this case see *International Law Reports*, 1954, p. 86. Briefly, the defendant, a Belgian national, owned a " treaty pasture " which was intersected by the

Netherlands-Belgian frontier. In 1954 he was prosecuted for taking to his land cattle bought in Holland, without the necessary export documents. His conviction by the Police Magistrate for Economic Affairs at Middelburg was quashed by the Court of Appeal of The Hague, but that judgment was reversed by the Supreme Court and the case was referred to the Court of Appeal of 's-Hertogenbosch for a new trial.

Held: that the defendant must be convicted of contravening Article 21 of the Foreign Exchange Control Decree, 1945.

The Court said: " It may be true that owners of treaty pastures derive their right to bring cattle already belonging to the farm on to the treaty meadow regularly and without hindrance across the boundary intersecting the treaty pasture, from Article 37 of the Treaty of Maastricht of August 8, 1843, but the purpose of this provision cannot be to allow new cattle bought in the Netherlands to be freely brought on to such a pasture. For the export from the area of free trading intercourse within this country could then no longer be checked, inasmuch as, once in the treaty pasture, cattle could freely pass the frontier. No circumstances have appeared which would entitle the accused, acting as he did, to be exempt from the provision of Article 21 of the Foreign Exchange Control Decree, 1945. Such an exemption would be irreconcilable with the clear meaning of the text of Article 38 of the Treaty of Maastricht."

[Report: *N.J.*, 1955, No. 427.]

NOTE.—I. Subsequently, the defendant was again prosecuted before the Economic Police Magistrate's Court of Middelburg (May 21, 1957: *Public Prosecutor* v. *De M.*) for a similar offence, the transport of cattle from one plot of Netherlands territory to another over a dyke which was itself Belgian territory. He invoked Article 30[1] of the Boundary Treaty of Maastricht of August 8, 1943 (*Staatsblad*, 1844, No. 12), which declares the said dyke to be free for passage between the two parts of Netherlands territory. On appeal to the Supreme Court, it was *held* on November 12, 1957 (*N.J.*, 1958, No. 36), that the Article in question was only intended to guarantee free passage over the dyke and to prohibit any interference with it by the Belgian authorities; it did not detract in any way from provisions of Netherlands law regarding import and export. Moreover, there was no question in this case of the two parts of Netherlands territory which were connected by the dyke belonging to the same private owner, so that, with respect to them, the defendant was not a so-called " mixed owner ".

II. See, in the same sense, *Public Prosecutor* v. *L.A.O.*, decided by the District Court of Middelburg on July 6, 1956 (*N.J.*, 1957, No. 193). The defendant was a Netherlands national who lived in a house on Netherlands territory and who owned a flour-mill on Belgian territory. Both buildings were situated along a dyke which was Belgian territory. The Netherlands-Belgian Boundary Treaty of August 8, 1943, refers in Article 30 to this dyke, which in 1843 was the only road between the eastern and western parts of Dutch Flanders. The effect of this Article was that Netherlands nationals retained the right of free passage along the dyke. On December 7, 1955, the defendant carried along this dyke to his mill twenty bags of wheat which he had purchased in the Netherlands, but without the export documents required under Article 21 of the Netherlands Foreign Exchange Control Decree, 1945. He was prosecuted for violation of this Decree. He pleaded that, as an owner of real estate within the meaning of the Netherlands-Belgian Boundary Treaty, he was not subject to the Foreign Exchange Control Decree, 1945.

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[1] Article 30 of the Treaty of Maastricht provides: " The Kingdom of the Netherlands retains free passage over the entire series of dykes [here follows a geographical description] which, taken together, bear the general name of " Vrijendijk "[Free Dyke]." This Article is itself a confirmation of an earlier provision, contained in Article 7 of the Boundary Treaty of The Hague of November 5, 1842 (*Staatsblad*, 1843, No. 3): see Martens, *Nouveau Recueil Général* (1st series), vol. III, pp. 613 *et seq.*

The Court *held* that the defendant was a " mixed owner " in the sense of the Treaty since he owned property under the jurisdiction of the Netherlands as well as of Belgium, but that that did not exempt him from the provisions of the Foreign Exchange Control Decree. Paragraph 3 of the Additional Article of the Treaty applied to him in his capacity of a " mixed owner ". However, while enumerating the rights of the " mixed owners ", the Article also limited those rights by providing that owners " are subject to the measures taken by the Governments concerned with a view to preventing smuggling ". The Court therefore rejected the defendant's contention that he was not subject to the Foreign Exchange Control Decree, which had been enacted with a view to preventing smuggling and accordingly fell within the category of measures to which " mixed-owners " were subject. The Treaty itself was the superior law which subjected the defendant to the provisions of the Decree.

State Territory—Boundaries—Land Boundary—Proof of Location of Land Frontier in Municipal Law.

ATTORNEY-GENERAL *v.* KIRK.

Republic of Ireland, Circuit Court, Eastern Circuit. May 7, 1956.

(Circuit Court Judge Deale.)

THE FACTS.—The accused had been arrested while driving pigs at a place alleged to be in proximity to the land frontier between the Republic of Ireland (Éire) and Northern Ireland and had been convicted of attempting to export the pigs contrary to the Customs (Temporary Provisions) Act, 1945. The land frontier between Northern Ireland and the Republic of Ireland had been fixed by the Government of Ireland Act, 1920 (10 & 11 Geo. 5, c. 67), Section 1 (2), which provided that Northern Ireland was to consist of the parliamentary counties of Antrim, Armagh, Down, Fermanagh, Londonderry and Tyrone. On appeal to the Circuit Court,

Held: that as the position of the land frontier had not been proved, the accused must be discharged.

In the course of his judgment Judge Deale said: " The appellant was found and arrested while driving pigs on land which is alleged by the prosecution to be in the immediate vicinity of the land frontier between Éire (Republic of Ireland) and Northern Ireland. It was proved that preventive officers of the customs service had lain in wait there and when the appellant approached a certain gateway, in a fence alleged to run along the land frontier, disclosed themselves, apprehended him and seized the pigs. It is submitted that if the appellant had not been intercepted in the manner described, he would have gone through the gateway with the pigs and thus gained access to the adjoining land. The prosecution allege that this adjoining land is part of the territory of Northern Ireland and that the land on which the interception took place is part of the territory of Éire.

" The appellant is charged with attempting to export the pigs contrary to S. I. (1) (b) of the Customs (Temporary Provisions) Act, 1945, with bringing the pigs to a place for the purpose of exportation, and with attempting to bring the pigs to such a place, all in contravention of S. I. (1) (b), (c) and (d) of the Customs (Temporary Provisions) Act, 1945, and the Agricultural Products (Restriction of Export) Order, S. 2. The prosecution submit that but for the interception referred to, the appellant would have gone through the gateway mentioned and this gateway was in such proximity to the frontier that the only reasonable conclusion from the facts is that the appellant was attempting to export the pigs. To support this submission it is, in my opinion, essential to prove that the frontier runs along the fence where the gate is and that the territory on the other side is that of Northern Ireland. If this proof is not forthcoming, the facts merely show that the appellant was driving the pigs on land the ownership and geographical location of which are not proved, and it is of course obvious, that if these are the facts, no conviction for the alleged offences could be upheld.

" I have, of course, judicial notice of the fact that County Louth is part of Éire, and I suppose I have judicial notice of the fact that County Armagh is part of Northern Ireland. I will, for the purpose of this judgment, assume the latter. The prosecution produce, as proof of the location of the frontier, an ordnance survey map of the area, 1909 edition, on which, amongst other symbols, appears an irregular line marked with the words ' county boundary '. Other markings show the alleged position of the fence, the place where the appellant was walking when intercepted, and so forth. These symbols and marks, other than the red line and the words ' county boundary ', were placed on the map by Mr. Gunne, a member of the Ordnance Survey staff, called by the prosecution, and he says he did this after inspection by him of the *locus in quo*, and that they correspond with the position of the fence, hedge, and fields. He said that the map was an accurate representation of the physical features he saw, but he was unable to say with certainty that the place which he was speaking of and the various fields, ditches, etc., were the same fields, etc., as those shown on the map—a perfectly understandable failure. The 'county boundary' red line is, of course, not the representation of a physical feature on the ground, though some fences, hedges and other physical features there today, run a course similar to that shown by the red line.

"The map is a public map and is therefore admissible in evidence. But, subject to the evidence of Mr. Gunne, it is only evidence of the state of affairs it represents as at the time it was made, or revised, namely, 1909. I could perhaps hold that the county boundary as it existed in 1909, is proved on the map. That would be very far from being evidence of what the land frontier is today and has been since 1922. In my opinion, neither the map nor Mr. Gunne's evidence proves the position of the land frontier.

"The prosecution also sought to prove the position of the frontier by asking the customs officers who apprehended the appellant, where Éire territory ended and Northern Ireland territory began, but as it was obvious that this was hearsay evidence I rejected it as inadmissible. I cannot take judicial notice of the previous extent or limits of the County Louth nor of the fact whether this place is or is not situated therein, and as proof of these matters is not forthcoming, it is clear that the position of the land frontier is not proved."

[Report: (1955–56) *Irish Jurist Reports* 57.]

II.—Rivers

iii.—International Rivers

(*b*) FUNCTIONS AND COMPETENCE OF INTERNATIONAL COMMISSIONS ON INTERNATIONAL RIVERS

International Rivers—Rhine Navigation Courts—Jurisdiction as Established by Revised Convention of Mannheim concerning Navigation on the Rhine, 1868—Jurisdiction as Covering Allegations of Negligence.

DEN BREEJEN *v.* LLOYD SCHLEPPSCHIFFAHRT A.G.

Holland, District Court of Rotterdam. January 2, 1957.

THE FACTS.—A Dutch motor-vessel, the *Dolfijn*, owned by Den Breejen, was on tow to the Swiss tug *Rudolf Miescher*, owned by Lloyd Schleppschiffahrt A. G. The *Dolfijn* twice ran aground on the Rhine between Strasbourg and Basle. On the second occasion, which occurred on the French part of the Rhine, the *Dolfijn* sprang a leak and sank. Den Breejen sued for damages. The defendant, Lloyd Schleppschiffahrt A. G., pleaded to the jurisdiction of the

Court on the ground that, in view of the terms of Articles 34 and 35 of the Revised Convention of Mannheim of 1868 concerning Navigation on the Rhine, the action could only be brought in the Rhine Navigation Court which had jurisdiction at the place where the accidents took place. In reply, Den Breejen contended that the basis of his action was the towing agreement between the parties and that, according to the settled practice of the Central Commission for Rhine Navigation, Article 34 of the Rhine Convention did not apply to such an action.

Held: that the action must fail; the Court had no jurisdiction.

The Court said: " The plaintiff's argument cannot be accepted. It is true that Den Breejen invoked a towing agreement, but he also based his claim on allegations of fact, namely, that the *Rudolf Miescher* had been carrying out the tow of the *Dolfijn* in a reckless and negligent manner. The Rhine Convention is an international agreement binding upon the Netherlands as well as upon Switzerland. The relevant part of Article 34 of the Convention reads:

> " The Rhine Navigation Courts have jurisdiction . . .
>
> " II. in civil matters, to adjudicate summarily on disputes concerning . . .
>
> " (c) damage caused by skippers during the voyage or while mooring their vessels . . ."

This Article clearly applies to the facts stated by the plaintiff. According to the settled practice of the Central Commission for Rhine Navigation, Article 34 of the Rhine Convention is applicable whenever the master of a tug by his acts or through negligence, contrary to his duties as a master, causes damage during the voyage or while mooring. According to that practice, it is irrelevant whether acts of poor or of negligent navigation may also be construed as failure to meet obligations imposed by a towing agreement alleged by one party to exist. This practice has been laid down in a long series of judgments of the Central Commission which have been published by the Secretary-General of the Commission, M. Henri Walther, in *La Jurisprudence de la Commission Centrale pour la navigation du Rhin* (Strasbourg, 1948), pp. 70 *et seq*. The Rotterdam District Court decided in the same sense in its judgment of December 17, 1952, in a case involving collisions between the *Dorina*, the *Vredeburg* and the *Margaretha I*.[1] Having regard to Articles 33, 34 and 35 of the Rhine Convention, this Court has no jurisdiction in the present case either *ratione materiae* or *ratione personae*."

[Report: *Netherlands International Law Review*, 1957, p. 311.]

NOTE.—The judgment of the District Court of Rotterdam in the above case was confirmed by the Court of Appeal of The Hague on

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[1] See *International Law Reports*, 1952, Cases No. 35 and 108, *sub nom. The Vredeburg* v. *The Sarina Dorina*.

November 5, 1958 (*N.J.*, 1959, No. 660) on the ground that the Rhine Navigation Courts have jurisdiction whenever an action is based on an error in navigation, irrespective of what relations might otherwise exist between the parties.

International Rivers—Rhine Navigation Courts—Court Fees in Cases Involving Collisions on German Section of Rhine and Adjudicated by Netherlands Courts—Unlawful Denunciation of Rhine Navigation Convention by Germany—Factual Effects of.

In re PETITION OF NEDERLANDSCHE RIJNVAART-VEREENIGING AND OTHERS.

Holland, District Court of Rotterdam. September 27, 1957.

THE FACTS.—The Registrar of the Rotterdam District Court rendered an account for court fees in four cases involving collisions at various points on the Rhine in Germany decided by that Court. The interested parties filed a petition for a ruling that no fees were due, relying on Article 39 of the Revised Convention of Mannheim of 1868 concerning Navigation on the Rhine (hereinafter called " the Rhine Convention "). That Article provided:

> " Proceedings in regard to the navigation of the Rhine shall not occasion either the use of stamped paper nor the appropriation of fees for judges or registrars. The parties shall not be charged with any other expenses than those of witnesses or experts and their citation of judicial notification of the franking of letters, etc., the whole according to the ordinary scale in regard to such proceedings."

Held: that the fees were due. The collisions had taken place outside Netherlands territory, so that the Rhine Convention, in particular Article 39 thereof, did not apply.

The Court said: " It is true that the denunciation of the Rhine Convention of 1868 by Germany in 1936[1] was unlawful and that, in consequence, that international agreement did not *de jure* cease to be binding as between the Netherlands and Germany. However, Germany did not limit herself to this unlawful denunciation, but also replaced the judicial organization set up under the Rhine Convention by one organized according to her own national views and having no connection whatsoever with the Convention. As a result of this action, the provisions of the Rhine Convention concerning Rhine Navigation Courts ceased *de facto* to apply in Netherlands-German relations. This situation continued until, after the Second World War, a German judicial organization was again set up on the basis of the Rhine Convention. During the period when the provisions of the Rhine Convention were *de facto* inoperative, the Netherlands courts undertook, by way of a practical solution, to adjudicate on cases concerning collisions on the Rhine in Germany, deriving their jurisdiction in this matter from Article 543 of the Netherlands Commercial Code. The present Court is a Rhine Navigation Court within the meaning of the Rhine Convention. However, that Convention confers upon the Rotterdam Court jurisdiction as such only in cases involving collisions which occur on the northern half of the River Lek, between Krimpen and Schoonhoven, and—if the parties agree thereto—on the other parts of the Rivers Lek, Waal and Rhine in so far as these are located within Netherlands territory. The present Court can never assume jurisdiction on the basis of Articles 33, 34 and 35 of the Rhine Convention to hear and determine Rhine navigation cases which arise on sections of the Rhine outside Netherlands territory. Whenever this Court, under the said Article 543, adjudicated on cases which, according to the Rhine Convention, were subject to the jurisdiction of the German Rhine Navigation Courts, it acted not in its capacity as a Rhine Navigation Court under the Convention, but exclusively as a Netherlands court.

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[1] In a Note dated November 14, 1936, the German Government declared that they no longer recognized as binding the provisions of the Treaty of Versailles dealing with German waterways and the international river conventions based thereon. The intention of the declaration was to set aside the Convention of Mannheim. See *The Maas* (*International Law Reports*, 1950, Case No. 31, at p. 124).

"In the cases now under consideration, proceedings started at a moment when German Rhine navigation jurisdiction in accordance with the Rhine Convention had not yet been re-established. The present Court dealt with these cases on the basis of Article 543 of the Commercial Code, and not as a Rhine Navigation Court under the Convention."

[Report: *N.J.*, 1958, No. 223.]

NOTE.—This case constitutes a further confirmation of the practice of the Rotterdam District Court concerning jurisdiction in Rhine navigation cases as laid down by that Court in its judgments of April 17, 1953, in *Swiss Corporation Tanutra* v. *Nederlandsche Rijnvaart-Vereeniging* (*Tijdschrift*, vol. I, p. 89; see *International Law Reports*, 1953, p. 164); April 9, 1954, in *Geervliet* v. *Belgian Corporation Scheepswerf de Durme* (*Tijdschrift*, vol. I, p. 430; see *International Law Reports*, 1954, p. 300); April 13, 1956, in *The Watergeus* v. *The Wilcor*, reported *infra*, p. 172; and *Den Breejen* v. *Lloyd Schleppschiffahrt A.G.*, reported *supra*, p. 97.

State Territory—Rivers—Functions and Competence of International River Commissions—As to Construction of Works on River—International Commission for the Pyrenees.

See p. 101 (*Lake Lanoux Arbitration*), at p. 137.

iv.—Utilization of the Flow of Non-National and International Rivers

State Territory—Parts of—Rivers—Utilization of Flow of—Adverse Affection of Rights and Interests of Neighbouring State—Interests Going Beyond Specific Legal Rights—Whether Prior Agreement Necessary for Exercising Rights under Treaty—State Whose Interests May be Affected as Sole Judge Thereof—Right to Information on Proposed Works—Necessity for Genuineness of Prior Negotiations—Obligation of Good Faith—Recognition of Legality of Enjoyment of Use of Water—Adverse Effect of Diversion for Works of Public Utility—Whether Payment of Compensation Sufficient—Sufficiency of Guaranteed Restitution of Water—Necessity for Reconciling Interests by Mutual Concessions—Respective Rights of Upstream and Downstream States with Regard to Schemes.

LAKE LANOUX ARBITRATION (FRANCE *v.* SPAIN).

Arbitral Tribunal.[1] *November* 16, 1957.

(Petrén, President; Bolla, De Luna, Reuter, De Visscher).

THE FACTS.—This arbitration concerned the use of the waters of Lake Lanoux, in the Pyrenees. Briefly, the French Government proposed to carry out certain works for the utilization of the waters of the lake and the Spanish Government feared that these works would adversely affect Spanish rights and interests, contrary to the Treaty of Bayonne of May 26, 1866, between France and Spain and the Additional Act of the same date. In any event, it was claimed that, under the Treaty, such works could not be undertaken without the previous agreement of both parties.

Lake Lanoux lies on the southern slopes of the Pyrenees, on French territory.[2] It is fed by streams which have their source in French territory and which run entirely through French territory only. Its waters emerge only by the Font-Vive stream, which forms one of the headwaters of the River Carol. That river, after flowing approximately 25 kilometres from Lake Lanoux through French territory, crosses the Spanish frontier at Puigcerda and continues to flow through Spain for about 6 kilometres before joining the river Sègre, which ultimately flows into the Ebro. Before entering Spanish territory, the waters of the Carol feed the Canal of Puigcerda which is the private property of that town.

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[1] Set up under a *Compromis* dated November 19, 1956, pursuant to an Arbitration Treaty of July 10, 1929, between France and Spain.

[2] According to the French Memorial, Lake Lanoux, one of the largest Pyrenean lakes, lies at an altitude of approximately 2,174 metres, is about three kilometres in length and 500 metres in width, and has a surface of 86 hectares. Its depth is at some points as great as 53 metres. The volume of water it collects naturally is about 17 million cubic metres. The planned construction of barrage of the height of 45 metres would turn Lake Lanoux into a reservoir capable of storing approximately 70 million cubic metres of water. The water would be channeled through a tunnel toward the Altantic watershed and directed to a power station where it would be run through a turbine after dropping straight from a height of 780 metres. This project would enable France to produce enough electricity, even during the peak hours, to serve a city of 326,000 inhabitants throughout the year. To return to the Carol River the waters diverted from it, the French project contemplates the construction of a tunnel, 5 kilometres in length, which would take water from the Ariège to the Carol at a rate of approximately 5 cubic metres per second and at a point higher than where the headworks of a canal which serves Spanish users are located. The headworks would lie in French territory. The planned diversion amounts to 25% of the entire flow of the Carol, the waters of which are used in Spain by 18,000 farmers. (Affaire du Lac Lanoux, Mémoire du Gouvernement de la République Française 3–13 [Paris, 1957].)

The Franco-Spanish frontier was fixed by three successive treaties signed at Bayonne on December 1, 1856, April 14, 1862, and May 26, 1866, respectively. The last of these treaties delimits the frontier from the Valley of Andorra to the Mediterranean Sea. The Treaty of Bayonne of 1866 contains, *inter alia*, the following provisions:

> "His Majesty the Emperor of the French, and Her Majesty the Queen of Spain, wishing to fix in a definitive manner the Frontier common to both States, as well as the Rights, Usages, and Privileges belonging to the Populations bordering the two States between the Department of the Pyrénées-Orientales and the Province of Girone from the Val d'Andorre to the Mediterranean, in order to complete from one sea to the other the work so happily begun, and followed out in the Treaties of Bayonne of the 2nd December, 1856, and 14th April, 1862, and at the same time and for ever to strengthen order and good relations between Frenchmen and Spaniards in that eastern part of the Pyrenees, in the same manner as on the remainder of the Frontier, from the Mouth of the Bidassoa to the Val d'Andorre, have considered it necessary to insert in a third and last Special Treaty, in continuation of the two above mentioned, the stipulations which they have considered it best to attain that object, and have appointed as their Plenipotentiaries to that effect . . ."[1]

The three Treaties of Bayonne were completed by an Additional Act of May 26, 1866, in which, *inter alia*, the following provisions appear:

> "The Undersigned, Plenipotentiaries of France and Spain for the International Delimitation of the Pyrenees, duly authorised by their respective Sovereigns, to unite under one Act the Regulations applicable over the whole Frontier in either Country, and relative to the preservation of the Boundary Marks, to Cattle and Pasturage, to Properties divided by the Frontier, and the enjoyment of the Waters common to both, Regulations which, on account of their general character, claim a special place, which they could not find in the Treaties of Bayonne of the 2nd December, 1856, and the 14th April, 1862, nor in that of this day's date, have agreed upon the following articles:— . . .[2]
>
> "*Control and Enjoyment of Waters of Common User between the Two Countries*"
>
> "*Article* 8: All standing and flowing waters, whether they are in the private or public domain, are subject to the sovereignty of the

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[1] Translation as in Hertslet, *The Map of Europe by Treaty* (1875), vol. III, p. 1647.
[2] *Ibid.*, p. 1649.

State in which they are located, and therefore to that State's legislation, except for the modifications agreed upon between the two Governments.

" Flowing waters change jurisdiction at the moment when they pass from one country to the other, and when the watercourses constitute a boundary, each State exercises its jurisdiction up to the middle of the flow.

"*Article* 9: For watercourses which flow from one Country to the other, or which constitute a boundary, each Government recognizes, subject to the exercise of a right of verification when appropriate, the legality of irrigations, of works and of enjoyment for domestic use currently existing in the other State, by virtue of concession, title or prescription, with the reservation that only that volume of water necessary to satisfy actual needs will be used, that abuses must be eliminated, and that this recognition will in no way injure the respective rights of the Governments to authorize works of public utility, on condition that proper compensation is paid.

"*Article* 10: If, after having satisfied the actual needs of users recognized on each side respectively as regular, there remains at low tide water available where the frontier is crossed, such water will be shared in advance between the two countries, in proportion to the areas of the irrigable lands belonging to the immediate respective riparian owners, *minus* land already irrigated.

"*Article* 11: When in one of the two States it is proposed to construct works or to grant new concessions which might change the course or the volume of a watercourse of which the lower or opposite part is being used by the riparian owners of the other country, prior notice will be given to the highest administrative authority of the Department or of the Province to which such riparian owners are subject by the corresponding authority in the jurisdiction where such schemes are proposed, so that, if they might threaten the rights of the riparian owners of the adjoining Sovereignty, a claim may be lodged in due time with the competent authorities, and thus the interests that may be involved on both sides will be safeguarded. If the work and concessions are to take place in a *Commune* contiguous to the border, the engineers of the other Country will have the option, upon proper notice given to them reasonably in advance, of agreeing to inspect the site with those in charge of it.

"*Article* 12: The downstream lands are obliged to receive from the higher lands of the neighbouring country the waters which flow naturally therefrom together with what they carry without the hand of man having contributed thereto. There may be constructed neither a dam, nor any obstacle capable of harming the upper riparian owners, to whom it is likewise forbidden to do anything which might increase the burdens attached to the servitude of the downstream lands.

"*Article* 13: When watercourses form the frontier, any riparian owner may, on obtaining any authorization necessary under the law of his Country, make on his bank plantations and construct works of repair and of defence, provided that they do not produce any alteration of the flow of water which would harm his neighbours and that they do not encroach on the bed, that is, the land covered by water at ordinary levels.

"As regards the river Raour, which forms the frontier between the territories of Bourg-Madame and Puigcerda, and which, owing to special circumstances, has not any well-defined boundaries, the demarcation of a zone where it shall be forbidden to make plantations or construct works will be proceeded with, taking as a basis what was agreed between the two Governments in 1750 and renewed in 1820, but with the right to introduce modifications, if it can be done without injury to the river system or to adjoining lands, so that, on the execution of the present Additional Act, as little damage as possible is caused to the riparian owners when clearing the bed, which is to be delimited, of the obstacles which they have placed there.

"*Article* 14: If, by falls of earth from the banks, by objects carried down or deposited, or from other natural causes, some deterioration or blockage in the flow of water should result, to the detriment of the riparian owners of the other Country, the individuals affected may apply to the competent jurisdiction for [an order] that repairs and clearance be carried out by whoever may be concerned.

"*Article* 15: When, apart from disputes within the exclusive jurisdiction of the ordinary courts, there shall arise between riparian owners of different nationality difficulties or subjects of complaint regarding the use of water, the persons concerned shall each apply to their respective authorities, so that [the latter] shall agree between themselves to resolve the dispute, if it is within their jurisdiction, and in case of lack of jurisdiction or failure to agree, as also in a case where the persons concerned will not accept the decision given, then recourse shall be had to the higher administrative authority of the Department and the Province.

"*Article* 16: The highest administrative authorities of the bordering Departments and Provinces will act in concert in the exercise of their right to make regulations for the general interest and to interpret or modify their regulations whenever the respective interests are at stake, and in case they cannot reach agreement, the dispute shall be submitted to the two Governments.

"*Article* 17: The Prefects and the Civil Governors on both sides of the frontier may, if they deem it expedient, establish in concert, with the approval of their Governments, elected syndicates formed equally of French and Spanish riparian owners, to supervise the carrying out of the regulations and to bring offenders before the competent courts.

"*Article* 18: An international Commission of engineers shall ascertain, where it deems useful, on the frontier of the Department of Pyrénées-Orientales with the Province of Girona, and at all points on the frontier where there may be occasion, the present use of water in the respective frontier and, if necessary, other, communes, whether for irrigation, for factories or for domestic use, so as to allocate in each case only the necessary quantity of water, and to remove abuses; it will determine, for each watercourse, at low water and where it crosses the frontier, the volume of water available and the area of irrigable land belonging to the nearby respective riparian owners

> which have not yet been irrigated; it will proceed to the operations concerning the Raour indicated in Article 13; it will propose measures and precautions requisite for ensuring on either side the due execution of the regulations and for avoiding, so far as possible, all strife among the respective riparian owners; finally, if mixed syndicates are established, it will examine what is to be the extent of their competence.
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> "*Article* 19: As soon as the present Act has been ratified, the Commission of Engineers mentioned in Article 18 may be nominated so that it may proceed immediately to its work, commencing with the Raour and the Vanera, where it is most urgent."

Three further additional Conventions were attached to the Treaties of Bayonne: the first was designed to ensure the execution of the Treaty of December 1, 1856, the second that of April 14, 1862, and the third, entitled " Final Act of the Delimitation of the International Frontier of the Pyrenees ", was to ensure the execution of the Treaty of May 26, 1866, and the Additional Act of the same date. In the Final Act were contained various regulations, drawn up under Article 18 of the Additional Act, concerning the use of certain waters. None of these regulations, however, concerns the Carol; nor does it appear that at any subsequent time the waters of that river were made the subject of any such regulations.

On the other hand, the question of the use of the waters of Lake Lanoux was, on several occasions after 1917, the subject of exchanges of view between the French and Spanish Governments. Thus, when in 1917 the French authorities had a scheme for diverting the waters of Lake Lanoux towards the Ariège and thence towards the Atlantic, the Spanish Government intimated to the French Government that such a scheme would affect Spanish interests and requested that the scheme would not be carried out without previous notice to the Spanish Government and agreement between the two Governments. One effect of this action was that on January 31, 1918, the French Ministry of Foreign Affairs informed the Spanish Ambassador in Paris that the French Minister of Public Works would take no decision concerning the deviation of the waters of Lake Lanoux towards the Ariège without previously notifying the Spanish authorities. In reply, the Spanish Government intimated, on March 13, 1918, that it regarded the scrupulous maintenance of the *status quo* as being guaranteed until such time as the French Government should think fit to adopt definitively a plan modifying the current state of affairs, when an amicable and equitable accord should be arrived at between the interested parties acting in conformity with the provisions concerted by the two States.

As schemes for diverting the waters of Lake Lanoux continued to be studied by the French authorities, the Spanish Government, in a communication dated January 15, 1920, to the French Ministry of Foreign Affairs recalled their desire to be consulted and requested that steps be taken to appoint an international commission which, in accordance with the provisions of existing treaties, would examine the question in the name of the two Governments and would reach accord on the works to be undertaken so as to safeguard both the French and the Spanish interests involved. As a result of this *démarche*, the French Ministry of Foreign Affairs on February 29, 1920, communicated to the Spanish Ambassador in Paris the fact that the French Government were entirely in agreement with the Spanish Government in considering that the question of the diversion of the waters of Lanoux could be definitively resolved only with the agreement of the Spanish Government. At the same time the Ministry indicated that the studies then being pursued were not yet completed so that the French Government was not yet able to lay definite proposals before the Spanish Government.

The following years saw a series of exchanges of view regarding the constitution of the International Commission and the task to be confided to it; the French Government wishing to restrict the commission's mandate to taking note of representations made by Spanish users and ascertaining whether they were well-founded,[1] while, in the opinion of the Spanish Government, the Commission should have the power to deal with all other questions concerning the scheme which the respective delegations might deem it necessary to examine. In the meantime, the French Government intimated on January 17, 1930, that new schemes for the utilization of the waters of Lake Lanoux had taken the place of those previously studied and that these new schemes not having been sufficiently examined by the technical services of the French administration, it was not possible to supply the Spanish Government with particulars concerning the new schemes as had been requested. The world situation subsequently stopped the negotiations concerning Lake Lanoux, which were not recommenced until 1949.

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[1] In an official note of May 1, 1922, of the Prime Minister and Minister of Foreign Affairs, M. Poincaré, France objected to the enlarged jurisdiction of a Mixed Commission, saying that it was " incompatible with her sovereign rights. Every State has in practice the right to carry out, on its territory, independently, such works as it pleases. In case of alterations of the regime of waters whose counterpart is being used by riparians of another State, it must only subordinate the execution to the safeguarding of the interests of these riparians. These principles are those of natural law. Article 11 of the Treaty of May 26, 1866 has added nothing. It has confined itself to indicating the procedure aimed at ensuring its enforcement in the relations between France and Spain." (*Affaire du Lac Lanoux*, Contre-Mémoire du Gouvernement de la République Française, p. 6 (Paris, 1957).

The French Counter-Memorial, at p. 7, refers to this "natural law" and maintians that, since no alteration of the system or volume of the Carol River was planned, no violation would follow. In addition it indicates the French interpretation of the duties resting on France under Article 11. The French Government stated that " Il va de soi " a state must respect the rights and interests of a lower riparian in one of three possible ways, depending on the circumstances: (1) by indemnification in the form of payments or replacement of the waters appropriated; (2) by incorporating in its projects appropriate technical and legal guarantees; (3) even by giving up its project if it cannot avoid a serious injury to the interests in question. *Ibid.*, at p. 29.

The negotiations recommenced on the occasion of a meeting on February 3, 1949, at Madrid, of the International Commission for the Pyrenees, which had been created by an Exchange of Notes, dated May 30 and July 19, 1875, between the French and Spanish Governments. At that meeting, the French delegation raised anew the question of the utilization of the waters of Lake Lanoux and proposed the setting up of a mixed commission of engineers with instructions to study the question and make a report to the two Governments. That proposal was accepted by the Spanish delegation. It was also agreed, according to the *procès verbal* of the meeting, that the existing state of affairs should not be modified until the two Governments agreed to decide otherwise. The Commission of Engineers met on August 29 and 30 at Gerona, when the French delegation explained that the French Government had before it several schemes for the utilization of the waters of Lake Lanoux and had not yet come to any decision but that the procedure laid down by Article 11 of the Additional Act would be put into operation as soon as the Government had made its choice. The meeting at Gerona, therefore, had no result as regards Lake Lanoux.

On September 21, 1950, Electricité de France applied to the French Ministry for Industry for a concession, based on a scheme involving the diversion of the waters of Lake Lanoux towards the River Ariège. The waters so diverted were to be completely returned into the River Carol by means of a tunnel leading from the upper courses of the Ariège at a point on the Carol above the outlet to the Puigcerda Canal. The French Government, however, while accepting the principle that waters drawn off should be returned, regarded itself as bound only to return a quantity of water corresponding to the actual needs of the Spanish users. Consequently, and without any recourse to the Mixed Commission of Engineers, the Prefect of Pyrénées Orientales, by a letter dated May 26, 1953, intimated to the Governor of the Province of Gerona that France was going to proceed to develop Lake Lanoux by diverting its waters towards the Ariège but that a certain limited flow of water corresponding to the actual needs of the Spanish frontagers would be assured at the level of the outlet to the Puigcerda Canal and that the Spanish Government was invited to formulate the compensation to which these public utility works would give a right under Article 9 of the Additional Act. The reply of the Spanish Government was to request, on June 18, 1953, that the work on Lake Lanoux should not be undertaken until after a meeting of the Mixed Commission of Engineers. The French Government replied, by a Note dated June 27, 1953, that—even though the Additional Act did not provide that works likely to affect the system of the waters should be suspended at the request of the other party—it would willingly give an assurance that nothing had yet been undertaken or was about to be undertaken in connection with Lake Lanoux. Moreover, the French

Government agreed to a meeting of the Mixed Commission of Engineers.

In the meantime, the French Government had begun to review its position regarding the quantity of water which was to be restored to the Carol and decided to accept the proposal of " integral restitution " which Electricité de France had put forward when applying for the concession. Consequently, the Prefect of the Department of Pyrénées Orientales, by letter dated January 21, 1954, communicated to the Governor of Gerona the technical papers relating to this proposal. In that letter it was intimated that the scheme would involve no change in the waters system on the Spanish slope of the Pyrenees, seeing that the whole of the water diverted towards the Ariège would be restored to the Carol. Since, then, the present state of affairs would not have to be modified, the obligations undertaking at the meeting of the Commission of the Pyrenees at Madrid on February 3, 1949, would be respected.

As a result of the communication thus made to the Governor of the Province of Gerona, the Spanish Government by a Note dated April 9, 1954, drew attention to the serious prejudice which the work envisaged would cause, in his opinion, to the Spanish part of the Cerdagne Valley and requested a meeting of the Mixed Commission of Engineers. In its reply, dated July 18, 1954, the French Government emphasized the difference between the schemes which were studied in 1949 and 1953 and which provided for a partial restitution only of the water, and the scheme most recently adopted, which provided that the water should be restored in its entirety to the Carol before entering Spanish territory. In the former case, the French authorities were, under Article 11 of the Additional Act, obliged to inform the Spanish authorities about the proposed work—this was in order to determine the compensation which would eventually have to be paid. It was in this spirit that the communication of May 26, 1953, from the Prefect of Pyrénées Orientales to the Governor of Gerona and the French Government's Note of June 27, 1953, had been written. Thus, the latter had been limited to giving an assurance that nothing had yet been, or was about to be, undertaken with regard to Lake Lanoux and it did not postpone the beginning of the works to the results of the work of the Mixed Commission of Engineers. On the contrary, as regards the later French scheme, the Spanish riparian owners ought not to suffer any prejudice, seeing that, on Spanish territory neither the flow nor the system nor the course of the Carol would be modified. Article 11 of the Additional Act was therefore not applicable and the French authorities were in no way bound to make the beginning of the works depend on the meeting of the Mixed Commission of Engineers. Nevertheless, the French Government, in the hope of mutual understanding and co-operation, raised no objection to the meeting of that Commission for the study in detail of the restitution of the water of the Carol, it being understood that the question of principle was not to be debated.

The meeting of the Mixed Commission of Engineers took place at Perpignan on August 4, 1955, without achieving any result. The question of the development of Lake Lanoux was then raised again at the next meeting of the International Commission for the Pyrenees which was held at Paris from November 3 to 14, 1955. On that occasion, the French scheme which had been communicated to the Governor of Gerona on January 21, 1954, was the subject of an exchange of views in the course of which the French delegation formulated a certain number of proposals linking the execution of the projected works with guarantees for the interests of Spanish riparian owners. As it was not found possible to arrive at any agreement, the Commission decided, in accepting a French proposition to this effect, that there should be set up a special mixed commission, entrusted with the task of drawing up a proposal for the utilization of the water of Lake Lanoux, which would be submitted to the two Governments. The French delegation made it clear, however, that if the new Commission had not reached a conclusion by the end of three months from November 14, 1955, the French authorities would resume freedom of action within the limits of their rights.

The Special Mixed Commission met at Madrid from December 12 to 17, 1955. The French delegation produced details of a scheme which corresponded in substance to the scheme communicated to the Governor of Gerona on January 21, 1954, and to the French proposals put forward at the meeting of the International Commission for the Pyrenees in November 1955. The French development scheme for Lake Lanoux comprised, in essence, the following features: Without modifying the springs and the system of streams then feeding the lake, the latter would be transformed, in particular by the formation of a dam, so as to enable it to accumulate a quantity of water which would increase its capacity from 17 to 70 million cubic metres. The waters of the lake, which run naturally by a tributary stream of the Carol and thence flow towards Spain, would normally cease to follow that course. They could be used to produce electric energy by a diversion which would lead them towards the Ariège, a tributary of the Garonne. Those waters would then go on to lose themselves in the Atlantic Ocean and not, as previously, in the Mediterranean. In order to compensate for this prior abstraction of the waters feeding the Carol, an underground replacement tunnel would lead a part of the waters of the Ariège to the Carol, to which those waters would be restored in French territory upstream from the intake of the Canal of Puigcerda.

This scheme, then, envisaged the construction of a large reservoir at the very favourable site of Lake Lanoux, to utilize the waters accumulated there after falling a considerable distance and to restore to the Carol, by drawing it from the Ariège, a quantity of water equal to that which is brought to Lake Lanoux by springs and the natural system of streams. The amount of water received by Lake Lanoux is determined by a simple method: the volume of water in the lake is measured periodically—in principle every week—in order to determine its increase; to that volume is then added the quantity of water used in the fall and restored after passing through a turbine to the Ariège; and the volume of water artificially pumped back into the lake, in order to make use of the electric power at times when there is no more profitable employment for it, is deducted. Thus the amount brought into the lake from natural sources over a given period is obtained. It is simple to deduce from it the average hourly flow of restoration which ought to be effected by the canal which diverts a part of the waters of the Ariège towards the Carol. This method of calculation is capable of introducing into the water system of the Carol a certain modification which depends on the length of the period chosen. In effect, it introduces at the outset a displacement of time: the volume of the restitution is over a period a function of the quantity received from natural sources during the immediately preceding period. On the other hand, the restitution is effected according to the average of the quantity of water received which excludes errors in relation to that average during the same period. In any event, there is nothing to prevent the taking of very short periods of reference—one week, a few days, one day, or even less— in such a way that the systemic difference between the amount restored and the natural gains loses all practical significance as a function of the river system. In order to assure a restoration of water equivalent to that brought from natural sources, even in the event of technical difficulties preventing the restitution from the Ariège taking place by the tunnel intended for that purpose, a double set of cocks would permit the restoration being assured out of the waters of Lake Lanoux itself, which would thus resume for a time their present course.

The French scheme included, besides these two guarantees of a technical nature, two other guarantees and one advantage. There would be a mixed Franco-Spanish Commission, with both sides equally represented, to ensure the control of the works as well as the regularity of the restoration of water; one member of the Spanish Consulate at Toulouse, enjoying the immunities and privileges laid down in the Franco-Spanish Convention of January 7, 1862, would have access to any of the projected installations; and the volume of water restored, without ever being less than the actual amount received, would be fixed at an annual minimum of 20,000,000 cubic metres.

The Spanish delegation, however, maintained its basic opposition to any diversion of the waters of Lake Lanoux, and the meeting of the Special Mixed Commission in December 1955 was without result.

It was nevertheless agreed that a further meeting of the Commission should take place at Paris, and the Commission in fact met on March 2, 1956. In the course of this meeting, the French delegation intimated that they could offer certain additional modalities and guarantees to further the interests of certain Spanish riparian owners beyond those already included in the French project. The Spanish delegation, on the other hand, presented a counter-project for the utilization of the waters of Lake Lanoux without diverting them from the course of the Canal. The points of view of the two delegations could not be reconciled, and the Commission, not having been able to reach agreement, decided, on March 6, 1956, to terminate its work and report to the two Governments.

Subsequently to the declaration of the French delegation at the meeting of the International Commission for the Pyrenees in November 1955, the French Government, by a Note dated March 21, 1956, informed the Spanish Government of its determination thenceforth to assume freedom of action within the limits of their rights. In consequence, the work of developing the waters of Lake Lanoux—which had been declared works of public utility by a Decree of October 20, 1954, but had so far consisted in no more than the construction of a road and the installation of a *téléphérique*—was recommenced on April 3, 1956. Since that date, the work had by the date of the present judgment been largely completed without, however, involving any diversion of the waters flowing out of Lake Lanoux.

The Spanish Government asked the Tribunal to declare that the French Government should not execute works for the utilization of the waters of Lake Lanoux in accordance with the modalities and guarantees provided in the Electricité de France project, for if no agreement were previously arrived at between the two Governments on the problem of dealing with the said waters, the French Government would be committing a breach of the relevant provisions of the Treaty of Bayonne of May 26, 1866, and the Additional Act of the same date.

The French Government asked the Tribunal to declare that it was correct in maintaining that in carrying out, without an agreement previously arrived at between the two Governments, works for the utilization of the waters of Lake Lanoux on the conditions laid down in the French project and proposals mentioned in the *Compromis* (Arbitration Agreement) of November 19, 1956, it was not committing a breach of the Treaty of Bayonne of May 26, 1866, and the Additional Act of the same date.

The French Memorial summarizes the principles to be derived from the authorities as follows: " As far as this litigation is concerned, the following topics may be particularly borne in mind: the sovereignty in its own territory of a State desirous of carrying out hydro-electric developments; the correlative duty not to injure the interests of a neighbouring State; the convenience of informing a neighbouring State of contemplated projects; of discussing them with it, if need be; the opportunity of seeking an agreement, including, if appropriate, guarantees of execution; but, if the interests of the latter State do not suffer serious prejudice, no duty to obtain its consent before undertaking the work."

The Spanish Memorial, at pp. 61–78, states that the examination of treaties regulating the rights of co-riparians is a proper method of inquiry into the conception of general international river law held by States in general, since in many cases treaties contain applications of general principles to specific circumstances. A number of bilateral and multilateral treaties are then analyzed in the Memorial to show that co-riparians have often undertaken to refrain from making changes in the existing régime of international rivers without first securing the consent of interested co-riparians.

The decisions of the German, Swiss and American federal courts are reviewed in the Memorial to indicate that the principle that no substantial change can be brought about by one riparian without the consent of co-riparians is supported in the available opinions of courts having to decide questions analogous to those arising from the use of international rivers.

More than thirty publicists are listed in the Memorial as supporting the view that a prior agreement is mandatory before a riparian may effect a substantial change in the régime of the waters of international rivers and lakes. It is recognized by the Spanish Government that different authors justify their views on the basis of different theories, but the conclusion is reached that they all agree on the basic proposition that international law, apart from treaty, sanctions not only the equality of rights of co-riparians, but also the necessity of prior agreement among co-riparians, whenever a substantial alteration of the system of the waters is contemplated.

The principal arguments put forward by the parties were as follows:

On behalf of Spain. "(1) The Electricité de France scheme affects the whole of the water system and the flow of the waters coming from Lake Lanoux and passing through the Carol, because both are clearly predetermined by any modification of the physical causes which determine the flow of those waters along the bed of that river.

"(2) The Electricité de France scheme is based on the diversion of the waters of the basin of the Carol, which flow via the Sègre and the Ebro into the Mediterranean, to carry them into the Ariège the waters of which join the Garonne and flow into the Atlantic. This abstraction of water would produce a modification of the physical features of the hydrographic basin of the Carol, because it would radically alter its structure from its source onwards by the effect of the total removal of the volume of water which now flows along its natural course.

" (3) The restoration of the equivalent of the abstracted water, as it is projected in the Electricité de France scheme, implies that the water would no longer flow naturally in its own course, the physical cause of its present flowing being supplanted and replaced by the will of one country only, as much in the abstraction of the waters of Lake Lanoux as in the restoration of an eventual equivalent previously taken from the Ariège. This unilateral modification of the physical cause of the present flow of the Carol and the substitution for its hydraulic substance of another, of differing provenance, would transform the waters of the river basin which are common by nature into waters for the predominant use of one country, thus establishing a physical predominance which does not today exist, as is shown by the fact that the water flows today according to physical [natural] laws, whereas after the scheme has been completed its eventual equivalent will be restored solely by the work of the human will which abstracted it.

" (4) The technical possibility of restoring the equivalent of the waters abstracted, according to the Electricité de France scheme, will not lessen in any way the profound transformation which the basin of the River Carol will undergo in its physical structure as a result of human interference with the flow of waters which hitherto have run naturally. The restoration of the equivalent mentioned will do no more than lessen the consequences of that transformation, but it would not reduce the effectiveness of the physical superiority acquired by one of the parties, once the scheme has been carried out; and that superiority will not be diminished by a juridical system based on a unilateral conception, contrary to the system of community which is sanctioned by the Act.

" (5) The guarantees and the alleged advantages comprised in the Electricité de France scheme (the creation of a Spanish-French Commission to control the construction of the restoration arrangements; the nomination of a Spanish engineer, enjoying consular status, who would then inspect their operation; increased availability of water at the irrigation season; and the creation in Lake Lanoux of a reserve for use in Spain) are not in themselves sufficient to permit the juridical establishment of the system of community destroyed by the unilateral realization of the said scheme.

" (6) The nature of the Electricité de France scheme, and the effects which must result from its execution, prove that the appropriate works are of a kind which require the agreement of the two Governments prior to their execution, as appears from the provisions of Article 11 read with Articles 12, 15 and 16 of the Act of May 26, 1866—a point of view which the French Government itself took in regard to the hydraulic scheme known as the ' Ojo de Toro ' in the Val d'Aran.

" (7) Consequently, the execution, without the prior agreement of the two Governments, of the Electricité de France scheme will involve, on the part of the French Government, a breach of Articles 11, 12, 15 and 16 of the Act of 1866, in destroying the system of community established by that international instrument and the Demarcation Treaties to which it is complementary—a system which is respected by the Spanish scheme in its appraisal of the interests of France and Spain."

On behalf of France. "(1) The Treaty of Bayonne of May 26, 1866, and the Additional Act of the same date did not have as their object the 'freezing' in perpetuity of the natural conditions existing at the time; they confined themselves, in this matter, to laying down rules according to which, should occasion arise, those conditions should be modified.

"(2) The sovereignty of each of the two States on its own territory remains untouched, subject only to the restrictions contained in international instruments in force between them.

"(3) In particular, their right to undertake works of public utility is expressly confirmed.

"(4) The ability of one State to proceed with such works is not made subject to the prior consent of the other State by any of the provisions of the Acts above cited, and especially not by Article 11 or Article 16 of the Additional Act. The Spanish Government itself so adjudged when, not only without seeking assent but also without consulting the French Government, it authorized the works at Val d'Aran.

"(5) The French Government has observed the rules of procedure designed to preserve, in such matters, all the rights and interests in question.

"(6) The French scheme, with the guarantees and modalities with which it is furnished, will safeguard completely the rights and interests of Spain, whose independence it will not compromise in any way.

"(7) French rights and interests would, on the other hand, be seriously harmed if this scheme were not carried out or even if it were replaced by the Spanish scheme, the economic value of which would be substantially less.

"(8) The French scheme, as it has been conceived, presented and guaranteed, therefore complies fully with the conditions required for its valid execution by the provisions of the Conventions in force between the two States, even in the absence of the consent—which it was not obligatory to obtain—of the Spanish Government."

In reply on behalf of Spain, it was contended:

"(1) The Treaty of Bayonne of May 26, 1866, and the Additional Act of the same date did not intend to crystallize in perpetuity the conditions existing at the time [of their signature]; they were limited to laying down rules in the matter, rules according to which those conditions can be modified. But those rules were conceived and drawn up in a spirit of friendship, of reciprocal confidence, and with the idea of necessary mutual accord, which inform the whole system of ' community of pasture ' which is latent in the Treaty and underlies the Additional Act.

" (2) The sovereignty of the contracting States over the waters of successive[1] rivers which flow on their territories is not absolute, but is made subject to modifications arrived at between the two parties.

" (3) The rule of priority in recognizing existing legitimate utilization and the rule as to the distribution of the excess volume of water in the summer season, are clear limitations on territorial sovereignty, seeing that they were established for the common, peaceful enjoyment of the waters of rivers flowing on the territory of the two States. And the right of each country to execute works of *public utility* cannot supersede the right of *common utility* which flows from those rules, because the concept of municipal law is subordinated to the latter principle of international law.

" (4) The right which each State has to proceed with works of public utility is necessarily subject to agreement with the other State if such works affect the course and the flow of rivers. That follows clearly from Article 11 of the Act, seeing that it contains no mention of possible compensation for resulting damage; but it creates the obligation of giving notice to ' the competent authorities ' [*a qui de droit*] (a significantly imprecise expression . . .) so that interests which might be involved should not be harmed. And that necessarily requires the reconciliation, by virtue of the agreement of the Parties, of opposing interests. Article 11, read with Articles 15 and 17 which provide for administrative or governmental collaboration between the two States, confirms the necessity for that agreement, as appears from a proper construction of those provisions. Such agreement is much more desirable when the public utility works affect, not secondary causes like the course and the flow of rivers, but a prime cause, like the physical reason for their flow, or their hydraulic substance, as is the case in the Electricité de France scheme, a matter in which the Spanish Government and the French Government have successively agreed to regard such an agreement as inevitable. For just as the Spanish Government is now defending this point of view in connection with the scheme mentioned, so the French Government itself was fully of the same opinion with regard to the scheme of the Productora de Fuerzas Motrices, which was based on the diversion of waters in the upper part of the Val d'Aran (see the ' Ojo de Toro ' case previously cited).

" (5) The rules of procedure, which the French Government has observed, are not sufficient to preserve all the rights and interests in question seeing that the opinion which it was able to give concerning the works is not sufficient in itself, but constitutes merely a notification which allows the other Party to adopt the most appropriate attitude to safeguard those rights and interests. That attitude could be silence, acceptance or opposition, and the last named for the purpose of initiating conversations leading to the reconciliation of interests and eventually to agreement. That is why the mere observance of the rules of prodecure by the French Government does not mean that it has fulfilled all its obligations under the Act, since to hold that it had done so would be equivalent to accepting as valid the claim that that international instrument only lays down rules of procedure applicable to the modalities of the exercise of sovereignty by the Parties but without properly limiting that sovereignty, whereas, in fact, the limitations comprised in the Act have an essential import, as has been several times demonstrated.

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[1] *I.e.*, those which flow from one State to the other; *cf. infra, p.* 121].

" (6) The guarantees and modalities of the French scheme do not safeguard the Spanish rights and interests, although naturally they do not compromise the material independence of the State: the consequences of developing the waters of Lake Lanoux cannot go so far as that. But that scheme does affect its right to independence and gravely compromises very important interests, which touch the most sensitive point of the agronomy of the country, namely, shortage of water for irrigation, and serious damage would result from that if the whole of the use of the waters of the lake while following their natural basin could not be regularized. In any event, the guarantees of the French scheme are insufficient, because they were conceived unilaterally, starting from the erroneous concept that these waters can be freely disposed of in French territory, for which reason the scheme accords with a unilateral criterion which excludes a rational dealing with the waters of the basin to the advantage of both Parties and a juridical bilateral regularization of that dealing as an effective guarantee for the two Parties.

" (7) It is a gratuitous assertion that French rights and interests will be harmed if the French scheme were not carried out and if it were replaced by the Spanish scheme the economic value of which is said to be considerably less. And the assertion is gratuitous because the last observation envisages only the total of the energy produced and omits to say that, according to technical calculations, the two schemes differ by only ten per cent. But the assertion does not take into account that the Spanish scheme is conceived on the basis of dealing with the waters according to their natural basin which permits a more perfect regularization of the waters for irrigation and ensures that the interests of both Parties will benefit from it equally, instead of favouring the interest of one only, as does the French scheme, the basis of which establishes a preponderance which is repugnant to the spirit of equality which inspires the Additional Act. And that is the other aspect to which the Electricité de France scheme does not give full value, because it has an effect on the political equilibrium between the two sovereignties, which is confirmed by the Treaties of Delimitation, which the Spanish scheme respects. In consequence, the damage which the French scheme would cause to Spanish interests would be serious, permament, and contrary to the system of community established by the Treaty of Bayonne and its Additional Act, while the alleged damage which French interests would sustain if the French scheme were not carried out is reduced to obtaining only a relatively smaller hydro-electric production, which is however a minimal inconvenience which could well be put up with for the sake of good neighbourly relations between the two countries and in conformity with the spirit which inspires the Treaties of Delimitation and their Additional Act.

" (8) The Electricité de France scheme does not satisfy the requirements of the treaty provisions in force because it was conceived unilaterally on the principle that France can dispose freely of waters which flow on her territory. That is why its technical conception as well as its juridical regulation are contrary to the system of community sanctioned by the Act, of which both the letter and the spirit would be ignored if the scheme were carried out without first arriving at an agreement with the Spanish Government, given that the necessity for that agreement arises from the correct application of the provisions of that Act."

In reply on behalf of France, it was contended:

" (1) It is necessary to state once more, to indicate the exact material scope of the Electricité de France scheme, that the latter would not affect the whole of the waters in the basin of the Carol. It would extend only to the diversion of the waters coming from Lake Lanoux, and these represent only a quarter of those which feed the Carol. So far as regards [the other] three quarters, the waters of that basin will retain their natural destination. The modifications resulting from the execution of the scheme will bear solely on a short section of the course of the Carol, situated in France. The complete restoration of the volume of water diverted will take place well above the head of the Puigcerda Canal and, *a fortiori*, above the Spanish frontier. On Spanish territory, neither the course nor the flow of the Carol will suffer the slightest change.

" (2) The diversion, not of the waters of the basin of the Carol, as the Spanish pleadings assert, but only of the water brought from Lake Lanoux to that river, will no doubt involve, to that very small extent, and only on French territory, a physical modification of the basin. But such a modification, in the conditions laid down, is not forbidden either by the Treaty of May 26, 1866, or by the Additional Act of the same date.

" (3) It cannot be said that the Carol would cease to follow its natural course. Save on one very small part of French territory, no change would be effected in that course. . . . Only a very limited quantity of its waters will be used in a ' preponderant ' manner by France. There is nothing to forbid such a use if it is compensated by the restoration of an equivalent quantity of water, as will be the case.

" (4) The restoration of the diverted waters will be not partial but total. That is the very basis of the Electricité de France scheme. That complete restoration has been the object of formal and unconditional obligations undertaken by the French Government. In those circumstances, to say that the restoration would depend on the ' good will ' of France is to bring against the latter a charge of a kind which is quite unjustified and to manifest a spirit of suspicion of a kind which would make international relations impossible.

" (5) The functioning of the system would bring about, thanks to the complete restoration of the volume of water diverted, the maintenance of the system of utilization of waters of common use as it was laid down by the Additional Act. The analysis above set forth of the guarantees offered by the French Government is sufficient to show the indisputable efficacy of the scheme, both on the juridical and on the practical plane. The working of these guarantees would assure, as between the Parties, respect for equality which would break, to the disadvantage of France, a Spanish veto of a kind which would seriously prejudice the interests of France, while the realization of the scheme would cause no detriment to Spanish interests.

" (6) On that point, which is fundamental to the dispute, the divergence of opinion between the two Governments is complete and it is now for the Tribunal to make its decision, there being no need to set out afresh the contentions of the French Government in its pleadings herein.

" (7) The divergence of opinion on the preceding point inevitably entails the same disagreement on this one. The French Government maintains that, for the various reasons it has shown, the execution of its scheme will not modify the system set up by the Additional Act, which nowhere lays down the necessity, in such a case as this, for the previous consent of the other State. It is also pointed out that the Spanish Government in its contentions refers only to the Act and no longer to the Treaty of Bayonne itself."

In addition, the French Government added the following arguments:

" 1. The Spanish Memorial excludes, in its juridical discussion, the final provision of Article 9 of the Additional Act which reserves the respective rights of each of the Governments to authorize works of public utility.

" 2. It ignores the fact that the French scheme provides for the complete restoration of the volume of water diverted and not, as it several times asserts, a partial restoration.

" 3. It is silent on the formal undertakings accepted with regard to this total restoration by the French Government.

" 4. It analyses in a manner which is quite insufficient the guarantees offered by the latter.

" 5. It does not make it sufficiently clear that the French scheme does not affect the whole of the waters of the basin of the Carol, but only approximately one-quarter of them.

" 6. It gives no precise indication of the damage which the execution of the French scheme would cause to Spanish interests."

Further arguments advanced during the oral hearings are dealt with, so far as necessary, in the findings of the Tribunal.

Held: that France must succeed. " In carrying out, without previous agreement between the two Governments, works for the utilization of the waters of Lake Lanoux under the conditions set forth in the [Electricité de France] scheme . . . the French Government would not be committing a breach of the provisions of the Treaty of Bayonne of May 26, 1866, and the Additional Act of the same date." Nor did the French action contravene any rule of international law. These two instruments comprised inroads on the principle of territorial sovereignty, which must yield to such and other limitations of international law. The conflicting interests aroused by the industrial use of international rivers must be reconciled by mutual concessions embodied in comprehensive agreements. States have a duty to seek to enter into such agreements. The " interests " safeguarded in the Treaties between France and Spain included interests beyond specific legal rights. A State wishing to do that which will affect an international watercourse cannot decide whether another State's interests will be affected; the other State is the sole judge of that and has the right to information on the proposals. Consultations and negotiations between the two States must be genuine, must comply with the rules of good faith and must not be mere formalities. The rules of reason and good faith are applicable to procedural rights and duties relative to the sharing of the use of international rivers; and the subjecting by one State of such rivers to a form of development which causes the withdrawal of some supplies from its basin, are not irreconcilable with the interests of another State.

The Tribunal said: " 1. The public works envisaged in the French scheme are wholly situate in France; the most important part if not the whole of the effects of such works will be felt in French territory; they would concern waters which Article 8 of the Additional Act submits to French territorial sovereignty:

> "*Article* 8. All standing and flowing waters, whether they are in the private or public domain, are subject to the sovereignty of the State in which they are located, and therefore to that State's legislation, except for the modifications agreed upon between the two Governments.

> " Flowing waters change jurisdiction at the moment when they pass from one country to the other, and when the watercourses constitute a boundary, each State exercises its jurisdiction up to the middle of the flow."

" This text itself imposes a reservation on the principle of territorial sovereignty (' except for the modifications agreed upon between the two Governments '); some provisions of the Treaty and of the Additional Act of 1866 contain the most important of these modifications; there may be others. It has been contended before the Tribunal that these modifications should be strictly construed because they are in derogation of sovereignty. The Tribunal could not recognize such an absolute rule of construction. Territorial sovereignty plays the part of a presumption. It must bend before all international obligations, whatever their origin, but only before such obligations.

"The question is therefore to determine the obligations of the French Government in this case. The Spanish Government has endeavoured to define them; the problem should be examined by beginning with the Spanish contention.

" 2. The argument of the Spanish Government is of a general character and calls for some preliminary remarks. The Spanish Government bases its contention first of all on the text of the Treaty and of the Additional Act of 1866. Its contention thus falls exactly within the jurisdiction of the Tribunal as it has been defined by the *Compromis* (Article 1). But in addition, the Spanish Government bases its contention on both the general and the traditional features of the régime of the Pyrenean boundaries and on certain rules of international common law in order to proceed to the interpretation of the Treaty and the Additional Act of 1866.

" In another connection, the French Memorial (p. 58) examines the question put to the Tribunal in the light of the ' law of nations '. The French Counter-Memorial (p. 48) does the same thing, but with the following reservation: ' although the question submitted to the Tribunal is clearly confined by the *Compromis* to the interpretation, in the present case, of the Treaty of Bayonne of 26 May 1866 and of the Additional Act of the same date . . .' In the oral pleadings the representative of the French Government said: ' The *Compromis* does not request the Tribunal to find out whether there are general principles of international law applicable in this context ' (third session, p. 7), and: 'A treaty is interpreted in the context of positive international law from the time when it may be applied ' (seventh session, p. 6).

" In an analogous case, the Permanent Court of International Justice (*Diversion of Water from the Meuse*[1]) declared:

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[1] *P.C.I.J.*, Series A/B, No. 70, p. 16; *cf. Annual Digest*, 1935–1937, Case No. 211, at p. 450.]

" ' In the course of the proceedings, both written and oral, occasional reference has been made to the application of the general rules of international law as regards rivers. In the opinion of the Court, the points submitted to it by the Parties in the present case do not entitle it to go outside the field covered by the Treaty of 1863.'

" Since the question presented by the *Compromis* relates solely to the Treaty and to the Additional Act of 1866, the Tribunal will apply the following rules for each particular point:

" The clear provisions of law contained in a treaty do not require any interpretation; the text provides an objective rule which covers entirely the subject matter to which it applies; when the provisions call for interpretation this should be done according to international law; international law does not sanction any absolute and rigid method of interpretation; we may therefore take into account the spirit that guided the framing of the Pyrenean Treaties as well as the rules of international common law.

" The Tribunal may deviate from the rules of the Treaty and of the Additional Act of 1866 only if they referred expressly to other rules or had been modified with the clear intention of the Parties.

" 3. The present dispute can be reduced to two fundamental questions:

" (A) Do the works for utilizing the waters of Lake Lanoux in the conditions laid down in the French scheme and proposals mentioned in the Preamble of the *Compromis* constitute an infringement of the rights of Spain recognized by the principal provisions of the Treaty of Bayonne of May 26, 1866, and the Additional Act of the same date?

" (B) If the reply to the preceding question be negative, does the execution of the said works constitute an infringement of the provisions of the Treaty of Bayonne of May 26, 1866, and of the Additional Act of the same date, because those provisions would in any event make such execution subject to a prior agreement between the two Governments or because other rules of Article 11 of the Additional Act concerning dealings between the two Governments have not been observed?

"*As to question (A):*

" 4. The Additional Act of May 26, 1866, includes a section headed ' Control and enjoyment of waters of common user between the two countries '. Besides Article 8 already cited, it contains three articles which are fundamental for the present case (9, 10 and 11) and one article (18) which deals with the ensuring of its practical application. Articles 9 and 10 both apply to watercourses ' which flow from one country to the other ' (successive watercourses) or which ' constitute a boundary ' (contiguous watercourses). By Article 9, each State recognizes the legality of irrigations, of works and of enjoyment for domestic use, by virtue of concessions, of title or by prescription, existing in the other State at the moment when the Additional Act entered into force. Under Article 18, an international Commission of Engineers was charged with the technical operations necessary for the application of Article 9 and other articles of the Additional Act.

" The recognition of the legality of such use is subject to the following conditions:

" (a) Each State may, when appropriate, require the concession, the title or the prescription invoked by the other State to be verified by examination. The recognition of such legality by the State which requires the verification shall cease for any enjoyment which has not passed this latter test.

" (b) The legality of each enjoyment is recognized only to the extent that the water used is necessary to satisfy actual needs.

" (c) The recognition of the legality of an enjoyment is to cease in case of abuses, including abuses other than employment of water in excess of what is necessary to satisfy actual needs.

" 5. Article 10 provides that after having satisfied the actual needs of recognized enjoyments, the quantity of water available at low water at the point where it crosses the frontier is calculated and is then shared out in advance according to a predetermined principle of distribution.

" These two Articles, 9 and 10, ought clearly both to be interpreted together without opposing one to the other, because Article 10 deals with ' available water ' after the application of Article 9 concerning recognized enjoyment: the two Articles taken together exhaust the object of the regulation.

" This remark is of interest if one approaches the point which raised most controversy between the parties, that is, the reservation of ' the respective rights of the Governments to authorize works of public utility, on condition that proper compensation is paid '.

" According to the Tribunal, the reservation of the right of each contracting State to execute works of public utility has a general application.

" In any event, if Article 9 gives the upstream State the right, subject to compensation, to deprive in a definitive way users in the downstream State of the enjoyment of waters to which they have a recognized right, it may be asked whether, for the execution of works of public utility, it is equally sufficient for the upstream State to pay, under Article 10, compensation for cutting off, in a definitive manner, the enjoyment by the downstream State of the available part of the water.

" It is certain that, if the right of the upstream State had no legal limit in this sphere, apart from the payment of compensation, the French scheme would satisfy the basic conditions laid down by Article 10.

" The Spanish Government maintains that the French Government did not have the right to deprive the Spanish State definitively of the enjoyment of that part of the water which devolves to it under Article 10. If that were the case, the French scheme would still comply with the terms of Article 11 if it were established that the part of the waters of the Carol diverted into the Ariège is less than the volume of water allocated to the riparian owners of the Carol on this side of the frontier as well as to the French State under Article 10. The Tribunal has not sufficient factual evidence to permit it to decide the latter point.

" The solution of the problem which has just been examined on the subject of the scope of Article 10 is nevertheless not indispensable for resolving the question put by the *Compromis*.

" 6. In effect, thanks to the restitution effected by the devices described above, none of the guaranteed users will suffer in his enjoyment of the waters (this is not the subject of any claim founded on Article 9); at the lowest water level, the volume of the surplus waters of the Carol, at the boundary, will at no time suffer a diminution; it may even, by virtue of the minimum guarantee given by France, benefit by an increase in volume assured by the waters of the Ariège flowing naturally to the Atlantic.

" One might have attacked this conclusion in several different ways.

" It could have been argued that the works would bring about an ultimate pollution of the waters of the Carol or that the returned waters would have a chemical composition or a temperature or some other characteristic which could injure Spanish interests. Spain could then have claimed that her rights had been impaired in violation of the Additional Act. Neither in the *dossier* nor in the pleadings in this case is there any trace of such an allegation.

" It could also have been claimed that, by their technical character, the works envisaged by the French project could not in effect ensure the restitution of a volume of water corresponding to the natural contribution of the Lanoux to the Carol, either because of defects in measuring instruments or in mechanical devices to be used in making the restitution. The question was lightly touched upon in the Spanish Counter Memorial (p. 86), which underlined the ' extraordinary complexity ' of procedures for control, their ' very onerous ' character, and the ' risk of damage or of negligence in the handling of the watergates, and of obstruction in the tunnel '. But it has never been alleged that the works envisaged present any other character or would entail any other risks than other works of the same kind which today are found all over the world. It has not been clearly affirmed that the proposed works would entail an abnormal risk in neighbourly relations or in the utilization of the waters. As we have seen above, the technical guarantees for the restitution of the waters are as satisfactory as possible. If, despite the precautions that have been taken, the restitution of the waters were to suffer from an accident, such an accident would be only occasional and, according to the two Parties, would not constitute a violation of Article 9.

" 7. The Spanish Government takes its stand on a different ground. In the arbitration *Compromis* it had already alleged that the French scheme ' modifies the natural conditions of the hydrographic basin of Lake Lanoux by diverting its waters into the Ariège and thus making the restoration of the waters of the Carol physically dependent on human will, which would involve the *de facto* preponderance of one Party in place of the equality of the two Parties as provided by the Treaty of Bayonne of May 26, 1866, and by the Additional Act of the same date.

" The position of the Spanish Government seems to become clearer in the course of the written and of the oral proceedings. In the Memorial (at p. 52) that Government invokes Article 12 of the Additional Act:

> " '*Article* 12. The downstream lands are obliged to receive from the higher lands of the neighbouring country the waters which flow naturally therefrom together with what they carry without the hand of man having contributed thereto. There may be constructed neither a dam, nor any obstacle capable of harming the upper riparian owners, to whom it is likewise forbidden to do anything which might increase the burdens attached to the servitude of the downstream lands.'

" According to the Spanish Government, that provision appears to establish the conception that neither of the Parties may, without the consent of the other, modify the natural flow of the waters. The Spanish Counter Memorial (at p. 77) recognizes nevertheless that: ' From the moment when human will intervenes to bring about some hydraulic development, it is an extra-physical element which acts upon the current and changes what Nature has established.' Similarly, the Spanish Government does not give a fixed meaning to ' the order of Nature '; according to the Counter Memorial (at p. 96): ' A State has the right to utilize unilaterally that part of a river which runs through it so far as such utilization is of a nature which will effect on the territory of another State only a limited amount of damage, a minimum of inconvenience, such as falls within what is implied by good neighbourliness.'

" Actually, it seems that the Spanish argument is twofold and relates, on the one hand, to the prohibition, in the absence of the consent of the other Party, of compensation between two basins, despite the equivalence of what is diverted and what is restored, and, on the other hand, the prohibition, without the consent of the other Party, of all acts which may create by a *de facto* inequality the physical possibility of a violation of rights.

" These two points must now be examined successively.

" 8. The prohibition of compensation between the two basins, in spite of equivalence between the water diverted and the water restored, unless the withdrawal of water is agreed to by the other Party, would lead to the prevention in a general way of a withdrawal from a watercourse belonging to River Basin A for the benefit of River Basin B, even if this withdrawal is compensated for by a strictly equivalent restitution effected from a watercourse of River Basin B for the benefit of River Basin A. The Tribunal does not overlook the reality, from the point of view of physical geography, of each river basin, which constitutes, as the Spanish Memorial (at p. 53) maintains, ' a unit '. But this observation does not authorize the absolute consequences that the Spanish argument would draw from it. The unity of a basin is sanctioned at the juridical level only to the extent that it corresponds to human realities. The water which by nature constitutes a fungible item may be the object of a restitution which does not change its qualities in regard to human needs. A diversion with restitution, such as that envisaged by the French project, does not change a state of affairs organized for the working of the requirements of social life.

" The state of modern technology leads to more and more frequent justifications of the fact that waters used for the production of electric energy should not be returned to their natural course. Water is taken higher and higher up and it is carried ever farther, and in so doing it is sometimes diverted to another river basin, in the same State or in another country within the same federation, or even in a third State. Within federations, the judicial decisions have recognized the validity of this last practice (*Wyoming* v. *Colorado* . . . [259 U.S. 419]) and the instances cited by Dr. J. E. Berber, *Die Rechtsquellen des internationalen Wassernützungsrechts*, p. 180, and by M. Sauser-Hall, ' L'Utilisation industrielle des fleuves internationaux ', [in] *Recueil des Cours de l'Académie de Droit international de la Haye*, 1953, vol. 83, p. 544; for Switzerland, [see] *Recueil des Arrêts du Tribunal Fédéral*, vol. 78, Part 1, pp. 14 *et seq.*).

" The Tribunal therefore is of opinion that the diversion with restitution as envisaged in the French scheme and proposals is not contrary to the Treaty and to the Additional Act of 1866.

" 9. Elsewhere, the Spanish Government has contested the legitimacy of the works carried out on the territory of one of the signatory States of the Treaty and of the Additional Act, if the works are of such a nature as to permit that State, albeit in violation of its international pledges, to bring pressure to bear on the other signatory. This rule would derive from the fact that the Treaties concerned confirm the principle of equality between States. Concretely, Spain considers that France has not the right to bring about, by works of public utility, the physical possibility of cutting off the flow of the waters of the Lanoux or the restitution of an equivalent quantity of water. It is not the task of this Tirbunal to pronounce judgment on the motives or the experiences which may have led the Spanish Government to voice certain misgivings. But it is not alleged that the works in question have as their object, apart from satisfying French interests, the creation of a means of injuring, at least contingently, Spanish interests; that would be all the more improbable since France could only partially dry up the resources that constitute the flow of the Carol, since she would affect also all the French lands that are irrigated by the Carol and since she would expose herself along the entire boundary to formidable reprisals.

" On the other hand, the proposals of the French Government which form an integral part of its project carry ' the assurance that in no case will it impair the régime thus established ' (Annex 12 of the French Memorial). The Tribunal must therefore reply on the basis of this assurance to the question posed by the *Compromis*. It cannot be alleged that, despite this pledge, Spain would not have a sufficient guarantee, for there is a general and well-established principle of law according to which bad faith is not presumed. Furthermore, it has not been contended that at any time one of the two States has knowingly violated, at the expense of the other, a rule relating to the control of the water. At any rate, while inspired by a just spirit of reciprocity, the Treaties of Bayonne have only established a legal equality and not an equality in fact. If it were otherwise, they would have had to forbid on both sides of the boundary all installations and works of a military nature which might have given one of the States a *de facto* preponderance which it might use to violate its international pledges. But we must go still further; the growing ascendancy of man over the forces and the secrets of nature has put into his hands instruments which he can use to violate his pledges just as much as for the common good of all; the risk of an evil use has so far not led to subjecting the possession of these means of action to the authorization of the States which may possibly be threatened. Even if we took our stand solely on the ground of neighbourly relations, the political risk alleged by the Spanish Government would not present a more abnormal character than the technical risk which was discussed above. In any case, we do not find either in the Treaty and the Additional Act of May 26, 1866, or in international common law, any rule that forbids one State, acting to safeguard its legitimate interests, to put itself in a situation which would in fact permit it, in violation of its international pledges, seriously to injure a neighbouring State.

" It remains to enquire whether the French scheme conflicts with the basic rules laid down by Article 11. That question will be examined below within the general framework of that Article (see para. 24).

" Subject to this last-mentioned question, the Tribunal replies in the negative to the first question, at para. 3 (A) *supra*.[1]

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[1] See *supra*, p. 121.]

"*As to question (B):*

"10. In the *Compromis*, the Spanish Government had already declared that, in its opinion, the French scheme required for its execution 'the previous agreement of both Governments, in the absence of which the country making the proposal is not at liberty to undertake the works'.

"In the written as well as the oral proceedings, that Government developed this point of view, completing it by the recital of the principles which ought to govern dealings leading to such prior agreement. Two obligations, therefore, would seem to rest upon the State which desires to undertake the works envisaged, the more important being to reach a prior agreement with the other interested State; the other, which is merely accessory thereto, being to respect the other rules laid down by Article 11 of the Additional Act.

"The argument put forward by the Spanish Government is stated on two planes—the Spanish Government takes its stand, on the one hand, on the Treaty and the Additional Act, on the other hand on the system of *faceries* or *compascuités*[1] which exists on the Pyrenean frontier, as well as on the rules of international common law. The two latter sources would permit, first of all, the interpretation of the Treaty and the Additional Act of 1866, and then, in a larger perspective, the demonstration of the existence of an unwritten general rule of international law. The latter (it is contended) has precedents which would permit its establishment in the traditions of the system of *faceries*, in the provisions of the Pyrenean Treaties and in the international practice of States in the matter of the industrial use of international watercourses.

"11. Before proceeding to an examination of the Spanish argument, the Tribunal believes it will be useful to make some very general observations on the nature of the obligations invoked against the French Government. To admit that jurisdiction in a certain field can no longer be exercised except on the condition of, or by way of, an agreement between two States, is to place an essential restriction on the sovereignty of a State, and such restriction could only be admitted if there were clear and convincing evidence. Without doubt, international practice does reveal some special cases in which this hypothesis has become reality; thus, sometimes two States exercise conjointly jurisdiction over certain territories (joint ownership, *co-imperium*, or *condominium*); likewise, in certain international arrangements, the representatives of States exercise conjointly a certain jurisdiction in the name of those States or in the name of organizations. But these cases are exceptional, and international judicial decisions are slow to recognize their existence, especially when they impair the territorial sovereignty of a State, as would be the case in the present matter.

[[1] "Droit de passage commun à plusieurs communautés, villages, etc."—*Nouveau Larousse Universel.*]

" In effect, in order to appreciate in its essence the necessity for prior agreement, one must envisage the hypothesis in which the interested States cannot reach agreement. In such case, it must be admitted that the State which is normally competent has lost its right to act alone as a result of the unconditional and arbitrary opposition of another State. This amounts to admitting a ' right of assent ', a ' right of veto ', which at the discretion of one State paralyses the exercise of the territorial jurisdiction of another.

" That is why international practice prefers to resort to less extreme solutions by confining itself to obliging the States to seek, by preliminary negotiations, terms for an agreement, without subordinating the exercise of their competences to the conclusion of such an agreement. Thus, one speaks, although often inaccurately, of the ' obligation of negotiating an agreement '. In reality, the engagements thus undertaken by States take very diverse forms and have a scope which varies according to the manner in which they are defined and according to the procedures intended for their execution; but the reality of the obligations thus undertaken is incontestable and sanctions can be applied in the event, for example, of an unjustified breaking off of the discussions, abnormal delays, disregard of the agreed procedures, systematic refusals to take into consideration adverse proposals or interests, and, more generally, in cases of violation of the rules of good faith (*Tacna-Arica Arbitration*: *Reports of International Arbitral Awards*, vol. II, pp. 921 *et seq.*;[1] *Case of Railway Traffic between Lithuania and Poland*: *P.C.I.J.*, Series A/B, No. 42, pp. 108 *et seq.*[2]).

" In the light of these general observations, and in relation to the present case, we will now examine in turn whether a prior agreement is necessary and whether the other rules laid down by Article 11 of the Additional Act have been observed.

"*A. The necessity for a prior agreement.*

" 12. First, to enquire whether the argument that the execution of the French scheme is subject to the prior agreement of the Spanish Government is justified in relation to the system of *compascuités* or *faceries* or in relation to international common law; the collected evidence would permit, if necessary, the interpretation of the Treaty and the Additional Act of 1866, or rather, according to the wider formula given in the Spanish argument, to affirm the existence of a general principle of law, or of a custom, the recognition of which, *inter alia*, is embodied in the Treaty and the Additional Act of 1866 (Spanish Memorial, p. 81).

" The Spanish Government has endeavoured to demonstrate that ' the demarcation line at the Pyrenean boundary constitutes a zone organized in conformity with a special law, customary in nature, incorporated in international law by the Boundary Treaties which have recognized it, rather than being a limitation on the sovereign rights of bordering States ' (Spanish Memorial, p. 55). The most characteristic manifestation of this customary law would be the existence of *compascuités* or *faceries* (Oral Pleadings, fourth session, p. 16) which are themselves the remnant of a more extensive communal system which, in the Pyrenean valleys, was founded on the rule that matters of common interest must be regulated by agreements that have been freely debated.

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[1] [See also *Annual Digest*, 1925–1926, Case No. 269.]

[2] [*Ibid.*, 1931–1932, Case No. 215.]

" In effect, the French project does not impair at all the rights of pasturage on French territory guaranteed by the treaties for the benefit of certain Spanish communes. It appears in particular, according to the replies of the Parties to a question put by the Tribunal, that the pasturage rights that the Spanish Commune of Llivia possesses on French territory in no way touch the waters of Lake Lanoux or of the Carol. The Spanish Government invokes also the system of *compascuités* or rather that of the Pyrenean communal rights which have now disappeared, and of which the *compascuités* are the last trace, to retain essentially the spirit of this system, based on understanding, on respect for common interests and on a search for compromise by agreements freely negotiated and concluded. In this sense, it is indeed correct that the characteristics peculiar to the Pyrenean border induce the bordering States to be guided, more than for any other boundary, by a spirit of co-operation and of understanding indispensable to the solution of the difficulties which may be born of boundary relations, particularly in mountainous countries.

" But one cannot take the matter any further; it is impossible to extend the system of *compascuités* beyond the limits assigned to them by the treaties, or to deduce therefrom a notion of generalized ' communal rights ' [*communauté*] which would have a legal content of some sort. As for recourse to the notion of the ' boundary zone ', it cannot, by the use of a doctrinal vocabulary, add an obligation to those sanctioned by positive law.

" 13. The Spanish Government endeavoured to establish similarly the content of current positive international law. Certain principles which it demonstrates are, assuming the demonstration to be accepted, of no interest for the problem now under examination. Thus, if it is admitted that there is a principle which prohibits the upstream State from altering the waters of a river in such a fashion as seriously to prejudice the downstream State, such a principle would have no application to the present case, because it has been admitted by the Tribunal, in connection with the first question examined above, that the French scheme will not alter the waters of the Carol. In fact, States are today perfectly conscious of the importance of the conflicting interests brought into play by the industrial use of international rivers, and of the necessity to reconcile them by mutual concessions. The only way to arrive at such compromises of interests is to conclude agreements on an increasingly comprehensive basis. International practice reflects the conviction that States ought to strive to conclude such agreements: there would thus appear to be an obligation to accept in good faith all communications and contracts which could, by a broad comparison of interests and by reciprocal good will, provide States with the best conditions for concluding agreements. This point will be referred to again later on, when enquiring what obligations rest on France and Spain in connection with the contracts and the communications preceding the putting in hand of a scheme such as that relating to Lake Lanoux.

" But international practice does not so far permit more than the following conclusion: the rule that States may utilize the hydraulic power of international watercourses only on condition of a *prior* agreement between the interested States cannot be established as a custom, even less as a general principle of law. The history of the formulation of the multilateral Convention signed at Geneva on December 9, 1923, relative to the Development of Hydraulic Power Affecting More than One State,[1] is very characteristic in this connection. The initial project was based on the obligatory and paramount character of agreements whose purpose was to harness the hydraulic forces of international watercourses. But this formulation was rejected, and the Convention, in its final form, provides (Article 1) that

> ' [The present Convention] in no way alters the freedom of each State, within the framework of international law, to carry out on its territory all operations for the development of hydraulic power which it desires ';

there is provided only an obligation upon the interested signatory States to join in a common study of a development programme; the execution of this programme is obligatory only for those States which have formally subscribed to it.

" Customary international law, like the traditional Law of the Pyrenees, does not supply evidence of a kind to orient the interpretation of the Treaty and of the Additional Act of 1866 in the direction of favouring the necessity for prior agreement; even less does it permit us to conclude that there exists a general principle of law or a custom to this effect.

" 14. As between Spain and France, the existence of a rule requiring prior agreement for the development of the water resources of an international watercourse can therefore result only from a Treaty. From this point of view, first the Treaty and the Additional Act of 1866 and then the Agreement of 1949 will be examined. The latter was the subject of copious argument; it can be included among the number of those ' modifications agreed upon between the two Governments' mentioned in Article 8 of the Additional Agreement

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[[1] *L.N.T.S.*, vol. 36, p. 75.]

of May 26, 1866; and for that reason the Tribunal is competent to examine it.

" (a) *The Treaty and the Additional Act of* 1866.—15. The basic argument of the Spanish Government, put forward from the time of the *Compromis* onward, is that the execution of the French scheme is subject to the necessity of a prior agreement because it touches the common general interests of the two countries.

" According to one argument, the waters are subject to a régime of *indivision* [joint ownership] or, rather, *communauté*. In its strict meaning, this argument clearly contradicts the provisions of Article 8 of the Additional Act; it was not maintained by the Spanish Government. But the latter distinguished between community of property and community of use and made reference to a community of use based on the sub-heading covering Articles 8 to 21 in the Additional Act: ' Control and enjoyment of waters of common usage between the two countries ' (*cf.* Spanish Counter Memorial, p. 42; Oral Pleadings, 4th session, p. 28).

" In regard to running waters, it is difficult to make a very great distinction between a communal right of property and a communal right of usage, both of which are in perpetuity. But above all, expressions used in a heading cannot in themselves embrace consequences contrary to the principles formally established by the articles grouped under that heading. Now, the water system which results from the Additional Act is not in general favourable to *indivision* or communal rights, even of usage; it sets out precise rules for a division of waters; few international watercourses are subjected to such detailed rules as are those of the Pyrenees; the object of these provisions is to divide and separate the rights so as to avoid the difficulties of the systems of *indivision*, difficulties to which the Pyrenean Treaties openly call attention in their preamble (Treaty of April 14, 1862), and even in their text (Article 13 of the Treaty of December 2, 1856).

" 16. A second argument to establish the necessity for a prior agreement could be drawn from the text of Article 11 of the Additional Act (*cf.* Spanish Memorial, p. 48). If Article 11 explicitly sets forth only an obligation to furnish information, ' the necessity for prior agreement . . . results implicitly from this obligation to give information which was considered above; this obligation cannot disappear by itself since its object is the protection of the interests of the other Party.' In the opinion of the Tribunal, this reasoning lacks a logical basis. If the contracting Parties had wished to establish the necessity for a prior agreement, they would not have confined themselves to mentioning in Article 11 only the obligation to give notice. The necessity for prior notice from State A to State B is implicit if A is unable to undertake the work envisaged without the agreement of B; it would, then, not have been necessary to mention the obligation of notice to B, if the necessity for a prior agreement with B had been established. In any case, the obligation to give notice does not include the obligation, which is much more extensive, to obtain the agreement of the State that has been notified; the purpose of the notice may be completely different from that of agreeing to allow B to exercise the right of veto; it may be quite simply (and Article 11 of the Additional Act states this) to allow B to safeguard, on the one hand, at the proper time, the rights of its riparian owners to compensation, and on the other hand, so far as is possible, its general interests. This is so true that, incidentally, and without abandoning on that account its main thesis, the Spanish Counter Memorial (at p. 52) admits that according to Article 11 ' these works or new concessions may not alter the system or flow of a watercourse except to the extent to which the reconciliation of the interests compromised would be impossible.'

" The method of reasoning apparent in the development of the Spanish thesis calls for a more general observation. The necessity for a prior agreement would derive from all the circumstances in which the two Governments are led to reach agreement; this would be the case in matters concerning the compensation provided for by Article 9 of the Additional Act, and in the matter of the French proposals which, on account of the interplay of the guarantees which they provide, would presuppose an agreement with the Spanish Government. This reasoning is in contradiction with the most general principles of international law. It is for each State to evaluate in a reasonable manner and in good faith the situations and the rules which will involve it in controversies; its evaluation may be in contradiction with that of another State; in that case, should a dispute arise the Parties normally seek to resolve it by negotiation or, alternatively, by submitting to the authority of a third party; but one of them is never obliged to suspend the exercise of its jurisdiction because of the dispute except when it assumes an obligation to do so; by exercising its jurisdiction it takes the risk of seeing its international responsibility called into question, if it is established that it did not act within the limits of its rights. The commencement of arbitral proceedings in the present case illustrates perfectly these rules in the functioning of the obligations subscribed to by Spain and France in the Arbitration Treaty of July 10, 1929.

" Pushed to the extreme, the Spanish thesis would imply either the general paralysis of the exercise of State jurisdiction whenever there is a dispute, or the submission of all disputes, of whatever nature, to the authority of a third party; international practice does not support either the one or the other of these consequences.

" 17. The last textual argument relied upon by the Spanish Government relates to Articles 15 and 16 of the Additional Act, which (it is said) establishes the obligation to reach a prior agreement. Their exact scope raised considerable controversy: the French text of Article 16 relates to a ' *droit de réglementation des intérêts généraux* *et interprétation ou modification de leurs règlements* '; the Spanish text, which is wider, refers to matters of common accord (' *asuntos de conveniencia general* ').

" In the opinion of the Tribunal, even giving that provision its widest connotation and combining, as in the Spanish argument, Article 15 and Article 16, no more can be drawn from it than the following conclusion: it lays down a procedure of consultation which defines the extent to which the local authorities are called upon to resolve certain disputes or to harmonise the exercise of their powers. In case of difficulty, the superior administrative level must take over, and finally, in the terms of Article 16, ' the dispute shall be submitted to the two Governments '. It results from what has been said above that it is impossible to deduce from that formula the need for prior agreement. If the Spanish argument were correct, it would have to be admitted that, in a zone which would vary from case to case according to the general interests involved, the exercise of the powers of the two States would be suspended by the necessity for a prior agreement. Practice shows no trace of such an obligation.

" The examination of Articles 15 and 16 of the Additional Act leads therefore to a negative conclusion as regards the obligation to enter into a prior agreement. Positively, one can but admit that there does exist a duty of consultation and of bringing into harmony the respective actions of the two States when general interests are involved in matters concerning waters. On this point, the fairly extensive principles of Article 16 are worthy of being borne in mind when the obligations of the two Parties resulting from Article 11 of the Additional Act are examined later.

" 18. The Parties have attempted to determine the meaning of the Treaty and of the Additional Act of 1866 by reference to their respective attitudes, notably on the occasion of various projects for developing hydraulic power in the Pyrenees. In support of the necessity for an agreement the Spanish Government invoked a Note of February 29, 1920, from the French Ministry of Foreign Affairs to the Spanish Ambassador in Paris (Annex 13 to the Spanish Memorial) as well as a *note verbale* dated February 10, 1932, from the French Ambassador at Madrid relating to the diversion of the waters known as Trou de Toro. It is not possible to draw a direct conclusion from this diplomatic correspondence, because it concerns works which comprise for a large part diversion without restoration.

" In a more general way, when a question gives rise to long controversies and to diplomatic negotiations which have been several times begun, suspended and resumed, it is appropriate, in order to interpret the meaning of diplomatic documents, to take into account the following principles.

" As has been recognized by international judicial decisions, both by the Permanent Court of Arbitration (in the case of the *North Atlantic Fisheries* (1910)) and by the International Court of Justice (in the [*Anglo-Norwegian*] *Fisheries Case* (1951)[1] and in the *Case concerning* [*Rights of*] *United States Nationals in Morocco* (1952)[2]), one must not seize upon isolated expressions or ambiguous attitudes which do not alter the legal positions taken by States. All negotiations tend to take on a global character; they bear at once upon rights—some recognized and some contested—and upon interests; it is normal that when considering adverse interests, a Party does not show intransigence with respect to all of its rights. Only thus can it have some of its own interests taken into consideration.

" Further, in order for negotiations to proceed in a favourable climate, the Parties must consent to suspend the full exercise of their rights during the negotiations. It is normal that they should enter into engagements to this effect. If these engagements were to bind them unconditionally until the conclusion of an agreement, they would, by signing them, lose the very right to negotiate; this cannot be presumed.

" It is important to keep these considerations in mind when drawing legal conclusions from diplomatic correspondence.

" In this case, it is certain that Spain and France have always maintained their essential theses concerning the necessity for prior agreement. As the Spanish Memorial recognizes (p. 35), neither of the two Governments has ever modified the position that it has taken from the beginning. The French Government has in particular restated its own position on several occasions, as shown in the dispatch of May 1, 1922 (Annex 25 of the Spanish Memorial), and in the conversations set forth in a report of the meeting of August 5, 1955, of the Mixed Commission of Engineers (Annex 39 of the Spanish Memorial). The Tribunal . . . has not found in the diplomatic correspondence any elements which involve recognition by France of the Spanish Government's thesis that the execution of works such as those envisaged in the present case is dependent upon a prior agreement between the two Governments.

" (b) *The Agreement of* 1949.—19. But a special place must be given to an Agreement concluded in 1949, to which the Spanish case attaches considerable importance.

" At the time of the meeting of the session of January 31–February 3, 1949, of the International Commission of the Pyrenees, the question of Lake Lanoux was brought up under the item ' other business ' on the agenda, by the French delegation, who proposed the constitution of a mixed Commission of Engineers. The Spanish delegation accepted the constitution of the Commission ' which shall undertake to study the matter and report to the respective Governments, it being understood that the present state of affairs is not to be modified until the Governments shall have decided otherwise by common accord ' (Annex 31 (1) of the Spanish Memorial). On March

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[1] *I.C.J. Reports*, 1951, p. 116; *International Law Reports*, 1951, Case No. 36.]

[2] *I.C.J. Reports*, 1952, p. 176; *International Law Reports*, 1952, Case No. 51.]

13, 1950, the Spanish Government, in a *note verbale* addressed to the French Government, suggested that the installation at Lake Lanoux of water-measuring apparatus constituted a breach of the Agreement. Then France drew up another scheme which would ensure a partial restoration of the water, which was notified in accordance with Article 11 of the Additional Act of May 26, 1866. In response to a *démarche* by the Spanish Embassy at Paris, the French Government by a Note dated June 27, 1953, agreed to the meeting of the Mixed Commission of Engineers envisaged at the meeting of the International Commission for the Pyrenees in 1949. Furthermore, the Note stated:

‘ Although the Additional Act of Bayonne of May 26, 1866, which governs the matter, in particular by Article 11 thereof, does not provide that works which might affect the water system shall be suspended on the request of the other Party, the Minister for Foreign Affairs most willingly gives the Spanish Embassy the assurance that nothing has been or is about to be undertaken in regard to Lake Lanoux.’ (Annex 37 of the Spanish Memorial.)

“ In 1954, the Prefect of the Department of Pyrénées Orientales, acting on the instructions of his Government, brought to the notice of the Governor of Gerona that an essential modification had been effected to the French scheme, which now provided for the restoration of the diverted water, and he added that therefore ‘ as the present state of affairs is not being modified, the obligations undertaken at the time of the meeting of the International Commission for the Pyrenees at Madrid in February 1949 are being observed.’ (Annex 8 of the French Memorial). To a Spanish Note of April 9, 1954, the French Ministry of Foreign Affairs replied by a *note verbale* of July 18, 1954 (Annex 9 of the French Memorial). It stated that ‘ contrary to what the Spanish Embassy asserts in the penultimate paragraph of its Note of April 9, 1954, the Ministry of Foreign Affairs did not, in its Note of June 27, 1953, give an assurance “ that such works would not be commenced before the meeting of the Mixed Commission of Engineers ” but, more precisely, that nothing had been or was about to be undertaken in regard to Lake Lanoux, without making the commencement of the works subject to the results of the labours of the Commission.’ Moreover, the Note adds that the Spanish riparian owners of the Carol were not to suffer any damage: ‘ Article 11 of the Additional Act cannot be invoked by either party and the French authorities are in no way bound to make the commencement of the work wait upon the meeting of the Mixed Commission arranged at the International Commission for the Pyrenees in 1949.’ The Mixed Commission of Engineers met at Perpignan on August 5, 1955, and reached no result. In reply to a Spanish *note verbale* of August 19, 1955 (Annex 40 of the Spanish Memorial), which on the basis of previous obligations denied that the French Government had the right to execute the projected works, the latter Government on October 3, 1955, renewed its assurance to the Spanish authorities ' that no work has been or will be undertaken which might modify the water system on the Spanish slopes of the Pyrenees before the Commission for the Pyrenees meets at Paris on November 3 next. Certain ancillary works which had been begun have been suspended.' (Annex 41 of the Spanish Memorial.) With the meeting of the International Commission for the Pyrenees the negotiations were to take another course; the two delegations recorded their disagreement on important points of law, but it was decided that a new Commission, the Special Mixed Commission, was to meet at Madrid on December 12, 1955, in order ' to draw up a scheme for the utilization of the waters of Lake Lanoux ' (Annex 12 of the French Memorial). At the same time, the French delegation made it clear that ' if, within three months from today, the Commission whose meeting is provided for in the *procès-verbal* has not reached a conclusion, the French authorities will resume their freedom of action within the limits of their rights '. The Special Mixed Commission held its first meeting at Madrid on December 12, 1955, and a second meeting at Paris on March 2, 1956, without arriving at any result and without any new obligations being undertaken.

" Examination of the diplomatic correspondence shows then that three distinct obligations (before the arbitration proceedings) were undertaken by the French Government. The two last, that of October 3, 1955, and that of November 14, 1955, were for a limited duration; that of 1949 did not mention any period of duration—that is why it has a special importance in the Spanish argument.

" 20. One point alone is not contested: the obligation had a valid existence; but the Parties are in accord neither as to its duration nor as to its scope.

" It is not to be doubted that each of the Parties understands that obligation in the light of its own interpretation of the Treaty and of the Additional Act of 1866. France was able to form the view that, as Spain did not have the right to approve or disapprove, and seeing that she could regard the proposed works as conforming with the basic rules of the Treaties, she was not bound to suspend the execution of the works; from that point of view, the agreement of 1949 was a measure which was preparatory to negotiations and which had no meaning except in its concrete framework. This position had been taken up in 1922 by France, who in a Note dated January 5, 1922 (Annex 21 of the Spanish Memorial), asserted that the constitution of a survey commission could not in any event prejudice the Treaty of May 26, 1866. Spain, on the other hand, was able to form the view that, in any circumstances, France was bound not to carry out any work without her consent and that, in consequence, the agreement of 1949, far from giving rise to a new obligation, did no more than confirm a pre-existing general obligation. This difference of viewpoint also explains why the Parties differed as to the extent of their respective liabilities. It appears that the French Government . . . considered sometimes that it was only bound to ensure for the Carol a course and a flow equivalent to its natural course and flow, sometimes that it was only bound not to divert the waters. Spain, on the contrary, all along took the view that France must not undertake any work which, whether closely or remotely, had a direct or indirect connection with the development project.

" The good faith of both Parties being absolutely unchallenged, it falls to the Tribunal to make an objective search for the full significance of the obligation; it is not necessary in fact that it should determine the scope thereof; it will suffice to establish its duration.

In view of the circumstances surrounding its conclusion, it is normal to place this agreement within the framework of diplomatic negotiations. It was brought about by an act of the International Commission of the Pyrenees, which possesses no power of its own to decide questions which are submitted to it, and whose competence is limited to making studies and giving information. The agreement contained not only the pledge to maintain the present state of affairs, but above all and essentially it established a Mixed Commission of Engineers whose rather vague mandate was to study the question of Lake Lanoux and to submit the result of its labours to the Governments. The pledge to maintain the *status quo* therefore appears to be an accessory consequence of the task entrusted to this Commission. The maintenance of the *status quo* is therefore, in some manner, a provisional measure which could last only on condition that the Mixed Commission of Engineers showed some real activity. But this Commission, after its first meeting held at Gerona on August 29 and 30, 1949, became dormant after having done no useful work at all. The engagement entered into by the French Government came to a normal end at the moment when, faced with this default, it had recourse to a procedure, provided for by treaty, for submitting to Spain a new scheme which comprised, unlike all the preceding ones, the restitution, at first partial and then total, of the diverted waters. Nevertheless, some doubts may persist, as both the French Note of June 27, 1953, and that of July 18, 1954, allude to a mixed Commission of engineers; and this body met at Perpignan on August 5, 1955, to put on record that it was definitely unable to accomplish anything. After this setback, it may be regarded as certain that the Commission disappears as an instrument for study and negotiation and that the obligations connected with its existence disappear with it. The International Commission of the Pyrenees met in November 1955 and set up fresh negotiating machinery, a Special Mixed Commission of new composition of which one of the Governments had fixed the authority at a period of three months. No engagement similar to that of 1949 was entered into. The agreement of 1949, therefore, could not prolong its effect beyond the existence of the Mixed Commission of Engineers, unless it was to be of indefinite duration. But in this last hypothesis it would lose its provisional character; it would subordinate the very right to execute the works to the necessity for an agreement, whereas such an agreement was simply to mark the moment when their execution might be begun.

" *B. Other obligations flowing from Article* 11 *of the Additional Act.*

" 21. Article 11 of the Additional Act imposes on the States in which it is proposed to erect works or to grant new concessions likely to change the course or the volume of a successive watercourse a double obligation. One is to give prior notice to the competent authorities of the frontier district; the other is to set up machinery for dealing with compensation claims and safeguards for all interests involved on either side.

" The first obligation does not call for much comment, since its sole object is to permit the carrying out of the second. In any event, the possibility of prejudicing the course or the volume of the water mentioned in Article 11 cannot in any case be left exclusively to the discretion of the State which proposes to execute those works or to grant new concessions; the assertion of the French Government that the projected works can cause no prejudice to the Spanish riparian owners is, despite what has been said in argument (French Memorial, p. 36) not sufficient to relieve that Government from any of the obligations contained in Article 11 (see the *note verbale* of July 18, 1954, from the French Ministry of Foreign Affairs to the Spanish Embassy: Annex 9 of the French Memorial, p. 100). A State which is liable to suffer repercussions from work undertaken by a neighbouring State is the sole judge of its interests; and if the neighbouring State has not taken the initiative, the other State cannot be denied the right to insist on notification of works or concessions which are the object of a scheme.

" It has not been disputed that France has, in regard to the development of Lake Lanoux, complied with the obligation to give notice.

" 22. The content of the second obligation is more difficult to determine. The ' claims ' mentioned in Article 11 are related to the various rights protected by the Additional Act, but the essential problem is to ascertain how ' all the interests that may be involved on both sides ' ought to be safeguarded.

" It must first be determined what are the ' interests ' which have to be safeguarded. A strict interpretation of Article 11 would permit the reading that the only interests are those which correspond with a riparian right. However, various considerations which have already been explained by the Tribunal lead to a more liberal interpretation. Account must be taken of all interests, of whatsoever nature, which are liable to be affected by the works undertaken, even if they do not correspond to a right. Only such a solution complies with the terms of Article 16, with the spirit of the Pyrenees Treaties, and with the tendencies which are manifested in instances of hydroelectric development in current international practice.

" The second question is to determine the method by which these interests can be safeguarded. If that method necessarily involves communications, it cannot be confined to purely formal requirements, such as taking note of complaints, protests or representations made by the downstream State. The Tribunal is of the opinion that, according to the rules of good faith, the upstream State is under the obligation to take into consideration the various interests involved, to seek to give them every satisfaction compatible with the pursuit of its own interests, and to show that in this regard it is genuinely concerned to reconcile the interests of the other riparian State with its own.

" It is a delicate matter to establish whether such an obligation has been complied with. But, without substituting itself for the Parties, the Tribunal is in a position to proceed to that decision on the basis of elements furnished by the negotiations.

" 23. In the present case, the Spanish Government reproaches the French Government for not having based the development scheme for the waters of Lake Lanoux on a foundation of absolute equality: this is a double reproach. It attacks simultaneously form and substance. As to form, it is said that the French Government has imposed its scheme unilaterally without associating the Spanish Government with it in a common search for an acceptable solution. Substantively, it is alleged that the French scheme does not maintain a just balance between French interests and Spanish interests. The French scheme, in the Spanish view, would serve perfectly French interests, especially those related to the production of electric energy, but would not take into sufficient consideration Spanish interests in connection with irrigation. According to the Spanish Government, the French Government refused to take into consideration schemes which, in the opinion of the Spanish Government, would have involved a very small sacrifice of French interests and great advantages for the Spanish rural economy. Spain bases its arguments on the following facts in particular. In the course of the work of the Special Mixed Commission at Madrid (September 12–17, 1955), the French delegation compared three schemes for the development of Lake Lanoux and remarked on the considerable advantages which the first scheme (which was similar to the final scheme) presented, in its view, over the other two. The Spanish delegation having no special objection in regard to the latter schemes, declared itself ready to accept either of the two. The French delegation did not feel itself able to depart from the execution of scheme No. 1, which was more favourable to French interests and was founded, according to the delegation, on French rights (French Memorial, pp. 117 *et seq.*, 127).

" On a theoretical basis the Spanish argument is unacceptable to the Tribunal, for Spain tends to put rights and simple interests on the same plane. Article 11 of the Additional Act makes this distinction and the two Parties have reproduced it in the basic statement of their contention at the beginning of the *Compromis:*

> " ' Considering that in the opinion of the French Government the carrying out of its scheme . . . will not harm any of the rights or interests referred to in the Treaty of Bayonne of May 26, 1866, and in the Additional Act of the same date,
>
> " ' considering that, in the opinion of the Spanish Government, the carrying out of that scheme will harm Spanish rights and interests.'

" France is entitled to exercise her rights; she cannot ignore Spanish interests.

" Spain is entitled to demand that her rights be respected and that her interests be taken into consideration.

"As a matter of form, the upstream State has, procedurally, a right of initiative; it is not obliged to associate the downstream State in the elaboration of its schemes. If, in the course of discussions, the downstream State submits schemes to it, the upstream State must examine them, but it has the right to give preference to the solution contained in its own scheme provided that it takes into consideration in a reasonable manner the interests of the downstream State.

" 24. In the case of Lake Lanoux, France has maintained to the end the solution which consists in diverting the waters of the Carol to the Ariège with full restitution. By making this choice France is only making use of a right; the development works of Lake Lanoux are on French territory, the financing of and responsibility for the enterprise fall upon France, and France alone is the judge of works of public utility which are to be executed on her own territory, save for the provisions of Articles 9 and 10 of the Additional Act, which, however, the French scheme does not infringe.

" On her side, Spain cannot invoke a right to insist on a development of Lake Lanoux based on the needs of Spanish agriculture. In effect, if France were to renounce all of the works envisaged on her territory, Spain could not demand that other works in conformity with her wishes should be carried out. Therefore, she can only urge her interests in order to obtain, within the framework of the scheme decided upon by France, terms which reasonably safeguard them.

" It remains to be established whether this requirement has been fulfilled.

" In whatever fashion one regards the course of dealings covering the period 1917–1954, it is beyond doubt that the French position became very flexible and even transformed. From a promise of compensation but without restoration of diverted water, it passed to a partial restoration; then, in 1954, to complete restoration. In 1955, in the proposals which are an integral part of the scheme itself, France added to complete restoration the guarantee of a minimum restoration of 20 million cubic metres; that offer was possible only within the framework of the diversion of water from the Atlantic into the Mediterranean, since, moreover, France was going to ensure the complete restoration of the waters of the Carol. In 1956, at the time of the second meeting of experts, in March, France made two new proposals to Spain. The restoring of the water by the French, instead of following the rhythm of the natural feeding of Lake Lanoux, would be modified according to the needs of Spanish agriculture; during the irrigation period, all the water would be diverted into the Carol while during the winter period, on the other hand, France would reduce the flow so as to ensure over the year an equality of water diverted and restored (a system known as 'running account of water'). On the other hand, an inter-annual reserve would permit Spain to draw from a supplementary source in an exceptionally dry year (Annex 11 of the French Memorial, p. 147). On March 5, 1956, the president of the Spanish delegation replied, according to the *procès-verbal*, as follows:

> " 'The new proposals formulated by the French delegation cannot be taken into consideration because any solution which pre-supposes the diversion of the waters of Lake Lanoux out of their natural course is unacceptable to Spain. He adds that the attitude of the Spanish delegation does not result from a desire to obtain compensation either by an increase in the volume of water guaranteeing Spanish irrigation or by more electric energy, so that it is quite useless to discuss the volume of water proposed by way of compensation, seeing that there is no agreement on the basic question.' (French Memorial, p. 156.)

" When one examines the question of whether France, either in the course of the dealings or in her proposals, has taken Spanish interests into sufficient consideration, it must be stressed how closely linked together are the obligation to take into consideration, in the course of negotiations, adverse interests and the obligation to give a reasonable place to these interests in the solution finally adopted. A State which has conducted negotiations with understanding and good faith in accordance with Article 11 of the Additional Act is not relieved from giving a reasonable place to adverse interests in the solution it adopts simply because the conversations have been interrupted, even though owing to the intransigence of its partner. Conversely, in determining the manner in which a scheme has taken into consideration the interests involved, the way in which negotiations have developed, the total number of the interests which have been presented, the price which each Party was ready to pay to have those interests safeguarded, are all essential factors in establishing, with regard to the obligations set out in Article 11 of the Additional Act, the merits of that scheme.

"Having regard to all the circumstances of the case, set out above, the Tribunal is of opinion that the French scheme complies with the obligations of Article 11 of the Additional Act.

"For these reasons:

"The Tribunal decides to reply affirmatively to the question set out in the first Article of the *Compromis*. In carrying out, without prior agreement between the two Governments, works for the utilization of the waters of Lake Lanoux in the conditions mentioned in the Scheme for the Utilization of the Waters of Lake Lanoux notified to the Governor of the Province of Gerona on January 21, 1954, and brought to the notice of the representatives of Spain on the Commission for the Pyrenees at its session held from November 3 to 14, 1955, and according to the proposals submitted by the French delegation to the Special Mixed Commission on December 13, 1955, the French Government was not committing a breach of the provisions of the Treaty of Bayonne of May 26, 1866, and the Additional Act of the same date."

[Report: *Sentence du Tribunal arbitral* (*Affaire du Lac Lanoux*), November 16, 1957 (in French).[1]]

State Territory—Rivers—International Rivers—Utilization of Flow of—Under Treaty—Purported "Reservation" Relating to Municipal Allocation of Water Provided under Treaty—Constitutional Limitation on—The Law of the United States of America.

See p. 557 (*Power Authority of the State of New York* v. *Federal Power Commission*).

III.—Territorial Waters

i.—Nature of the Maritime Belt

State Territory—Territorial Waters—Nature of—Importation of Goods by Sea—Whether Importation Effected by Entry into Territorial Waters from High Seas—The Law of Zanzibar.

GOKULDAS KHIMJI HINDOO *v.* R.

Zanzibar, High Court. May 31, 1957.

(Windham C.J.)

THE FACTS.–The appellant boarded the S.S. *Karanja* at Zanzibar, where in pursuit of his trade he sold a passenger eleven watches. The passenger took the watches and, having no cash, went away to find the purchase price somewhere in the ship, leaving with the appellant as security two pieces of gold. By the time the appellant had to disembark the passenger had not returned, and so the appellant went ashore with the gold. The appellant, having been prosecuted and convicted on three counts in respect of the unlawful importation of the gold, appealed. It was argued on his behalf, *inter aila*, that, in the circumstances of the case, the appellant had not imported the gold within the meaning of " importation " contained in the Customs Management Decree, s. 3, and the Interpretation Decree, 1953, s. 2, since " importation ", it was contended, meant bringing goods within territorial waters and this had been done before the appellant obtained possession of the gold.

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[1] See also *A.J.*, 53 (1959), pp. 37–49, 62–66 and 156–171.

Held: that the appeal must be dismissed. Importation was a continuing act beginning at the outer limit of territorial waters and was completed only when the goods were landed and, where a Customs post existed, passed by the Customs.

After referring to matters appertaining solely to municipal law, Windham C.J. said: " The remaining ground of appeal involves a point of law and interpretation. An essential element in all three counts on which the appellant was convicted was that he ' imported ' the gold. The definition of ' importing ' and ' to import ' in s. 3 of the Customs Management Decree, which applies to the two counts under that Decree, and in s. 2 of the Interpretation Decree, 1953, which applies to the count under the Import Controls Decree, 1954, are similar though not identical in terms. The former defines the expression as meaning

> ' the bringing of goods into, or within the Protectorate by sea or air from a foreign port.'

The latter defines it as meaning

> ' to bring goods into or within the limits of the Protectorate from a foreign port.'

Now since the territorial limits of the Zanzibar Protectorate extend, as the Crown concedes, to include the territorial waters up to the three-mile limit, it is argued that the appellant did not import, nor take any part in importing, the two pieces of gold into the Protectorate, since they had already been imported as soon as the ' Karanja ' came within three miles of the Zanzibar shores, and thereafter could not be imported over again. This is an attractive forensic argument and if the statutory definitions are to be construed literally it might seem to have substance. But all definitions, including those in criminal statutes, must, though without doing violence to their language, be construed in the light of their context and of the general objects of the enactments in which they appear; and moreover these definitions in particular are by express provision only to be applied to the expressions defined ' unless there is something in the subject or context repugnant to such construction.' The relevant principles of construction will be found set out in *Maxwell's Interpretation of Statutes* (10th edn.) at pp. 262–285. Now it is quite clear from a general perusal of the Customs Management Decree and of the Imports Control Decree, 1954, that a paramount object of each of them is to prevent certain kinds of goods from entering the Protectorate, that is to say, entering the actual island of Zanzibar (or Pemba) and not merely the territorial waters, without the payment of the duty or the possession of a licence by the person whom I will loosely term the importer, that is to say, the person who brings or seeks to bring the goods ashore. Such an object could be defeated in a very easy and widespread manner wholly at variance with the purpose of the legislation if the interpretation which learned counsel for the appellant seeks to place upon the expression ' to import ' were adopted, namely, that the importation takes place once and for all, so far as importation by sea is concerned, the moment that the vessel bearing the goods comes within three miles of the Zanzibar coast. For if that were so, then any person going on board the ship upon her coming into harbour could with impunity take the goods ashore without declaring them, since he would not be ' importing ' them at all because they would have already been imported three miles out to sea, long before he ever boarded the vessel or saw them. That would be the case, as the learned trial Magistrate pointed out, whenever a person went on board and bought controlled or dutiable articles from a ship's shop and came ashore without declaring them. Clearly this would defeat the intention of the legislature. That the legislature's intention was otherwise appears, moreover, not merely from a general perusal of the Customs Management Decree, but from a reference to more than one particular section of it. Section 46, for instance, provides that

> ' for the purpose of securing the due importation of goods . . . the goods shall be entered, unshipped and may be examined.'

This necessarily implies that the importation of the goods has not taken place, or at least has not been completed, until they are unshipped, which is quite incompatible with any argument that the importation must be deemed to have taken place once and for all three miles out at sea. Again, s. 47 (1) empowers the British Resident to prohibit or regulate the

> ' importation into the Protectorate, or any area or place therein, of any goods or class of goods.'

Any ' area or place ' necessarily implies somewhere ashore, or at least somewhere well within the three-mile territorial water limit. But if the importation had occurred once and for all three miles out at sea there could be no importation into such an ' area or place '. And the provisions of s. 51, which have been relied on by both sides in support of their respective contentions, are very revealing. The section reads as follows:

> ' 51. Goods the importation of which is prohibited, restricted or regulated on board a ship calling at any port in the Zanzibar

> Protectorate, but intended for and consigned to some port or place outside the Zanzibar Protectorate, shall not be deemed to be unlawfully imported into the Zanzibar Protectorate if the goods are specified on the ship's manifest, and are not transhipped or landed in the Zanzibar Protectorate, or are transhipped or landed by authority.'

Section 51 certainly implies that goods can be 'imported' before they come ashore, for otherwise its provisions would be unnecessary. But it also clearly implies, to my mind, that if prohibited or restricted goods from the ship in harbour *are* transhipped or landed in the Zanzibar Protectorate without authority then they will be deemed to have been unlawfully imported. But if the importation took place once and for all three miles out at sea, before anything unlawful had been done in respect of them (the section providing that their mere presence on the ship does not make them unlawful imports) then there could be no subsequent unlawful importation, since there could be no subsequent importation at all. Clearly the appellant's interpretation cannot be reconciled with s. 51.

"Upon a careful consideration of the manifest objects of the legislature and the provisions of particular sections such as I have examined, it seems clear to me that 'importation' for the purposes of the Customs Management Decree—and the same considerations apply to the Imports Control Decree, 1954—is a continuing act which, while it may begin when the vessel containing the goods in question enters the territorial waters of the Protectorate, continues until the goods, if landed at all, have been landed and, where there is a Customs post, have passed the Customs barrier. If the word is so interpreted, then the appellant certainly imported the two pieces of gold in question.

"This interpretation does not in my view do violence to the definitions of the expressions 'to import' or 'importing' in the Customs Management Decree and the Interpretation Decree, 1953, even assuming what I think there is no need to assume, namely, that there is nothing in the context of the charging sections that is repugnant to those expressions being limited strictly to the framework of the definitions. For each of those definitions defines the expression as meaning the bringing of goods 'into or within the limits of the Protectorate'. The meaning of the words 'or within' is not quite clear, but they must be assumed to have some meaning and must, at least *prima facie*, be assumed to have a meaning different from the word 'into' and not merely redundant or tautologous. They may in my view properly be held to cover the act of the appellant in the present case in bringing the pieces of gold ashore, even if the word 'into' be limited (though I see no reason for limiting it) to the first bringing of them within the territorial waters of the Protectorate."

[Report: *Eastern Africa Law Reports* (1957), p. 203.]

VIII.—International Canals

State Territory—International Canals—Tolls—Fixing of—Judicial Review—The Panama Canal—The Law of the United States of America.

PANAMA CANAL CO. *v.* GRACE LINE, INC., *ET AL.*

United States, District Court, Southern District, New York.
June 28, 1956.

Court of Appeals, Second Circuit. April 8, 1957.

Supreme Court. April 28, 1958.

(Warren C.J.; Black, Frankfurter, Douglas, Burton, Clark, Harlan, Brennan, Whittaker JJ.)

THE FACTS.—This was an action by certain American shipping companies using the Panama Canal to compel the Panama Canal Company to prescribe new tolls for the use of the Canal and to refund tolls which it was alleged had been illegally collected in the past. The plaintiffs maintained that the enactment of the Act of September 26, 1950, §§ 11 and 12, (64 Stat. 1038, 2 Canal Zone Code §§ 411 and 412, the text of which is quoted below in the opinion of the Supreme Court) required the fixing of new rates in accordance with the formula contained in § 412; that the plaintiffs, as users of the Canal, had a right to transit at the rate of tolls so established; that application of the formula in § 12 would result in a reduction in rates; and that the continuation of the previous tolls constituted an unlawful exaction for the exercise of the right of transit. On the defendant's motion to dismiss,

Held (by the District Court): that the motion to dismiss must be granted and the complaint dismissed. The Act of September 26, 1950, did not require, but only authorized, a change in the tolls for the use of the Canal. The Court would not compel the exercise of discretion by the Panama Canal Company, any decision by which would thereafter be subject to review by the President. The plaintiffs moreover lacked the right to sue. [Report: 143 F.Supp. 539.]

On appeal,

Held (by the Court of Appeals): that the decision of the Court below must be reversed and the case sent back to the District Court. The text and legislative history of the Act of September 26, 1950, indicated that the Panama Canal Company was expected to propose changes in tolls for Presidential approval whenever it became apparent that tolls were substantially out of line with costs. While it had been given discretion to defer proposals of change for short periods of time where it believed that the discrepancy between costs and revenue was due to a temporary factor, it could not delay such proposals unreasonably long. Since the Canal Company was charged with the responsibility of setting rates and did not act merely as an adviser to the President, its failure to act was subject to judicial review. [Report: 243 F.2d 844.]

The Panama Canal Company petitioned for *certiorari* to the Supreme Court, and the petition was granted (355 U.S. 810, 2 L.Ed.2d 29, 78 Sup. Ct. 37 (1957)).

Held (by the Supreme Court): that the decision of the Court of Appeals must be reversed. The initiation of a procedure for readjustment of the tolls of the Panama Canal was a matter which the Congress had left to the discretion of the Panama Canal Company. While the construction put on the statute governing tolls by the Panama Canal Company was not necessarily the correct one, the question of a change in tolls was " so wide open and at large " as to be left at that stage to agency discretion.

The Court said (*per* Douglas J.): " Petitioner was created by Congress in 1950. 64 Stat. 1041. It holds the assets of the Panama Canal and has the duty of operating and maintaining it. It may sue and be sued in its corporate name. Canal Zone Code, Tit. 2, § 248, 62 Stat. 1078, as amended, 64 Stat. 1038. Prior to 1950 the Panama Canal was operated by the President through the Governor of the Canal Zone. 37 Stat. 561. Business activities incident to that operation were conducted by the Panama Railroad Co., a federal corporation, 62 Stat. 1076, which was an agency and instrumentality of the United States, *ibid.* Those auxiliary business activities were ' designed and used to aid ' in the management and operation of the Canal. See *New York ex rel. Rogers* v. *Graves*, 299 U.S. 401, 406. Since 1950 all those business activities have been carried on by petitioner, the Panama Canal Co., all of whose stock is held by the President or his designee, Canal Zone Code, Tit. 2, § 246 (a), the present designee being the Secretary of the Army.

" The Hay-Pauncefote Treaty, proclaimed February 22, 1902, 32 Stat. 1903, provided in Article III that the ' charges of traffic shall be just and equitable.' Under the original Panama Canal legislation, 37 Stat. 562, the President was authorized to fix the tolls on six months' notice by proclamation. Under that Act the tolls were to be not less than 75¢ nor more than $1.25 per net registered ton. In 1937 the ceiling was lowered to $1 per net vessel ton, the minimum of 75¢ being retained. 50 Stat. 750. When President Truman in 1948 sought to increase the toll rate to the statutory maximum, 62 Stat. 1494, Congress asked the President to withhold action until the entire problem could be studied. See H. R. Rep. No. 1304, 81st Cong., 1st Sess. 7. President Truman agreed by revoking his proclamation, 64 Stat. A433, and agreeing to the study.

" On the basis of that study Congress separated the governmental functions of the Canal from its transit and business functions, the latter to be operated by petitioner. See H. R. Doc. No. 460, 81st Cong., 2d Sess.; H.R. Rep. No. 2935, 81st Cong., 2d Sess. It was learned that if the Canal were operated at cost, the tolls would have to be raised to a prohibitive level. Congress therefore undertook to reduce the financial burden that was imposed upon the users of the Canal. The interest on the capital investment of the United States was reduced and interest accrued during the construction period was to be disregarded for the purposes of computing interest on the capital investment. Free transits of government-owned vessels were eliminated for accounting purposes. The supporting business activities previously operated by the Panama Railroad Co. were to bear a proportionate share of the cost of the Canal Zone Government from which they had been exempted. H.R. Doc. No. 460, 81st Cong., 2d Sess. And the ' net costs of operation of the Canal Zone Government ' were declared by Congress ' to form an integral part of the costs of operation of the Panama Canal enterprise as a whole'. See Canal Zone Code, Tit. 2, § 246 (e), 64 Stat. 1041.

" It was to carry out these provisions that the Congress merged the functions of operating and maintaining the Canal with the business activities formerly carried on by the Panama Railroad Co. At the same time, the Congress, by the Act of September 26, 1950, 64 Stat. 1038, Canal Zone Code, Tit. 2, §§ 411, 412, made changes in the provisions for the fixing of tolls.

" Section 411 provides:

> ' The Panama Canal Company is authorized to prescribe and from time to time change (1) the rules for the measurement of vessels for the Panama Canal, and (2), subject to the provisions of the section next following, the tolls that shall be levied for the use of the Panama Canal: *Provided, however,* That the rules of measurement, and the rates of tolls, prevailing on the effective date of this amended section shall continue in effect until changed as provided in this section: *Provided further,* That the said corporation shall give six months' notice, by publication in the Federal Register, of any and all proposed changes in basic rules of measurement and of any and all proposed changes in rates of tolls, during which period a public hearing shall be conducted: *And provided further,* That changes in basic rules of measurement and changes in rates of tolls shall be subject to, and shall take effect upon, the approval of the President of the United States, whose action in such matter shall be final and conclusive.'

" Section 412 (b) provides the formula which petitioner must employ in computing new tolls:

> ' Tolls shall be prescribed at a rate or rates calculated to cover, as nearly as practicable, all costs of maintaining and operating the Panama Canal, together with the facilities and appurtenances related thereto, including interest and depreciation, and an appropriate share of the net costs of operation of the agency known as the Canal Zone Government. In the determination of such appropriate share, substantial weight shall be given to the ratio of the estimated gross revenues

from tolls to the estimated total gross revenues of the said corporation exclusive of the cost of commodities resold, and exclusive of revenues arising from transactions within the said corporation or from transactions with the Canal Zone Government.'

" By § 412 (c) vessels operated by the United States, including naval ships, may ' in the discretion of the President ' be required to pay tolls. In the event they do not, tolls shall nevertheless be computed for that use and the amounts thereof ' shall be treated as revenues of the Panama Canal Company for the purpose of prescribing the rates of tolls.'

" A Committee of the Congress in 1953 directed petitioner to determine the adequacy of the canal tolls. See H. R. Rep. No. 889, 83d Cong., 1st Sess. 10. Petitioner in reply stated that no increase in tolls was at that time indicated but that, should canal traffic decline, and should the decline appear likely to continue for an appreciable length of time, ' the Company will promptly take the steps available to it to increase the rates of tolls.'[1]

"[1] The reply was in the form of a letter to the Speaker of the House from J. S. Seybold, President of petitioner, 100 Cong. Rec. (daily ed.) A 1995, stating, *inter alia*:

' An initial study of the adequacy of tolls rates under the new legislation has now been completed by the Company. This study reveals that, largely as a result of the very high level of traffic using the canal in recent years without a corresponding increase in costs, the tolls rates that have been in effect since 1938 are still sufficient to cover all operating costs, including interest and depreciation, as required by the tolls statutes. This conclusion is based on the assumption that the Director of the Bureau of the Budget, who under the law must approve the valuation of the assets transferred to the Company from the agency formerly known as the Panama Canal, will concur generally in the valuations tentatively established by the Company upon which the interest and depreciation requirements for the most part have been based.

' In recent months, chiefly as the result of the cessation of hostilities in Korea, there has been some drop in traffic transiting the canal. The Company's study indicates that a further and more substantial decline in the volume of canal traffic during the next few years is to be expected primarily as the result of changing economic factors affecting world movements of petroleum and its products, iron ore, and coal. It is possible that by sometime during the fiscal year 1955 canal traffic will have declined to a point where revenues at existing rates will no longer be adequate to cover all charges. Should this condition materialize and should it appear reasonably certain that it will continue for an appreciable length of time, the Company will promptly take the steps available to it to increase the rates of tolls.

' In computing the tolls requirements for purposes of this study the Company has made what it believes to be an adequate allowance for depreciation giving due consideration to the factors of obsolescence and potential inadequacy of the capital assets includable in the tolls base. Extimates of the service lives used for the principal classes of plant and equipment have been approved by independent engineering consultants. A depreciation rate of 1 percent per annum from date of service has been used for the investment in the channel, harbors, lock structures, dams, breakwaters and similar long-lived facilities. Including this accrual the annual depreciation requirements of the Company are presently approximately $9 million.

' The tentative valuations used in the study result in a net interest-bearing investment of the Government in the Canal enterprise, as defined by law, of $274 million. At the rate of 2·342 percent currently established for repayment of interest costs as required by the Company's charter annual interest payments to the Treasury will amount to $6.4 million. It is expected that this amount will increase somewhat in the future years as the result of the generally rising trend of long term interest rates.

' No depreciation or return on the capital value of interest during the 1904–14 construction period has been included in the study because the legislative history of the present tolls statutes clearly indicates the intent of the Congress to exclude this

" Petitioner, being a wholly owned government corporation, is subject to annual audit by the General Accounting Office. 59 Stat. 599, 31 U. S. C. § 850. And it is provided that the Comptroller General shall report on this audit to the Congress with ' such comments and information as may be deemed necessary to keep Congress informed of the operations and financial condition ' of the corporation, ' together with such recommendations ' as the Comptroller General may deem advisable. 31 U. S. C. § 851.

" The Comptroller General in 1955 expressed the view that the petitioner had allocated too high a share of the costs of the Canal Zone Government, of the corporate overhead, and of interest payments to the operations of the Canal and too little to its supporting or auxiliary activities. H. R. Doc. No. 160, 84th Cong., 1st Sess. According to his method of cost allocation, the canal operations showed a large surplus, the auxiliary or supporting activities a deficit. *Ibid.* He also claimed that the prices charged for the latter activities were inadequate. *Ibid.* He went on to give his construction of § 412 (b) of the Canal Zone Code, which was that the tolls must be computed exclusively on the basis of the cost of operating the Canal without reference to the losses incident to the auxiliary or supporting operations. *Ibid.* He thought this result to be unsound and recommended that § 412 (b) be amended to provide specifically that any losses of the auxiliary or supporting activities be included in the cost basis for the determination of the canal tolls. *Ibid.*

" Petitioner vigorously opposes that construction of § 412 (b), maintaining that the Comptroller's methods of cost allocation and his conclusions violate both sound accounting practices and the Act. Petitioner in particular objects to the Comptroller General's view that the Act requires the computation of toll rates without regard to any deficit in the operation of the auxiliary or supporting business activities. Petitioner concludes that the downward revision of the tolls recommended by the Comptroller General is not in harmony with the congressional program and that no change in the toll formula is needed.

" It was shortly after the Comptroller General's Report for 1954 was submitted to the Congress that respondents instituted this suit.

item entirely from the tolls base. Likewise no provision has been made for amortization of lands and treaty rights because of lack of statutory authority, although these assets have been included in the investment for interest purposes.

' Using the tentative plant valuations developed by the Company and recomputing the operating costs and expenses accordingly, the aggregate net income of the Company from all sources for the 4-year period from the reorganization to June 30, 1955, under present tolls rates is estimated to be approximately $9 million after providing for all charges currently authorized and required by law. As previously indicated however, it appears that a possible decline in volume of Canal traffic coupled with rising interest and wage rates may necessitate an increase in the tolls rates in the near future. Current indications are that such an increase may be necessary by July 1, 1955, in which case public announcement of the new rates would be made 6 months earlier or January 1, 1955, as required by law.' "

" It is, we think, impermissible to conclude that, because petitioner may sue and be sued, this suit can be maintained. We deal here with a problem in the penumbra of the law where generally the Executive and the Legislative are supreme. We do not say, for we are not called upon to do so, that no justiciable issues can arise out of the toll-making procedure for the Panama Canal. All we hold is that the controversy at present is not one appropriate for judicial action.

" Section 10 of the Administrative Procedure Act, 60 Stat. 243, 5 U. S. C. § 1009, excludes from the categories of cases subject to judicial review ' agency action ' that is ' by law committed to agency discretion.' We think the initiation of a proceeding for readjustment of the tolls of the Panama Canal is a matter that Congress has left to the discretion of the Panama Canal Co. Petitioner is, as we have seen, an agent or spokesman of the President in these matters. It is ' authorized ' to prescribe tolls and to change them. Canal Zone Code, Tit. 2, § 411. But the exercise of that authority is far more than the performance of a ministerial act. As we have seen, the present conflict rages over questions that at heart involve problems of statutory construction and cost accounting: whether an operating deficit in the auxiliary or supporting activities is a legitimate cost in maintaining and operating the Canal for purpose of the toll formula. These are matters on which experts may disagree; they involve nice issues of judgment and choice, *New York* v. *United States*, 331 U. S. 284, 335, which require the exercise of informed discretion. Cf. *United States ex rel. McLennan* v. *Wilbur*, 283 U. S. 414; *Interstate Commerce Commission* v. *Humboldt S. S. Co.*, 224 U. S. 474, 484–485. The case is, therefore, quite unlike the situation where a statute creates a duty to act and an equity court is asked to compel the agency to take the prescribed action. *Cf. Virginian R. Co.* v. *System Federation*, 300 U. S. 515, 551; *Kansas City So. R. Co.* v. *Interstate Commerce Commission*, 252 U. S. 178. We put the matter that way since the relief sought in this action is to compel petitioner to fix new tolls. The principle at stake is no different than if mandamus were sought—a remedy long restricted, *Marbury* v. *Madison*, 1 Cranch 137, 166; *Decatur* v. *Paulding*, 14 Pet. 497, 514–517, in the main, to situations where ministerial duties of a nondiscretionary nature are involved. Where the matter is peradventure clear, where the agency is clearly derelict in failing to act, where the inaction or action turns on a mistake of law, then judicial relief is often available. *Harmon* v. *Brucker*, 355 U. S. 579, is a recent example. There the Secretary of the Army issued less than ' honorable ' discharges to soldiers, based on their activities prior to induction. The Court held that the ' records ', prescribed by Congress as the basis for his action, were only records of military service. But where the duty to act turns on matters of doubtful or highly debatable inference from large or loose statutory terms, the very construction of the statute is a distinct and profound exercise of discretion. See *Work* v. *Rives*, 267 U. S. 175, 183; *Wilbur* v. *Kadrie*, 281 U. S. 206, 219; *United States ex rel. Chicago Great Western R. Co.* v. *Interstate Commerce Commission*, 294 U. S. 50, 62–63. We then must infer that the decision to act or not to act is left to the expertise of the agency burdened with the responsibility for decision.

" We think this case is in that area. The petitioner, as agent of the President, is given questions of judgment requiring close analysis and nice choices. Petitioner is not only agent for the President but a creature of Congress. It is on close terms with its committees, reporting to the Congress, airing its problems before them, looking to Congress for guidance and direction. It is at least arguable that Congress to date has sided with petitioner and against the Comptroller General in construing §§ 411 and 412 of the Code. For Congress, fully advised of the Comptroller General's views in his Report for 1954, approved the budgets for the Panama Canal Co. for 1956, 1957, and 1958, based on petitioner's interpretation of the statute and its methods of accounting and cost allocation, 69 Stat. 235–237, 70 Stat. 322–324, 71 Stat. 78.[1] That does not necessarily mean that the construction of the Act, pressed on us and on Congress by petitioner, is the correct one. It does, however, indicate that the question is so wide open and at large as to be left at this stage to agency discretion.[2] The matter should be far less cloudy, much more clear for courts to intrude."

[Reports: 356 U.S. 309, 2 L.Ed.2d 788, 78 Sup. Ct. 752.]

NOTE.—Although the above decision turns exclusively on issues of municipal law, it has been included in this volume because of the international significance of the Panama Canal. The British Government and certain foreign ship-owners filed briefs as *amici curiae* in the Supreme Court.

International Canals—Suez Canal—Constantinople Convention, 1888—Article 10—Measures Necessary for Safety and Defence of Egypt—Seizure of Goods which Strengthen War Effort of a Country at War with Egypt—The Law of Egypt—Egypt and Israel.

See p. 992 (*The Fedala*).

" [1] Congress has been repeatedly informed of the basic problem involved here, indeed of this very litigation. See, *e.g.*, Reports on Audit of Panama Canal Company and the Canal Zone Government, by the Comptroller General: For the Fiscal Year Ending June 30, 1954, H. R. Doc. No. 160, 84th Cong., 1st Sess. 1–3, 8–9, 12–18; For the Fiscal Year Ending June 30, 1955, H. R. Doc. No. 465, 84th Cong., 2d Sess. 2, 9—10, 17—24; For the Fiscal Year Ending June 30, 1956, H. R. Doc. No. 210, 85th Cong., 1st Sess. 2–5, 15–21. See also, Hearings before the Subcommittee on Panama Canal of the House Committee on Merchant Marine and Fisheries on H. R. 6917, 7645, and 7697, 84th Cong., 1st Sess. 159–165; Hearings before the Subcommittee of the Senate Committee on Interstate and Foreign Commerce on S. 2167, 84th Cong., 2d Sess. 23, 68–70, 89–92, 101–102."

" [2] A bill was introduced in the Senate in 1955, S. 2167, 84th Cong., 1st Sess., by Senator Magnuson which would give judicial review of agency action in fixing tolls. That bill was reported favourably by the Committee, S. Rep. No. 2375, 84th Cong., 2d Sess. But it never came to a vote. See 102 Cong. Rec. 11541, 12791, 13901."

C—MISCELLANEOUS

State Territory—Ship on High Seas as Part of—For Purpose of Claim of Asylum—The Law of the United States of America.

CHING LAN FOO *v.* BROWNELL.

United States, District Court, District of Columbia.

February 8, 1957.

THE FACTS.—This was an action for a declaratory judgment to review an order of the Attorney General denying the plaintiff an adjustment of his status as a permanent resident of the United States under Section 6 of the Refugee Relief Act of 1953 (67 Stat. 403, as amended, 50 U.S.C. App. § 1971d). That statute provides that the Attorney General is to report to the Congress the case of an alien who (a) entered the United States as a *bona fide* non-immigrant; (b) was physically present in the United States on the date of the enactment of the Act, August 7, 1953; (c) is unable to return to his country of origin because of persecution or fear of persecution on account of race, religion, or political opinion; and (d) is otherwise qualified but would be chargeable to an immigration quota which is oversubscribed. If the Congress thereafter approves the granting to the alien of the status of having been lawfully admitted to permanent residence, the Attorney General is authorized to record his admission to that status.

The plaintiff was a native and citizen of China, who had entered the United States as a seaman prior to 1945. He had thereafter shipped out as a seaman on American vessels, and on August 7, 1953, he was so serving on a vessel on the high seas. The Attorney General denied his application for adjustment of status solely on the ground that the requirement of physical presence in the United States is not satisfied by presence on board a vessel flying the American flag.

Held: that judgment must be rendered for the plaintiff, adjudging that he was physically present in the United States on the pertinent date of August 7, 1953. Under international law, a vessel on the high seas was for many purposes regarded as part of the territory of the country whose flag it flew.

The Court said: " The Court is of the opinion that the remedial statute should receive a reasonably liberal construction in order to accomplish its objective. It would be obviously arbitrary and unreasonable to reach the conclusion that a seaman in the position in which the plaintiff finds himself does not come within the Act merely because the vessel on which he was a member of the crew happened to be on the high seas on August 7, 1953, and that another seaman in like position would be eligible for consideration merely because his vessel was in port on that day.

"It seems to me that the reasonable construction of the Act is that the words, 'physically present in the United States' on August 7, 1953, should include any person who arrived in the United States and entered lawfully prior to that date, and who either remained physically present within the continental limits of the United States, or in one of its possessions, or who by reason of his occupation had shipped out on an American vessel which happened to be on the high seas on that date and who came back later.

"In reaching this conclusion, I am in accord with the only reported decision on this precise question, *Shio Han Sun* v. *Barber*, 144 F.Supp. 850, decided in the United States District Court for the Northern District of California, by Judge Edward P. Murphy. It is important to note that the Government did not prosecute an appeal from the decision unfavorable to it in that case. It must be observed also that under international law a vessel on the high seas is, for many purposes, regarded as part of the territory of the country whose flag if flies. I am of the opinion that this should be done in this instance.

"Accordingly, judgment will be rendered for the plaintiff adjudging that the plaintiff is to be regarded as having been physically present in the United States on the pertinent date for the purposes of determining his rights under the Refugee Relief Act . . ."

[Report: 148 F. Supp. 420.]

PART IV

JURISDICTION

A—IN GENERAL. TERRITORIAL AND PERSONAL

I.—Territorial

i.—Over Territory in General and Persons and Property Situated therein. Territorial Limits of Jurisdiction. Expropriation of Alien Property

[*See also* PART II, STATES AS INTERNATIONAL PERSONS: A, IV, Recognition of Acts of Foreign States and Governments, *and* D, Recognition of States and Governments.]

Jurisdiction—Territorial Limits of—Nationalization of Company Incorporated Abroad—Whether " Successor " of Nationalized Company Entitled to Institute Proceedings for Recovery of Debt in Country of Forum—Rights of Former Shareholders of Nationalized Company When Resident in Country of Forum—The Law of Austria.

See p. 40 (*Nationalization of Czechoslovak Savings Bank Case*).

Jurisdiction — Territorial Limits of — Confiscatory Decrees — Nationalization of Company—Substitution of State Enterprise—Business of Nationalized Company Continued Elsewhere—Whether State Enterprise Liable to be Restrained in Country of Forum from Trading under Original Name—The Law of Austria.

See p. 42 (*Jenaer Glaswerk Schott & Gen.* v. *Waldmüller*).

Jurisdiction—Territorial Limits of—Foreign Confiscatory Decrees—Effect of—Debt Owed to Victim of Confiscation—Debtor in Country of Forum—Assignment of Claim by Victim of Confiscation to Assignee in Country of Forum—Whether Assignee Entitled to Payment—The Law of Germany.

See p. 28 (*Assignment of Debt* (*Eastern Sector of Berlin*) *Case*).

Jurisdiction—Territorial Limits of—Foreign Confiscatory Legislation—The Law of Italy.

See p. 211 (*Pauer* v. *Hungarian People's Republic*).

Jurisdiction—Territorial Limits of—Foreign Confiscatory Legislation—Netherlands Decree Confiscating German Property—Confiscation of Debt—Debt Owed in Germany—Interpretation of Specific Treaty Provisions—Convention of October 23, 1954, on the Settlement of Matters Arising out of the War and the Occupation—Chapter 6, Article 3—The Law of Germany.

See p. 31 (*Assignment of Confiscated Debt* (*Germany*) *Case*).

Jurisdiction—Territorial Limits of—Foreign Confiscatory Decrees —Effect of—Expropriation of Co-operative Society in Czechoslovakia—Assets of Society in German Federal Republic—Removal of Seat of Society to German Federal Republic—Whether Society Established in Federal Republic Entitled to Assets in Germany—The Law of Germany.

See p. 35 (*Expropriation of Sudeten-German Co-operative Society Case*).

ii.—Criminal and Other Jurisdiction over Foreigners

Jurisdiction—Territorial—Over Aliens Abroad—Offence Actually Committed by Alien Within National Territory Notwithstanding His Corporeal Presence Abroad—Extra-territorial Operation of Penal Law—Objective Territorial Principle in International Law —General Principles of Law—The Law of India.

MOBARIK ALI AHMED *v.* THE STATE OF BOMBAY.

India, Supreme Court. September 6, 1957.

(Jagannadhadas, Iman and Govinda Menon JJ.)

THE FACTS.–The accussed had been undergoing trial in the Court of the Sessions Judge at Bombay for a criminal offence and had been on bail in connection with that trial. While thus on bail he fled, first to Pakistan and from there to England. The Indian authorities applied to the Metropolitan Magistrate, Bow Street, London, under the Fugitive Offenders Act, 1881, for his arrest and surrender. That application was granted by the Magistrate. Thereupon the appellant moved in the King's Bench Division of the High Court in England for a writ of habeas corpus, challenging the validity of his arrest and surrender to the Indian authorities. The application was dismissed and the order for surrender made under the Fugative Offenders Act was upheld. When the accused was brought back to Bombay he was indicted for another offence (under s. 420 of the Indian Penal Code) and convicted by the Presidency Magistrate. This sentence was confirmed by the High Court of Bombay, and the accused appealed to the Supreme Court. The appellant argued (1) that he " is a Pakistani national who during the entire period of the commission of the offence never stepped into India and was only at Karachi. Hence he committed no offence punishable under the Indian Penal Code and cannot be tried by an Indian Court "; (2) that he " was brought over from England where he happened to be, by virtue of extradition proceedings in connection with another offence, the trial for which was then pending in the Sessions Court in Bombay, and accordingly he could not be validly tried and convicted for a different offence like the present ".

As to the second contention, the appellant relied on " s. 3 (2) of the English Extradition Act, 1870 . . . which shows that it is contemplated thereby that a fugitive criminal who has been surrendered under the Extradition Act in respect of a particular offence should not be tried for any other offence until he has been restored or has been given an opportunity of returning ". The Court overruled the appellant's objection on the ground that this section had no bearing on the present case as he was surrendered under the Fugitive Offenders Act, which contained no analogous provision. The Court then dealt with the first and main contention, *i.e.*, the objection to jurisdiction on the ground that the offence was committed by the appellant, a foreign national, outside India.

In spite of certain doubts, the Court assumed that the appellant was a Pakistani national and it then asked the crucial question: where was the offence committed. Offences under s. 420 of the Penal Code (cheating) had two essential elements, one of which was deceit, *i.e.*, dishonest misrepresentation to a person and the inducing of that person to deliver or part with property. In the present case the appellant, while in Karachi, had made fraudulent representations to the complainant in Bombay who consequently parted with money to the amount of more than the equivalent of £40,000. On these facts the Court came to the conclusion that the offence had been committed in Bombay; it then posed the question whether it was authorized to assume jurisdiction.

Held: that the Court was entitled to try the case, and that the appeal must be dismissed. The Court relied on the principle that once an offence was *treated* as having been committed within the State, the fact that the offender was a foreigner corporeally outside the State at the time of the commission of the offence, was no objection to the exercise of jurisdiction. The assumption of criminal jurisdiction depended on the locality of the offence and not on the nationality of the offender. The Court applied this principle as one of municipal law and not of international law, but added that as a principle of international law it was virtually based on its recognition by the municipal laws of various countries and was therefore really part of the general jurisprudence relating to criminal responsibility.

The Court said: " What is . . . to be seen is whether there is any reason to think that a foreigner not corporeally present at the time of the commission of the offence does not fall within the range of persons punishable therefor under the Code. It appears to us that the answer must be in the negative unless there is any recognized legal principle on which such exclusion can be founded or the language of the Code compels such a construction. It is urged that to consider a foreigner guilty under the Penal Code for an offence committed in India though attributable to him, and to punish him therefor in a case where he is not corporeally present in India . . . would be to give extra-territorial operation to the Indian Penal Code and that an interpretation which brings [about] such extra-territorial operation must be avoided.

" The case of the Privy Council in *Macleod* v. *Attorney-General of New South Wales* ((1891) A.C. 455) is relied upon. But this argument is based on a misconception. The fastening of criminal liability on a foreigner in respect of culpable acts or omissions in India which are juridically attributable to him notwithstanding that he is corporeally present outside India at the time, is not to give any extra-territorial operation to the law; for it is in respect of an offence whose locality is in India that the liability is fastened on the person and the punishment is awarded by the law if his presence in India for a trial can be secured.

" That this is part of the ordinary jurisdiction of a municipal Court is well recognized in the Common Law of England as appears from Halsbury's *Laws of England* (3rd edition), vol. X, p. 318. Para. 580 therein shows that the exercise of criminal jurisdiction at Common Law is limited to crimes committed within the territorial limits of England, and para. 581 states the jurisdiction in respect of acts outside English territory as follows:

> " ' For the purposes of criminal jurisdiction, an act may be regarded as done within English territory, although the person who did the act may be outside the territory; for instance, a person who, being abroad, procures an innocent agent or uses the post office to commit a crime in England is deemed to commit an act in England. If a person, being outside England, initiates an offence, part of the essential elements of which take effect in England, he is amenable to English jurisdiction. It appears that even though the person who has initiated such an offence is a foreigner, he can be tried if he subsequently comes to England.'

Thus the exercise of criminal jurisdiction in such cases under the Common Law is exercise of municipal jurisdiction and much more so in a case like the present, where all the ingredients of the offence occur within the municipal territory. It would be desirable at this stage to notice certain well-recognized concepts of international law bearing on such a situation. Wheaton in his book on *Elements of International Law* (fourth edition) at page 183, dealing with criminal jurisdiction, states as follows:

> ' By the Common Law of England, which has been adopted, in this respect, in the United States, criminal offences are considered as

altogether local, and are justiciable only by the Courts of that country where the offence is committed.'

At page 182 thereof it is stated as follows:

'The judicial power of every independent State extends (with the qualifications mentioned earlier) to the punishment of all offences against the municipal laws of the State, by whomsoever committed, within the territory.'

"In Hackworth's *Digest of International Law* (1941 edition), vol. II, at page 188, there is reference to opinions of certain eminent American Judges. It is enough to quote the following dictum of Holmes J., noticed therein:

'Acts done outside a jurisdiction, but intended to produce and producing detrimental effects within it justify a State in punishing the cause of the harm as if he had been present at the effect, if the State should succeed in getting him within its power.'

"In Hyde's *International Law* (second edition), vol. I, at page 798, the following quotation from the Judgment of the Permanent Court of International Justice dated September 7, 1927, in the case relating to *S.S. Lotus* (Publications of the Permanent Court of International Justice, Series A, No. 10, 23 (B),[1] is very instructive:

'It is certain that the Courts of many countries even of countries which have given their criminal legislation a strictly territorial character, interpret criminal law in the sense that offences, the authors of which at the moment of commission are in the territory of another State, are nevertheless to be regarded as having been committed in the national territory, if one of the constituent elements of the offence, and more especially its effects, have taken place there.'

This quotation is also noticed in Oppenheim's *International Law* (eighth edition), vol. I, at page 332 in the footnote. In noticing the provisions of international law in this context we are conscious that what we have to deal with in the present case is a question merely of municipal law and not of any international law. But as is seen above, the principles recognized in international law in this behalf are virtually based on the recognition of those principles in the municipal law of various countries and [are] really part of the general jurisprudence relating to criminal responsibility under municipal law.

"No doubt some of the above dicta have reference to offences actually committed outside the State by foreigners and treated as offences commited within the State by specific legislation. But the principle emerging therefrom is clear, that, once it is treated as committed within the State, the fact that he is a foreigner corporeally present outside at the time of such commission is no objection to the exercise of municipal jurisdiction under the municipal law. This emphasises the principle that exercise of criminal jurisdiction

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[1 See *Annual Digest*, 1927–1928, Case No. 98.]

depends on the locality of the offence and not on the nationality of the alleged offender (except in a few specified cases such as ambassadors, Princes, etc.).

" Learned counsel for the appellant has relied on various passages in the judgment of Cockburn C.J. in the well-known case *The Queen* v. *Keyn* (*Franconia's case*), (1876) 2 Ex D 63 (I). Fourteen learned Judges participated in that case and the case appears to have been argued twice. Eight of them, including Cockburn C.J., formed the majority. Undoubtedly there are various passages in the judgment of Cockburn C.J. which prima facie seem capable of being urged in favour of the appellant's contention. In particular the following passage at page 235 may be noticed:

> ' The question is not whether the death of the deceased, which no doubt took place in a British ship, was the act of the defendant in such ship, but whether the defendant, at the time the act was done, was himself within British jurisdiction.'

The learned Chief Justice, however, recognized at page 237 that there were certain American decisions to the contrary. Now the main debate in that case was whether the sea up to three mile limit from the shore is part of British territory or whether in respect of such three mile limit only limited and defined extra-territorial British jurisdiction extended which did not include the particular criminal jurisdiction under consideration. In respect of this question, as a result of the judgment, the Parliament had to enact the Territorial Waters Jurisdiction Act, 1878 (41 & 42 Vict., c. 73), which in substance overruled the view of the majority and of the learned Chief Justice on this point. The main principle of criminal jurisdiction, however, relevant for our purpose was enunciated in the minority judgment of Amphlett J.A., at page 118, that ' it is the locality of the offence that determines the jurisdiction ', implying by contrast that it is not the nationality of the offender [which determines].

" The question, however, that still remains for consideration is whether there is anything in the language of the sections of the Indian Penal Code relating to the general scheme of the Code which compels the construction that the various sections of the Penal Code are not intended to apply to a foreigner who has committed an offence in India while not being corporeally present therein at the time. " This question the Court answered in the sense that it had no doubt " that on a plain reading of s. 2 of the Penal Code, the Code does apply to a foreigner who has committed an offence within India notwithstanding that he was corporeally present outside. "

[Report: A.I.R. 1957 S.C. 857.]

NOTE.—The principle enunciated by the Court in the above case is to the effect that once an offence is treated as having been committed within the State assuming jurisdiction, the fact that the offender is a foreigner physically present abroad at the time of the commission of the offence is no bar to the assumption of jurisdiction. However, a criminal act committed abroad can be treated as having been committed on territory of the State of jurisdiction only if it produces its effects there. The Court did not justify the exercise of jurisdiction in the present case on grounds of international customary law. It considered the principle applied by it to be one recognized by the laws of various countries and as part of the general jurisprudence relating to criminal responsibility—in other words, as a general principle of law recognized by civilized nations.

Jurisdiction—Territorial Limits of—Jurisdiction in Respect of Act Committed on Merchant Vessel on High Seas—Whether Act is Offence Against Flag State—The Law of Zanzibar.

Peola *v.* R.

Zanzibar, High Court. May 17, 1957.

(Windham C.J.)

The Facts.—The appellant was the master of a British vessel which carried 120 cows from Mogadishu to Zanzibar, calling at the ports of Malindi and Mombassa on the way. During the voyage thirty-nine cows died, owing to overcrowding in the hatch and exhaustion from lack of water. The appellant was charged with cruelty to animals under s. 36 of the Prevention of Cruelty to Animals Decree (Z) (Cap. 127). The Magistrate found that all the cattle save one died between Mogadishu and Mombassa. He did not find it necessary to State the precise stage of the voyage where the cruelty occurred, or whether the cruelty occurred on the high seas or within Zanzibar territorial waters, because he held that under Articles 5 and 25 of the Zanzibar Order in Council, 1924, and s. 686 of the Merchant Shipping Act, 1894, the offence was within his jurisdiction as one committed on a British ship (Zanzibar being a British Protectorate). He found the appellant guilty and convicted him.

On appeal, it was argued, *inter alia*, that if Articles 5 and 25 and 26 of the Zanzibar Order in Council, 1924, and s. 686 of the Merchant Shipping Act, 1894, were relied upon, these, whilst bringing within the jurisdiction of the Zanzibar courts an offence committed by a foreigner in a British ship on the high seas, were concerned wholly with venue and did not provide that an act which would be an offence under the law of Zanzibar if committed within Zanzibar harbour or within its territorial waters was an offence if committed in a British ship on the high seas.

Held: that the appeal must be allowed While deciding the appeal on other grounds, relating entirely to municipal law, the Court indicated that an act which, if committed in Zanzibar, would have been an offence against the law of Zanzibar was not, *ipso facto*, an offence against the law of Zanzibar if committed on the high seas on a British ship unless it was also an offence against the moral laws and to be regarded as wrong wherever committed.

On the question of jurisdiction, Windham C.J. said: " The first and legally the most interesting contention is that Article 5 (2), Article 25 (2) and Article 26 (2) of the Zanzibar Order in Council, 1924, and s. 686 (1) of the Merchant Shipping Act, 1894, while admittedly their effect is to bring within the jurisdiction of the Zanzibar courts any offence committed by a foreigner on a British ship upon the high seas, so that he can be tried for it when in Zanzibar, are concerned with venue and jurisdiction only, and do not in themselves provide, or have the effect of providing, that an act which would be an offence under the laws of Zanzibar if committed in Zanzibar (including the territorial waters) shall be deemed to be an offence if committed on a British ship upon the high seas. In short, the contention is that in order to make the appellant's act of carrying cattle in overcrowded conditions upon the high seas into an offence against the laws of Zanzibar at all, then either (a) there would have to be some specific or inclusive provision in the Prevention of Cruelty to Animals Decree, or elsewhere, providing that an offence against section 3 (b) of that Decree shall be deemed to be an offence if committed upon a British ship upon the high seas—which admittedly there is not; or alternatively, (b) the offence should be one so universally recognized as an infringement of the moral law and therefore as a crime wherever committed (*e.g.*, such an offence as murder or theft), that no foreigner travelling to Zanzibar could in reason be heard to say that he did not know that the act was a crime under the Zanzibar laws.

" Now upon a careful perusal of the terms of the relevant legislation, and in the light of the very pertinent observations and decision in the recent case of *R.* v. *Martin and Others* [1956] 2 All E.R. 86, a decision to which it is fair to observe that the learned trial magistrate's attention was not drawn, it seems to me that there is nothing in Article 26 (2) of the Zanzibar Order in Council, 1924, or in s. 686 (1) of the Merchant Shipping Act, 1894) (a section made applicable in Zanzibar by Article 25 (2) of that Order in Council), which provides, or whose effect is, that any act which would be an offence in Zanzibar shall be deemed to be an offence against the laws of Zanzibar if committed on the high seas on a British ship. Article 26 (2) provides as follows:

> " ' 26 (2). In the case of any offence committed on the high seas or within the Admiralty jurisdiction, by any person subject to this Order, who at the time of committing such offence was on board a British ship, or on board a foreign ship to which he did not belong, a court acting under this Order shall have jurisdiction as if the offence had been committed within Zanzibar.'

All that the above provision lays down, as I read it, is that if an act is done which under some other provision of the Zanzibar legislation, or by operation of some legal principle or presumption, has been made an offence against the laws of Zanzibar if committed on a British ship on the high seas, then the offender may be tried for it in Zanzibar just as if it had been committed by him in Zanzibar. But in order that Article 26 (2) shall operate on the act at all, the act must have been made (independently of the Article) an offence when committed on a British ship on the high seas, since Article 26 (2) does not itself provide that any act so committed on the high seas shall be deemed to be an offence if it would have been an offence when committed in Zanzibar. The wording of Article 26 (2) is, in this connection, not essentially different from that of s. 62 (1) of the Civil Aviation Act, 1949, with which the judgment in *R.* v. *Martin and Others* was concerned. Section 62 (1) of that Act provides as follows:

> " ' 62 (1). Any offence whatever committed on a British aircraft shall, for the purpose of conferring jurisdiction, be deemed to have been committed in any place where the offender may for the time being be.'

" It was held that s. 62 (1) could not be construed as itself providing that an act which if committed in England would be an offence shall be deemed to be an offence (*i.e.*, against the laws of England) as if it had been done in England. Devlin J., in his judgment in *R.* v. *Martin and Others* [1956] 2 All E.R. 86, at p. 90 said:

' The prosecution say that, apart from these few statutes, s. 62 is the only enactment that can make a criminal act done in the air an offence. Accordingly the prosecution say that s. 62 must be given a construction which is wide enough to make it an offence-creating section. It begins with the words "Any offence whatever committed on a British aircraft ", and, since it thus starts by apparently assuming that the act to be considered is an offence before the words of the section operate on it, the prosecution say that the word " offence " must be construed as if it read " any act which if done in England would be an offence ". No doubt so wide a construction would sustain the prosecution's submission. The defence say that that construction is not permissible. They point to the large number of statutes (some of which I have already cited) which make that sort of provision in specific terms, saying an act committed in such-and-such a place should be treated in the same way as if it had been an act committed in England or in the place where the man was apprehended or tried. Those are the sort of words, counsel for the defendant Martin submitted, that are used by the legislature when it intends to achieve the result the prosecution contends for here; such words are not present in this Act.'

The learned judge goes on to recapitulate and to hold (at p. 91) as follows:

' In my judgment, if the prosecution is to succeed, it can only succeed if a very free construction is applied to the words of the statute. It can only succeed if in lieu of the words " any offence whatever " there is read " any act which if done in England would be an offence ". That is a free construction. It is not a construction which emerges from the grammar of the Civil Aviation Act, 1949, and it is not one which I find myself willing to accept. What the Act appears to postulate is this, that before the section operates at all there must be enquiry whether any offence has been committed; if an offence has been committed, then s. 62 (1) of the Civil Aviation Act, 1949, determines the place where it should be tried. If, however, it is conceded, as it is in this case, that apart from s. 62 (1) no offence has been committed, it must follow that the section has no operation at all.'

" The same construction as was so applied to the words ' any offence ' in s. 62 (1) of the Civil Aviation Act, 1949, must in my view be applied to the words ' any offence ' in Article 26 (2) of the Zanzibar Order in Council, 1924, and with a similar result, namely that we must look elsewhere for some specific or implied provision of the law making an act which would be an offence against s. 3 (b) of the Prevention of Cruelty to Animals Decree if committed in Zanzibar into an offence if committed on a British ship on the high seas. A similar construction must also be placed upon the words ' an offence ' in s. 60 of the Criminal Procedure Decree, which likewise deals only with jurisdiction and venue and itself creates no offence. Now there is admittedly no such specific provision, either in the Prevention of Cruelty to Animals Decree or elsewhere. And if we turn to s. 686 (1) of the Merchant Shipping Act, 1894, which must be read not only *mutatis mutandis* for the purpose of its application to the Zanzibar Protectorate but also subject to Article 26 (2) of the Zanzibar Order in Council, 1924, then again we find that it is concerned with jurisdiction only, and does not itself make into an offence any act that would not otherwise be an offence. Section 686 (1) reads as follows:

> " ' 686 (1). Where any person, being a British subject, is charged with having committed any offence on board any British ship on the high seas or in any foreign port or harbour or on board any foreign ship to which he does not belong, or, not being a British subject, is charged with having committed any offence on board any British ship on the high seas, and that person is found within the jurisdiction of any court in Her Majesty's dominions, which would have had cognizance of the offence if it had been committed on board a British ship within the limits of its ordinary jurisdiction, that court shall have jurisdiction to try the offence as if it had been so committed.'

I will deal presently with the particular passage in this section which reads—

> ' or, not being a British subject, is charged with having committed any offence on board any British ship on the high seas ';

but for the moment I would simply observe that on the face of it the section deals only with jurisdiction to try in any court in Her Majesty's dominions an ' offence ' committed on the high seas, without providing that any acts there committed shall be deemed to be offences if they would be offences if committed in the dominion concerned.

"At this point the question arises—do the provisions of Article 26 (2) of the Zanzibar Order in Council, 1924, and of s. 686 (1) of the Merchant Shipping Act, 1894, become in effect a dead letter as a result of the above construction placed upon them? Obviously the legislature could never have intended such a result. This difficulty was foreseen and discussed in another part of the judgment in *R.* v. *Martin and Others*, in the following words at pp. 91–93, which, while they were dealing specifically with unlawful possession of drugs contrary to the British Dangerous Drugs Regulations, 1953, upon a British aircraft, are in their more general aspect applicable to the present case:

" 'Having reached this conclusion', the learned judge resumes, 'I wish to make it clear that I do not think that it necessarily follows that any act that is committed on board a British aircraft cannot be made subject to British criminal law. I propose to explain the distinction that I have in mind, not only because I must satisfy myself that this case must fall within it, but also because it would be most undesirable if it were thought it necessarily followed from this decision that anything could be done on board a British aircraft with impunity. There is a distinction in my judgement between what I may call the nature of an offence and the ingredients which have to be present before an offence is committed at all on the one hand, and, on the other hand, the question of what courts are to assume, or are to be given, jurisdiction when the offence has been committed. I can perhaps explain the distinction more easily in relation to civil law than in relation to criminal law.'

After a brief explanation the learned judge continued (at p. 92):

'A similar distinction may be made in criminal law. In a crime that is the creation of statute, regard must be had to the terms of the statute for a definition of the nature of the crime; and if the effect of the statute is limited territorially, then so is the nature of the crime. Crimes conceived by the common law, however, which are mostly offences against the moral law, such crimes as murder and theft, are not thought of as having territorial limits. They are universal offences. Murder is a crime whether it is done in France or in England; but if done in France the English courts would not under the common law assume jurisdiction to punish it because that would be an infringement of French sovereignty. It looks as if this principle was at the back of the application of English law to English ships on the high seas. It will have been observed from the terms of the old statute which I have quoted—the Offences at Sea Act, 1536—that it does not say that certain things which if done in England would be treasons, felonies, robberies, and so on, are also to be treasons, felonies, robberies and so on, if committed on a British ship. The statute assumed that they were felonies and that the only question was whether the admiral had jurisdiction over them. A distinction may therefore be drawn between the sort of situation where an act is to be regarded as an offence wherever it is committed and the sort of statutory offence which is created only in relation to a particular place. Murders are offences against the moral law in the broad sense wherever they are committed; but if a statute provides that something may not be done in a public house, it is an offence only if it is committed in a public house. . . . Broadly speaking, therefore, distinction can be drawn between offences which are offences against the moral law and to be regarded as wrong wherever they are committed, and offences which are merely breaches of regulations that are made for the better order or government of a particular place such as a public house, or a particular area such as the county of Middlesex, or a particular country such as England.'

The learned judge then went on to hold that the act with which he was dealing, namely, possession of dangerous drugs, fell in the second of these two categories, and was therefore not an offence if committed in a British aircraft outside England since there was no provision of the law making it so. But he went on to narrow the scope of his judgment by concluding:

'I am not saying that s. 62 applies to offences at common law. I have not heard that point argued and it may have to be argued hereafter. What I am saying is that s. 62 does not apply to a statutory offence which by the terms of the statute that creates it is local and not universal in character.'

" In which of the above two categories of offences, if in either, does the offence of cruelty to animals fall? It is an interesting speculation. Certainly it is not a mere technical statutory offence created only in relation to a particular place, such as the act of possessing dangerous drugs contrary to a particular regulation was, in the light of the particular terms of that regulation, held to be. It possesses more of the element of an infringement of the moral law than that act did. At the same time cruelty to animals is not yet universally regarded as a crime, as for instance theft or murder are. Increasingly enlightenment may eventually bring about such a result, but it has not done so yet, and there are regrettably large portions of the inhabited world today where it is not regarded as a crime or even as morally wrong to maltreat anything not human. For my part I incline to think that, looking on the world as it is and not as it ought to be, cruelty to animals is not yet an act of such a kind that a foreigner unconversant with the laws of (in this case) Zanzibar ought to know that it must constitute a crime under those laws or ought not to be allowed to protest his ignorance of that fact. But, like Devlin J. in *R.* v. *Martin and Others*, I refrain from deciding this appeal on that controversial issue, since I think it must in any case be allowed on another ground, to which I now turn.

" [After examining matters relating entirely to municipal law, Windham C.J. concluded:] In brief, I hold that the Crown failed to prove any act of cruelty within the territorial waters of Zanzibar, that they failed to aver in the charge sheet, as they should have done if they relied on it, any act of cruelty on the high seas, and that there was in any case insufficient proof of any act of cruelty on the high seas, as opposed to the territorial waters of either Zanzibar or of African mainland territories. On these grounds this appeal must be allowed, the conviction quashed, and the fine, if paid, refunded to the appellant."

[Report: (1957) *Eastern African Law Reports*, 196.]

iii.—Over Ports and National Waters

[*See also* PART III, STATE TERRITORY: B, III, Territorial Waters.]

Jurisdiction—Territorial—Over Ports and National Waters—Foreign Vessels in—Labour Disputes Between Foreign Nationals—Construction of Statute in Manner which Will Preclude International Discord and Retaliation—The Law of the United States of America.

BENZ *ET AL. v.* COMPANIA NAVIERA HIDALGO, S.A.

United States, Court of Appeals, Ninth Circuit. April 6, 1956.

Supreme Court. April 8, 1957.

(Warren C.J.; Black, Frankfurter, Douglas, Burton, Clark, Harlan, Brennan JJ.)

THE FACTS.—This case arose out of a labour dispute between the crew, made up entirely of nationals of States other than the United States, and the owners, a Panamanian corporation, of a vessel sailing under the Liberian flag. The crew had agreed to serve on a voyage originating at Bremen, Germany, and had signed a British form of articles of agreement.

In September 1952, the crew went on strike while the vessel was at Portland, Oregon. When they declined to work, the master discharged them and ordered them to leave the ship, which they did not do until required to leave by a Court order. The striking crew members and three American unions successively picketed the vessel until restrained by injunctions sought by the plaintiff shipowner; none of the crew were members of any of the three unions. The ship sailed in December 1952. .In June 1953, the injunction orders were vacated on appeal to the Court of Appeals and were ordered dismissed as moot (205 F.2d 944 (9th Cir. 1953)). The cases were then returned to the District Court for trial on the damage claims which had been made in the actions for injunctions brought by the shipowner. The ship had not returned to an American port by the time of trial in 1954.

The District Court entered judgment for damages against the three unions as well as their principal representatives on the grounds that the picketing was for an unlawful purpose under the law of

Oregon. The federal Labor Management Relations Act (61 Stat. 136, 29 U.S.C. § 141) was held not to apply to a labour dispute between a foreign ship and its foreign crew. The defendant unions and their representatives appealed.

Held (by the Court of Appeals): that the decrees of the District Court must be affirmed in so far as they granted judgment against the officers of the labour unions, but reversed in so far as they granted recovery against the unions. As a matter of the municipal law of the United States, federal labour legislation had not pre-empted the field so completely as to bar Oregon from giving a remedy by means of an action in tort for the damage done by the picketing. The law of Oregon did not, however, permit recovery against an unincorporated association. [Report: 233 F.2d 62.]

The Supreme Court granted *certiorari* (352 U.S. 889, 1 L.Ed.2d 84, 77 Sup. Ct. 125 (1956)).

Held (by the Supreme Court): that the decision of the Court of Appeals must be affirmed. The Congress could have legislated with respect to wage disputes between foreign nationals on foreign vessels entering a port of the United States, since a ship in such circumstances subjects itself to the law of the country it enters. However, the Congress had not indicated that the Labor Management Relations Act of 1947 applied to labour disputes between nationals of other countries operating ships under foreign laws. In the absence of any showing of a clear intention by the Congress to legislate in an area where the possibilities of international discord were evident and retaliative action certain, the statute should not be given foreign application.

The Court said (*per* Clark J.): " It should be noted at the outset that the dispute from which these actions sprang arose on a foreign vessel. It was between a foreign employer and a foreign crew operating under an agreement made aboard under the laws of another nation. The only American connection was that the controversy erupted while the ship was transiently in a United States port and American labor unions participated in its picketing.

" It is beyond question that a ship voluntarily entering the territorial limits of another country subjects itself to the laws and jurisdiction of that country. *Wildenhus's Case*, 120 U. S. 1 (1887). The exercise of that jurisdiction is not mandatory but discretionary. Often, because of public policy or for other reasons, the local sovereign may exert only limited jurisdiction and sometimes none at all. *Cunard S. S. Co.* v. *Mellon*, 262 U. S. 100 (1923).[1] It follows that if Congress had so chosen, it could have made the Act applicable to wage disputes arising on foreign vessels between nationals of other countries when the vessel comes within our territorial waters. The

[1] [See *Annual Digest*, 1923–1924, Case No. 57.]

question here therefore narrows to one of intent of the Congress as to the coverage of the Act.

" The parties point to nothing in the Act itself or its legislative history that indicates in any way that the Congress intended to bring such disputes within the coverage of the Act. Indeed the District Court found to the contrary, specifically stating that the Act does not ' cover a dispute between a foreign ship and its foreign crew.' The Court of Appeals, though not passing on the question, noted that ' It may well be that American laws should not be construed to apply, without some more explicit Congressional indication than we are able to find in the National Labor Relations Act, as amended, to situations with as many points of foreign contact as the situation at bar.' 233 F.2d, at 65.

" Our study of the Act leaves us convinced that Congress did not fashion it to resolve labor disputes between nationals of other countries operating ships under foreign laws.[1] The whole background of the Act is concerned with industrial strife between American employers and employees. In fact, no discussion in either House of Congress has been called to our attention from the thousands of pages of legislative history that indicates in the least that Congress intended the coverage of the Act to extend to circumstances such as those posed here. It appears not to have even occurred to those sponsoring the bill. The Report made to the House by its Committee on Education and Labor and presented by the coauthor of the bill, Chairman Hartley, stated that ' the bill herewith reported has been formulated as a bill of rights both for *American* workingmen and for their employers.' The report declares further that because of the inadequacies of legislation ' the *American* workingman has been deprived of his dignity as an individual,' and that it is the purpose of the bill to correct these inadequacies. (Emphasis added.) H. R. Rep. No. 245, 80th Cong., 1st Sess. 4. What was said inescapably describes the boundaries of the Act as including only the workingmen of our own country and its possessions.

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[1] Petitioners rely on two cases to bolster their argument that the Act applies to a foreign dispute such as the one here. We need only say that these cases are inapposite without, of course, intimating any view as to their result. First petitioners seek support in *Sailors' Union of the Pacific, AFL and Moore Dry Dock Co.*, 92 N. L. R. B. 547 (1950). That case, however, was brought to the Board by an American employer, the owner of the drydock, claiming that the picketing by an American Sailors' Union was of the drydock and constituted a secondary boycott and therefore an unfair labor practice. The Board in its opinion gave no indication that it felt that the Taft-Hartley Act was intended to apply to a dispute involving employment aboard a foreign vessel. In fact, in a forerunner of that same case, *Compania Maritima Sansoc Limitada*, Case No. 20–RC–809, May 1, 1950, CCH NLRB Decisions, 1950–1951, ¶10,081, a petition to represent employees on a Panamanian vessel manned by foreign seamen, and owned by a Panama corporation, the majority of whose stockholders were citizens of foreign countries, was dismissed on the ground that the internal economy of a vessel of foreign registry and ownership was involved. The Board thus made it clear that it would not assume jurisdiction when a foreign vessel was involved. It did assume jurisdiction in the later dispute because that dispute was between an American employer and an American union.

The second case on which petitioners rely is *Norris Grain Co.* v. *Seafarers' International Union*, 232 Minn. 91, 46 N. W. 2d 94 (1950). There a suit for an injunction was brought by the American owner of a grain elevator in Duluth, Minn., charging an American union and its affiliate with a secondary boycott by picketing, not of a foreign vessel, but of the grain elevator. Though a Canadian union (affiliated with the American union) was joined as a defendant, the action ran between an American plaintiff-employer and an American defendant-union. There was no claim by the foreign vessel owner against a union.

" The problem presented is not a new one to the Congress. In the Seamen's Act of March 4, 1915, 38 Stat. 1164, the Congress declared it unlawful to pay a seaman wages in advance and specifically declared the prohibition applicable to foreign vessels ' while in waters of the United States.' *Id.*, at 1169, as amended, 46 U. S. C. § 599 (e). In *Sandberg* v. *McDonald*, 248 U. S. 185 (1918), this Court construed the Act as not covering advancements ' when the contract and payment were made in a foreign country where the law sanctioned such contract and payment . . . Had Congress intended to make void such contracts and payments a few words would have stated that intention, not leaving such an important regulation to be gathered from implication.' *Id.*, at 195. The Court added that ' such sweeping and important requirement is not found specifically made in the statute.' *Ibid.* See also *Neilson* v. *Rhine Shipping Co.*, 248 U. S. 205 (1918). In 1920 Congress amended § 4 of the Seamen's Act of 1915, and granted to every seaman on a vessel of the United States the right to demand one-half of his then earned wages at every port the vessel entered during a voyage. 41 Stat. 1006, 46 U. S. C. § 597. The section was made applicable to ' seamen on foreign vessels while in harbors of the United States, and the courts of the United States shall be open to such seamen for its enforcement.' This Court in *Strathearn Steamship Co.* v. *Dillon*, 252 U. S. 348 (1920),[1] upheld the applicability of the section to a British seaman on a British vessel under British articles. The Court pointed out:

> ' taking the provisions of the act as the same are written, we think it plain that it manifests the purpose of Congress to place American and foreign seamen on an equality of right in so far as the privileges of this section are concerned, with equal opportunity to resort to the courts of the United States for the enforcement of the act. Before the amendment . . . the right to recover one-half the wages could not be enforced in face of a contractual obligation to the contrary. Congress, for reasons which it deemed sufficient, amended the act so as to permit the recovery upon the conditions named in the statute.' *Id.*, at 355.

In 1928, *Jackson* v. *S. S. Archimedes*, 275 U. S. 463,[2] was decided by this Court. It involved advance payments made by a British vessel to foreign seamen before leaving Manchester on her voyage to New York and return. It was contended that the advances made in Manchester were illegal and void. That there was ' no intention to extend the provisions of the statute,' the Court said, ' to advance payments made by foreign vessels while in foreign ports, is plain. This Court had pointed out in the *Sandberg* case [*supra*] that such a sweeping provision was not specifically made in the statute . . .' *Id.*, at 470. Soon thereafter several proposals were made in Congress designed to extend the coverage of the Seamen's Act so as to prohibit advancements made by foreign vessels in foreign ports. A storm of diplomatic protest resulted. Great Britain, Italy, Sweden, Norway, Denmark, the Netherlands, Germany, and Canada all joined in vigorously denouncing the proposals.[1] In each instance the bills died in Congress.

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[1] See *Annual Digest*, 1919–1922, Case No. 72.]

[2] *Ibid.*, 1927–1928, Case No. 100.]

"And so here such a ' sweeping provision ' as to foreign applicability was not specified in the Act.[2] The seamen agreed in Germany to work on the foreign ship under British articles. We cannot read into the Labor Management Relations Act an intent to change the contractual provisions made by these parties. For us to run interference in such a delicate field of international relations there must be present the affirmative intention of the Congress clearly expressed. It alone has the facilities necessary to make fairly such an important policy decision where the possibilities of international discord are so evident and retaliative action so certain. We, therefore, conclude that any such appeal should be directed to the Congress rather than the courts."

(Douglas J. dissented on the ground that the state law permitting the recovery of damages against the crew had been pre-empted by federal law and that the action should accordingly have been brought under the federal act.)

[Reports: 353 U.S. 138, 1 L.Ed.2d 709, 77 Sup. Ct. 699.]

NOTE.—The above case is discussed in *Yale Law Journal*, 69 (1960), at pp. 509, 516–575.

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[1] U. S. Foreign Rel.: 1928 at 830–838 (Dept. State 1942); *id.*,: 1929 at 1005–1009 (Dept. State 1943); *id.*: 1931 at 808–814 (Dept. State 1949); *id.*: 1932 at 959–960 (Dept. State 1948).

[2] As far back as 1856 this Court was faced with a related problem. In *Brown* v. *Duchesne*, 19 How. 183 (1857), in construing our patent laws which were silent as to their coverage of foreign ships in our ports, the Court held that Congress had expressed no intention of subjecting the use of improvements on foreign vessels stopping at our ports to our patent laws. In this regard the Court said: " We think these laws ought to be construed in the spirit in which they were made—that is, as founded in justice—and should not be strained by technical constructions to reach cases which Congress evidently could not have contemplated, without departing from the principle upon which they were legislating, and going far beyond the object they intended to accomplish." *Id.*, at 197.

Jurisdiction—Over National Waters—Distribution of Jurisdiction Over Navigation on Rhine—Territorial Limits of Operation of Revised Convention of Mannheim, 1868—Collision in Lateral Basin.

The Watergeus v. The Wilcor.

Holland, District Court of Rotterdam. April 13, 1956.

The Facts.—This was an action by the owner of the barge *Watergeus* against the owner of the tug *Wilcor* arising out of an accident which occurred at the point where the new Amsterdam-Rhine Canal crosses the river Lek, near the town of Wijk-bij-Duurstede in the southern part of the Province of Utrecht. On the northern bank of the river the entrance to the canal is a basin between two jetties that jut into the river. The *Watergeus*, which was on tow to the *Wilcor*, struck the western jetty as she entered this basin. The owner of the *Wilcor* at first denied the competence of the District Court of Rotterdam on the ground that this was a Rhine navigation case within the terms of the Revised Convention of Mannheim of 1868 concerning Navigation on the Rhine, and that the only Rhine Navigation Court competent to hear this case was, under the ordinary rules of local distribution of jurisdiction, the District Court of Utrecht. At a later stage of the proceedings, however, he withdrew his objection to the jurisdiction of the Court of Rotterdam, leaving it to that Court to decide upon this point *ex officio*.

Held: that the Court had jurisdiction. The place where the collision occurred was in Netherlands territory, and the parties had the right to have the case tried in the Netherlands court of their choice.

The Court said: " The river Lek is one of the rivers which, according to Article 1, para. 3, of the Rhine Convention, are regarded as being part of the Rhine. It is generally understood that harbours, ports and basins which are in open connection with the Rhine are regarded as being part of that river. The basin in which the collision occurred is in open connection with the Rhine in the sense of the said provision of the Rhine Convention. As the collision therefore took place, in the legal sense, on the Rhine, only Rhine Navigation Courts are, by virtue of Article 34 of the Convention, competent to deal with the present case. Since, on the one hand, the collision occurred in the Netherlands [and this was not, therefore, a case in which a choice between Netherlands and foreign courts was involved], and since, on the other hand, the owner of the *Wilcor* has withdrawn his initial objection to the case being adjudicated upon by the Court of Rotterdam instead of by the Utrecht Court which is the normally competent Court, the Court of Rotterdam declares that it has jurisdiction, accepted by both parties."

[Report: *N.J.*, 1956, No. 545].

NOTE.—See the Note by Judge Erades to a report of this case in *Netherlands International Law Review*, IV (1957), p. 212, in which he points out that it is the constant practice of the Central Commission for Rhine Navigation as well as of the French and Netherlands Rhine Navigation Courts, to regard ports, harbours, basins and canals leading to ports, etc., which are in open connection with the Rhine, as part of the Rhine and to apply the Revised Convention of Mannheim of 1868 to such ports, harbours, basins and canals. Originally, the German courts also followed this practice, but about 1930 certain German courts decided otherwise. See on this question of "La Querelle des Ports" Walther, *La Jurisprudence de la Commission Centrale pour la Navigation du Rhin, 1832–1939* (1948), pp. 85 *et seq.*

The District Court of Rotterdam, which is one of the Netherlands Rhine Navigation Courts, in this case continued its practice of permitting parties to select by agreement the Netherlands Rhine Navigation Court before which they wished to bring actions concerning collisions on the Rhine within Netherlands territory. See its earlier judgment of April 9, 1954, in *Geervliet* v. *Belgian Corporation Scheepswerf de Durme* (*Tijdschrift*, vol. I, p. 430; *International Law Reports*, 1954, p. 300, and Note). However, no such freedom of choice of a Netherlands court instead of a foreign court exists, even between parties who are both Netherlands nationals, as regards collisions on German, French or Swiss parts of the Rhine. See the decision of the same Court of April 17, 1953, in *Swiss Corporation Tanutra* v. *Nederlandsche Rijnvaartvereeniging* (*Tijdschrift*, vol. I, p. 89; *International Law Reports*, 1953, p. 164, and Note).

Jurisdiction—In Ports—With Regard to Offences on Foreign Vessels—The Law of Argentina—Binding Force of—Rules of International Law Not Expressly Reproduced in Argentinian Code.

Re BIANCHI.

Argentina, Cámara Nacional Especial. September 5, 1957.

THE FACTS.—The appellant, Gerónimo C. Bianchi, a member of the crew of the *R. T.*, a ship of Argentine registry, was charged with the commission of a theft on board the ship while it was anchored in the harbour of Río de Janeiro, Brazil. In the absence of any action in the matter by Brazilian authorities, charges were brought against Bianchi in Argentina. It was unsuccessfully argued for the defendant that the Argentine court lacked jurisdiction over an offence which had been committed in foreign territorial waters. On appeal,

Held: that the judgment appealed from must be affirmed. Where local authorities did not take jurisdiction over an offence committed on board a ship anchored in foreign territorial waters, jurisdiction reverted to the courts of the State of registry of the ship.

The Court said: "According to the record of proceedings in the trial Court, an inquiry was made into a theft which was allegedly committed on board the *R. T.*, a ship of Argentine registry, while it was at anchor in the port of Río de Janeiro. Article 1, para. 1, of the Penal Code provides that this Code is applicable (*inter alia*) to offences committed in places subject to the national jurisdiction. According to the rules of public international law, which have not been reproduced for obvious reasons in the said Article but which are none the less binding upon Argentine courts, offences committed on board a private ship fall within the jurisdiction of the courts of the flag State if the ship is on the high seas, and fall within the jurisdiction of a foreign State only in the event that such offences have been committed while the ship is in the territorial waters of that other State.

" This latter principle is not an absolute rule, however, for if the foreign State does not choose to exercise its right to institute proceedings because it considers that the act has not affected the community at large or the peace of the port (as maintained in French and Italian doctrine), the flag State may then assert full authority over the ship for the purpose of restoring order and discipline on board or protecting the rights of the passengers (Herrera, *La Reforma Penal*, p. 134). We may reasonably conclude with regard to the case before us, given the fact that the preliminary hearing was apparently held '*en route*', that the Brazilian authorities had relinquished jurisdiction over the alleged offence, so that this offence then became subject to the jurisdiction of the Argentine courts. As this reasoning accords with the judgment of the trial Court and with the opinion of the Fiscal of this Court regarding the case, the judgment under appeal is affirmed."[1]

[Report: *Revista Jurídica Argentina La Ley*, vol. 92 October–December 1958), p. 280.]

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[1] The report of this case is accompanied by a note by Goldschmidt entitled "Jurisdicción Competente y Legislación Aplicable en Materia de Derecho Penal".

viii.—Exemptions from and Restrictions upon Territorial Jurisdiction

(a) FOREIGN STATES

[*See also* PART II, STATES AS INTERNATIONAL PERSONS: A II, Sovereignty and Independence: iii. Conduct of Foreign Relations. Conclusiveness of Statements of the Executive.

Jurisdiction—Exemptions from—Foreign States—Money Belonging to One Sovereign Wrongly or Mistakenly Transferred to Defendant Servant of Another Foreign Sovereign—Action to Recover Money—Whether Foreign Sovereign, Not a Party to Proceedings, Is Impleaded—General Scope of Doctrine of Immunity—Whether Applicable to Moneys Said to be Held on Trust—Applicability of Immunity to a Debt or Chose in Action—Relevance of Possession and Control.

RAHIMTOOLA *v.* NIZAM OF HYDERABAD.

England, House of Lords. November, 7, 1957.

(Viscount Simonds, Lord Reid, Lord Cohen, Lord Somervell of Harrow and Lord Denning.)

THE FACTS.—In 1948, when Indian troops were invading Hyderabad, money standing in the account of the Nizam of Hyderabad and his Government at the Westminster Bank in London was transferred without authority by Moin (the Nizam's Finance Minister and one of the persons entitled to operate the account) into the name of Rahimtoola (then the High Commissioner for Pakistan in the United Kingdom), who received it on the instructions of the Foreign Minister of Pakistan. The Bank accordingly transferred the moneys, amounting to £1,007,940 9s. 0d., to the credit of an account entitled " To Habib Ibrahim Rahimtoola (High Commissioner for Pakistan in London) " and forwarded to him a credit advice showing this title.

The appellant Rahimtoola had since made affidavits stating that he had accepted the transfer of the moneys " in accordance with the instructions of and as agent for my Government ", that he had been instructed to accept the transfer by the then Foreign Minister of Pakistan, Sir Mohammed Zafrullah Khan, and that he " would never have agreed to the said transfer unless I had been expressly instructed to do so as High Commissioner for Pakistan. . . . It was never suggested to me that I should accept the said funds on my own account as a private individual as an agent or trustee for the Nizam but if it had I should have refused to do so as I would have considered it improper to act in such a way while holding the position of High Commissioner. . . . After accepting the said transfer I regarded myself as bound to deal with the account in accordance with the instructions of my Government."

The Nizam had made an affidavit, which had not been challenged, that Moin had no authority to make the transfer.

In 1954, a writ was issued by the Nizam and the State of Hyderabad as co-plaintiffs against Moin, the Bank and the appellant claiming payment of the moneys under three alternative heads: (a) as money held in trust for the Nizam (in this appeal, the State of Hyderabad having been dissolved and its rights formally assigned to the Nizam, it could be ignored); (b) as money due and owing to the Nizam; (c) as money had and received to the use of the Nizam. The appellant Rahimtoola asked that the writ in the action be set aside against him and that the proceedings be stayed as against the Bank on the ground that the action sought to implead a foreign sovereign, Pakistan, or sought to interfere with the right or interest of the Government of Pakistan in the moneys.

The present appeal was from an order of the Court of Appeal dated December 20, 1956, allowing an appeal by the respondent, the Nizam of Hyderabad, from an order dated July 30, 1956, of Upjohn J. whereby, on the motion of the appellant Rahimtoola, he ordered that all the proceedings against Rahimtoola be set aside, all further proceedings against the Bank stayed, and that the Nizam should pay to the Bank their taxed costs of the motion.[1]

Held: that the appeal should be allowed, the writ set aside against Rahimtoola and the proceedings stayed against the Bank; for although the money was paid to Rahimtoola wrongfully or under a mistake of fact, he was the agent of the sovereign State of Pakistan which, accordingly, had the legal title to the moneys and the right to sue the Bank for them.

Cases where there was a claim by a foreign sovereign to a trust fund were distinguishable.

Per Lord Denning (all the other Judges dissociating themselves from parts of his opinion): ". . . sovereign immunity should not depend on whether a foreign government is impleaded, directly or indirectly, but rather on the nature of the dispute. . . . If the dispute brings into question, for instance, the legislative or international transactions of a foreign government, or the policy of its executive, the court should grant immunity if asked to do so, . . . but if the dispute concerns, for instance, the commercial transactions of a foreign government . . . and it arises properly within the territorial jurisdiction of our courts, there is no ground for granting immunity." (At p. 422.[2])

Viscount Simonds, after stating the facts, continued: "I pause to observe that the position of the bank has throughout been one of impartial willingness to pay its debt to whomsoever it may be justly due, but, reasonably enough, it is anxious not to have this action continued against it, but not against the appellant. This anxiety is shared by the appellant and has determined the form of order originally made by Upjohn J. and the course of the argument on this appeal.

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[1] In the Courts below the case went under the name of *Nizam of Hyderabad* v. *Jung* (see *International Law Reports*, 1956, p. 173).

[2] For a full report of Lord Denning's opinion see *infra*, pp. 190–201.

" Upon the motion coming before that learned judge with a number of affidavits on either side which add little, if anything, to the bare statement I have made, an order was made in accordance with its terms. I have read and re-read the judgment of the learned judge, and I may perhaps be permitted to say that I find in it such a lucid exposition of the facts and relevant law that I should have been content to adopt it as my own and say no more but for the fact that the Court of Appeal came to a different conclusion and set aside his order. In my opinion, as I believe is that of all of your Lordships, they were wrong in doing so.

" The first question is: in what capacity did the apellant accept a transfer of the funds in question and become the customer of the bank, to whom it was primarily accountable? It has been said that there are three possible views. The first is that he was acting as a private individual. This view is so clearly untenable that I will say no more about it. The other alternatives were stated thus by Romer L.J. ([1957] Ch. 185, 243): (1) that he was acting as ' agent ' for Pakistan, and (2) that he was acting as the ' organ ' or ' alter ego ' of Pakistan, and that learned Lord Justice came to the clear conclusion that he accepted the transfer in his official capacity as servant or agent of Pakistan. On the other hand, he could not accept the view that he was the ' organ ' or ' alter ego ' of Pakistan. If these words or either of them connote that a High Commissioner is in the same sense to be identified with the Government he represents, as, for instance, a Department of State, I am not prepared to take a different view. But, for the purpose of the present case, it appears to me to be unimportant. No doubt, if a defendant, by whatever name he is called, can be identified with the Sovereign State, his task is easy: he need prove no more in order to stay the action against him. But, as soon as it is proved that quoad the subject-matter of the action the defendant is the agent of a Sovereign State, that, in other words, the interests or property of the State are to be the subject of adjudication, the same result is reached. This is precisely what is meant by the rule thus stated in Dicey's Conflict of Laws, 6th ed., p. 131:

" ' Rule 19. The court has (subject to the exceptions hereinafter mentioned) no jurisdiction to entertain an action or other proceeding against (1) any foreign sovereign. . . . An action or proceeding against the property of any of the foregoing is, for the purpose of this rule, an action or proceeding against such person. . . .'

" 'Two propositions of international law', said Lord Atkin in *Compania Naviera Vascongado* v. *S.S. Cristina* ([1938] A.C. 485, 490[1]) '[are] engrafted into our domestic law which seem to me to be well established and to be beyond dispute. The first is that the courts of a country will not implead a foreign sovereign. That is, they will not by their process make him against his will a party to legal proceedings, whether the proceedings involve process against his person or seek to recover from him specific property or damages. The second is that they will not by their process, whether the sovereign is a party to the proceedings or not, seize or detain property which is his, or of which he is in possession or control.'

" I should not, my Lords, have reminded your Lordships of these very familiar propositions were it not that the Court of Appeal has, as it appears to me, failed to observe them. That the Government of Pakistan were the principals (disclosed or undisclosed, it matters not) for whom the appellant as agent held the account in question with the bank, is, as I have already said, established beyond doubt. They were and are in a position to sue the bank either in the name of their agent, the appellant, or, if he were unwilling that his name should be used, in their own name, adding him as a defendant. The bank could not pay any other person without disregard of, and detriment to, their interests. For the bank knows only the appellant and knows him, as I think, though it does not matter, as the agent of the Government. I do not understand what difference it makes to this simple fact that before the Court of Appeal it was proved, or at least asserted and not disproved, that Moin exceeded his authority in making the transfer to the appellant. It would or might be important if the matter was litigated, but that is just what the Government of Pakistan, through its agent, declines to do. Much stress has been laid on the fact that it has not asserted a beneficial interest in the fund. But why should it? It is not concerned to admit, assert or deny. It has the legal title, which cannot be displaced except by litigation which it is entitled to decline. It rests on the principle, the statement of which I take from the judgment of the Court of Appeal in *Haile Selassie* v. *Cable and Wireless Ltd.* ([1938] Ch. 839, 844[2]) just because the respondent particularly relied on that case:

'If property locally situate in this country is shown to belong to, or to be in the possession of, an independent foreign Sovereign, or his agent, the courts cannot listen to a claim which seeks to interfere with his title to that property, or to deprive him of possession of it.'

It is true that in that case the court did not decline to adjudicate on the claim of a foreign sovereign State: it did so on the ground that, as there stated,

'in the case of a debt such as that with which we are concerned there can be no question of possession or control and the title to it is the very

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[[1] See *Annual Digest*, 1938–1940, Case No. 86.]
[[2] *Ibid.*, 1938–1940, Case No. 67.]

thing which stands to be established or not to be established in these proceedings.'

Your Lordships are not concerned to consider whether the principle, which was there correctly stated, was also there correctly applied. In the present case its application does not appear to me to be in doubt. The property in dispute is situate in this country. I say that because it is, for many purposes, necessary to ascribe a situation to a chose in action which physically has none, and, for the purpose of this doctrine, no other situation can be ascribed to it than the place in which it can be sued for and enforced. A suit by a third party, the Nizam, is calculated and intended to interfere with the title of Rahimtoola and his principals, the Government of Pakistan, and with their possession or control of their property. It can only be maintained if the Government of Pakistan take a course which their sovereign dignity entitled them to reject and descend into the arena. I have used the words ' possession or control ' because they are the words used in the statement of principle that I have adopted. It may be said that ' possession ' is not an apt word in connexion with a chose in action, but it seems to me that the two words, whether used together or separately, are apt to describe the relation in which an owner stands to the property which he owns. I would deprecate fine distinctions in our municipal laws in the application of international doctrine. Let it be supposed that a bank holds valuables, as, for instance, gold bars, on account of a foreign government or its agent and at the same time is indebted to the same party on current or deposit account in a sum of £X. It has been made clear by the recent case of *United States of America* v. *Dollfus Mieg et Cie S.A.* ([1952] A.C. 582[1]) that the foreign government could deny the jurisdiction of an English court to adjudicate upon their rights in regard to valuables. I decline to accept the argument of counsel for the respondent that this conclusion rested upon any sacred principle as to the rights of bailor and bailee, and I should regard it as deplorable if the court, while accepting, as a matter of comity, the right of the foreign government to deny its jurisdiction in regard to valuables, yet rejected it in regard to a chose in action. To make one law in regard to valuables, bars of gold or perhaps bearer bonds, and another in regard to simple contract debts is not a policy that should recommend itself to your Lordships. Whether the property is a gold bar or a debt, the Government of Pakistan is the legal owner and is entitled to refuse to have its title investigated. The case law dealing with this question has been so recently and so fully expounded in the *Dollfus* case that I think it unnecessary to add anything on the broad question.

" There are however, two other aspects of the question which I must examine.

[[1] See *International Law Reports*, 1952, Case No. 37.]

"In the Court of Appeal, and, as I understand, not until his reply, counsel for the Nizam raised a novel point which had not been considered by Upjohn J. but which found favour with that court. The argument runs thus. It is the law as laid down by a series of cases starting with *Buller* v. *Harrison* ((1777) 2 Cowp. 565), and as stated in Halsbury's Laws of England, 3rd ed., vol. 1, p. 233, para. 522, that

> 'if a third person pays money to an agent under a mistake of fact, or in consequence of some wrongful act, the agent is personally liable to repay it, unless, before the claim for repayment was made upon him, he has paid it to the principal or done something equivalent to payment to his principal.'

Apply this principle of law to the facts of this case. The account was transferred to the name of Rahimtoola by a mistake of fact or other wrongful act, namely, the unauthorized action of Moin; Rahimtoola and the bank were informed of the wrongful act and of the Nizam's claim before Rahimtoola had dealt with the account either by paying the money to his principal or in any other way. Therefore, it is concluded, Rahimtoola is liable in this suit to repay the Nizam and there is no need to consider any question of sovereign immunity. This argument, as I say, was successful in the Court of Appeal, but I think that your Lordships unanimously reject it.

"My Lords, I am not concerned to deny that in a suit in which private persons only are concerned the rule in *Buller* v. *Harrison*, if I may call it so, may prevail, though I would suppose that, in any case, the principal should not be denied the opportunity of asserting that the money was not paid to his agent in consequence, for instance, of a mistake of fact. But where, as for this purpose I assume to be the case here, the transfer is made to one who, if not an 'organ' of a foreign government, is demonstrably its servant and agent, it would make a strange breach in the international principle if it were open to a third party to recover from the agent by the mere assertion of mistake or other wrongful act. That is the very thing which the agent on behalf of his principal is concerned to dispute, and if his principal is a foreign sovereign it is the very thing upon which the courts of this country may not adjudicate in the face of the foreign sovereign's objection. I look again at the writ to see what is the substance of the matter. The claim is that money was paid to Rahimtoola in trust for the Nizam or as money due and owing to the Nizam or as money had and received to the use of the Nizam. These are matters which directly concern the principal on whose behalf Rahimtoola received the money. They cannot be determined without impleading him. Therefore they cannot be determined at all.

"The second matter is this. As your Lordships are aware, this branch of the law has long ago been complicated by a series of cases in the Court of Chancery or the Chancery Division of the High

Court in which the question has been of a claim by a foreign sovereign to a trust fund or a share in a trust fund subject to the administration of the court. On this subject I can add nothing to what was said by my noble and learned friend, Lord Radcliffe, in the *Dollfus* case. But I have failed to see that they have any relevance to the present case. Here is no trust fund which is being administered by the court. It is possible that, if the action proceeded as between private persons and all the matters in dispute were litigated to a conclusion, it might be held (though truly it would be unnecessary to do so) that Rahimtoola held the account with the bank in trust for the Nizam. But that is a consequence of carrying to a successful conclusion litigation which in its inception has nothing in common with the administration of a trust. Certainly the Government of Pakistan has never admitted that its agent or itself is a trustee for the Nizam, and until that fact is established the cases that have been cited are wholly irrelevant. It cannot be established because the Government through its agent declines adjudication by our courts.

" It remains to consider the question of the bank, whose attitude I have already stated. It is willing to pay whomsoever it may be ordered to pay but unwilling that the action should be stayed against Rahimtoola but continued against itself. It is, I think, clear that it would not be right to allow the action to proceed against the bank alone. Such a course would lay it open to a second attack. The account is the account of the Government of Pakistan in the name of its agent. If it pays a third party under an order of the court made in proceedings by which that Government is not bound, it is not safeguarded against a further claim. But, further than that, since the legal title is in the Government, it cannot in substance be anything but a grave interference with its property for a third party to sue the bank and, if the suit is successful, to recover from the bank the money to which it is nominally entitled.

" In my opinion, in this, as in the rest of his judgment, Upjohn J. was right. This appeal should therefore be allowed, the order of the Court of Appeal set aside and that of the learned judge restored. The respondent, the Nizam, must pay the costs of the appellant, Rahimtoola, and the Westminster Bank here and in the Court of Appeal.

" My Lords, I must add that, since writing this opinion, I have had the privilege of reading the opinion which my noble and learned friend, Lord Denning, is about to deliver [see *infra*, p. 190]. It is right that I should say that I must not be taken as assenting to his views upon a number of questions and authorities in regard to which the House has not had the benefit of the arguments of counsel or of the judgment of the courts below." (At pp. 393–398.)

Lord Reid briefly stated the facts at issue, and continued: " The Court of Appeal decided that the action should not be stayed. They were of opinion that, even if the appellant was acting in his official capacity, he was only an agent, that he held the legal title to the money, that there can be no possession or control of a chose in action by anyone who does not hold the legal title, and that therefore there was no basis for Pakistan's claim to have the action stayed.

" In my opinion, that is too narrow a view. On and after September 20, 1948, when the respondent bank opened the account in the name of 'Habib Ibrahim Rahimtoola (High Commissioner for Pakistan in London),' the position was that the appellant, as a servant or officer of the State of Pakistan, was bound to act upon any instructions regarding this money given to him by the appropriate Minister of that State. If the appellant for any reason failed or was unable to do so, then, in my judgment, Pakistan could have taken proceedings directly against the bank to recover the money. It is true that the appellant was the only person who could operate the account and that the bank was not bound to honour any cheque which was not signed by him. But that does not mean that there was no other way by which Pakistan could recover the money. Even if it be said that the form in which the account was opened was not sufficient notice to the bank that the appellant was acting merely as an officer or agent of Pakistan, that State was at least the undisclosed principal of the appellant. It is well settled that a principal, including an undisclosed principal, has a right to sue directly and in his own name. I can see no reason why this rule should not apply to banking, but it may well be that, if a bank declines to pay the principal without getting the authority of the agent who is its customer, the principal in suing the bank would have to make his agent a defendant in the action. And the principal would, of course, have to prove that the agent had in fact acted as his agent. It appears to me that Pakistan had an immediate and direct right to sue the bank in its own name for payment of this money and in that sense it had a legal title. It had full control of this chose in action.

" I do not think that it is correct to regard the appellant as a trustee. If the appellant acted throughout as the servant or agent of Pakistan, I find it difficult to see how he could become a trustee for someone else. A trustee has the duty and right to hold trust property and to prevent anyone from carrying it off. But the appellant could not have prevented Pakistan from suing for this money without his consent. That State had control. If anyone became a trustee by reason of the facts that to the knowledge of the Finance Minister of Hyderabad the appellant took the money as servant or agent of Pakistan, that no beneficial interest is claimed either by Pakistan or the appellant, and that they were later informed that the Nizam's property had been transferred without his authority, then the trustee must, I think, be the State of Pakistan itself. But that would not help the respondent, the Nizam.

"We were referred to cases which show that the court will not halt the administration of an English trust because a foreign sovereign makes a claim in respect of the trust property but will not submit his claim to the jurisdiction of our courts. It may well be that the claim to sovereign immunity does not extend to such a case. But in these cases there was an independent trustee who was subject to our jurisdiction, and they appear to me to have no application to a case where the trustee is the sovereign himself. It would be quite inconsistent with the whole conception of sovereign immunity that we should require the sovereign to submit himself to our jurisdiction and seek to control him in his conduct of the trust which he has undertaken. If the State of Pakistan is a trustee then it must be left to that State to determine what its duty is.

"We were also referred to a series of cases beginning with *Buller* v. *Harrison*, where it was held that a person who had paid money to the agent of a person who wrongfully induced the payment may recover the money directly from the agent if the agent still has the money in his possession. Normally a person who claims repayment would have to sue the principal, and I have found nothing to suggest that these cases would apply to a case where the person claiming payment could not successfully sue the principal: In the present case the sovereign immunity of Pakistan would prevent an action against that State, and, even if the principle of *Buller* v. *Harrison* applied to the circumstance of the payment in the present case, which I doubt, the fact that the principal could not be sued, in my view, excludes its application.

"I have assumed that the appellant is to be regarded as merely the agent or servant of Pakistan. I do not find it necessary to consider the question whether a High Commissioner should be regarded as the representative of the State which he represents so that to implead him would be equivalent to impleading the State itself, or whether, if that were so, it would make a difference that the appellant ceased to be High Commissioner before the commencement of this action.

"The point at issue in this case can now be stated in a simple form. The State of Pakistan has a right to sue the respondent bank but Pakistan claims no beneficial right to the money owed by the bank. Does that entitle Pakistan to have this action stayed (1) in so far as it is directed against the appellant, and (2) in so far as it is directed against the respondent bank? I do not see any reason why the right of that State to claim sovereign immunity should depend on whether the bank account stands in the name of the State itself or stands in the name of its servant, agent or nominee. It was not disputed that, if the bank account had stood in the name of the State itself, the State could not have been made a party to this action against its will. It appears to me to follow that the State is entitled to object to its agent being made a party: the agent would merely be defending the action on behalf of his principal. I am therefore of opinion that the action must be stayed in so far as it is directed against the appellant, and I proceed to consider whether it can continue against the bank alone.

" In a number of recent cases it has been necessary to consider in what circumstances a sovereign, who is not directly impleaded, is entitled to have an action stayed on the ground that it affects property in which the sovereign has or claims to have an interest. Most of these cases deal with ships or chattels and the only one dealing with a chose in action to which we were referred is *Haile Selassie* v. *Cable and Wireless Ltd.* There the defendants owed money to the Emperor of Ethiopia. When the action was brought, the plaintiff was recognized by our Government as de jure sovereign and the King of Italy was recognized as de facto sovereign of that country. The de facto sovereign claimed the money and sought, unsuccessfully, to have the action stayed. In that case Greene M.R., in delivering the judgment of the Court of Appeal, said ([1938] Ch. 839, 844–845[1]):

' The rule applies in the case both of actions in personam and of actions in rem. But it has never been extended to cover the case where the proceedings do not involve either bringing the foreign sovereign before the court in his own person or in that of his agent or interfering with his proprietary or possessory rights in the event of judgment being obtained. Where it is either admitted or proved that property to which a claim is made either belongs to, or is in the possession of, a foreign sovereign, or his agent, the principle will apply. But where property which is not proved or admitted to belong to, or to be in the possession of, a foreign sovereign or his agent is in the possession of a third party, and the plaintiff claims it from that third party, and the issue in the action is whether or not the property belongs to the plaintiff or to the foreign sovereign, the very question to be decided is one which requires to be answered in favour of the sovereign's title before it can be asserted that that title is being questioned. . . . It would be a strange result if a person claiming property in the hands of, or a debt alleged to be due by, a private individual in this country were to be deprived of his right to have his claim adjudicated upon by the courts merely because a claim to the property, or the debt, had been put forward on behalf of a foreign sovereign.'

That passage, if it were still fully authoritative, would go far to assist the present respondent, the Nizam. But it must now be read in light of the decisions of this House in the *Dollfus Mieg* case and of the Privy Council in *Juan Ysmael & Co. Inc.* v. *Indonesian Government*. In the latter case it is said ([1955] A.C. 72, 89–90[2]):

' In their Lordships' opinion a foreign government claiming that its interest in property will be affected by the judgment in an action to which it is not a party, is not bound as a condition of obtaining imunity to prove its title to the interest claimed, but it must produce evidence to satisfy the court that its claim is not merely illusory, nor founded on a title manifestly defective.'

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[1] [See *Annual Digest*, 1938–1940, Case No. 67, at p. 173.]

[2] [See *International Law Reports*, 1954, p. 95, at pp. 98–99.]

" The *Dollfus Mieg*[1] case shows that a sovereign can have an action stayed without having either a proprietary right in the sense of a beneficial right or a possessory right in the sense that the sovereign can effectively deal with the property at his own hand. In the *Dollfuss Mieg* case the gold bars were held by the bank. The bank could not be compelled by the Sovereign Governments, the bailors, to hand the gold bars over to them except by a judgment of the court, and it would not do so without either a judgment or the consent of Dollfus Mieg because if it had done so it would have laid itself open to an action of damages by Dollfus Mieg. Nevertheless, the Sovereign Governments were held entitled to have the action of Dollfus Mieg stayed and so to create a deadlock. Dollfus Mieg were prevented from recovering their property and the Sovereign Governments could not make good their right to immediate possession without doing the very thing that they objected to doing—submitting themselves to the jurisdiction of the English courts by suing the bank for delivery of the bars. Staying the present action may lead to a similar deadlock, but it is much too late now to argue that that is a good reason for not giving effect to the principle of sovereign immunity.

" It is true that Dollfus Mieg were permitted to proceed against the bank alone in an action of damages for conversion of 13 of the gold bars, which the bank had negligently failed to retain in their possession. The result of the bank's failure to retain possession of the gold bars was that it could be sued for damages both by Dollfus Mieg as owners of the bars and by the Sovereign Governments as bailors of the bars. The fact that Dollfus Mieg were permitted to pursue their action for damages does not appear to me to assist the present respondent. In the present case, the bank owes a single debt—the amount at the credit of the account in the name of the appellant. The question is to whom that debt should be paid. In order to succeed, the respondent, the Nizam, would have to displace the legal title and the right of the State of Pakistan to recover the money. In my judgment, an action for that purpose does directly affect the rights of that State and it cannot be allowed to proceed in the absence of that State or its representative.

" The argument for the respondent, the Nizam, involves the proposition that, if a sovereign deposits with a bank both money and gold bars, in neither of which he claims a beneficial interest, and a third party sues the bank claiming to be owner of both, then, although the sovereign can found on the principle of immunity to prevent the action from proceeding with regard to the gold bars, he cannot prevent the action from proceeding with regard to the money. The principle of sovereign immunity is not founded on any technical rules of law: it is founded on broad considerations of public policy, international law and comity. While the differences between the rights of a bailor and the rights of a lender of money are of great importance in many respects, those differences do not appear to me to require or justify such a result. I would associate myself with the final observations of my noble and learned friend, Viscount Simonds [see *supra*, pp. 176–181]. In my judgment this appeal should be allowed." [At pp. 399–404.)

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[1] [1952] A.C. 582 [see *International Law Reports*, 1952, Case No. 37].

Lord Cohen said: " The first question that arises is whether the action brought by the Nizam against the appellant and the bank should be stayed as against the appellant under the doctrine of sovereign immunity.

" The second, which only arises if the first question is answered in the affirmative, is whether the action should be allowed to proceed against the bank.

" Sir Andrew Clark submits that the first question should be answered in the negative on a number of grounds. He argues, in the first place, that the account opened by the bank in the name of the appellant was opened in his favour in his individual capacity and that the reference to ' High Commissioner of Pakistan ' on the title of the account was merely descriptive and was not intended to connote any Pakistan Government interest in the account. This view appears to have commended itself to the Master of the Rolls and Birkett L.J., although they did not decide the matter in favour of the Nizam on this ground. I find it impossible to accept it as correct, in view of the affidavit evidence by the appellant, the accuracy of which is not challenged. In his first affidavit he says that it was agreed between the defendant Moin (who had been placed by the Nizam in control of the funds in question) and himself that the said funds should be transferred to him as the agent of the Government of Pakistan and that he accepted the transfer in accordance with the instructions of and as agent for his Government. In his second affidavit he is more explicit. Speaking of the interview at which the transfer was arranged and at which there was present, in addition to the defendant Moin and the appellant, Sir Mohamed Zafrullah Khan, the then Foreign Minister of Pakistan, he says that (1) the said Foreign Minister instructed him to accept the transfer of the said funds into an account in his name but described as the High Commissioner for Pakistan; (2) but for those express instructions he would never have agreed to the transfer; (3) it was never suggested to him that he should accept the said funds on his own account as a private individual as agent or trustee for the Nizam; (4) had such a suggestion been made he would have refused the transfer as he would have considered it improper to act in such a way while holding the position of High Commissioner.

" In face of this evidence I am forced to the conclusion that when the appellant accepted the transfer of these funds he did so on behalf of the Government of Pakistan.

" My Lords, in the Court of Appeal Romer L.J. accepted that the appellant did not take the transfer in his individual capacity, and then proceeded to consider whether, taking the transfer on behalf of the State of Pakistan, he did so as the alter ego of the State or merely as its servant or agent. Like Upjohn J., I do not think that in considering the application of the doctrine of sovereign immunity I ought to draw narrow distinctions. To make a distinction between a title to a debt in the name of the State and title to a debt in the name of the appellant as High Commissioner of the State would, in my opinion, be drawing a very narrow distinction. However, I am content, for the moment, to say that, having regard to the title of this account in the books of the bank, and to the circumstances in which the account was opened, the appellant was plainly the agent for the State of Pakistan and the State could have enforced the transfer to the State of the balance to the credit of the account, though the appellant might have been a necessary party to the proceedings.

" Prima facie, therefore, a suit against the appellant in respect of this account affects the right or interest of the State of Pakistan. None the less, the Court of Appeal rejected the claim of the appellant to sovereign immunity on the basis of a principle stated in Halsbury's Laws of England, 3rd ed., vol. 1, p.233, para. 522, in the following terms:

> 'The receipt of money from a third person by an agent on his principal's behalf, does not in itself render the agent personally liable to repay it when the third person becomes entitled as against the principal to repayment, whether the money remains in the agent's hands or not. But if a third person pays money to an agent under a mistake of fact, or in consequence of some wrongful act, the agent is personally liable to repay it, unless, before the claim for repayment was made upon him, he has paid it to the principal or done something equivalent to payment to his principal.'

" Applying that exception to the present case, Sir Andrew argued that (1) Moin acted wrongfully in transferring the funds to the appellant; (2) the appellant was the agent for the State of Pakistan and, before he had transferred the funds to his principal, the State, he had notice of Moin's wrongful act and knew that the Nizam was demanding the return of the money. Therefore, (3) the Nizam could recover the balance to the credit of the account from the appellant as money had and received without impleading the State of Pakistan directly or indirectly.

" This argument was accepted by the Court of Appeal, Romer L.J. saying that the appellant could successfully escape from this position only by identifying himself with the State of Pakistan.

My Lords, were it necessary to do so I should, I think, have regarded the evidence of the appellant as discharging this onus; but I do not think it is necessary to go so far. Like the Master of the Rolls and Birkett L.J., I am prepared to base my judgment on the citation made by them from the speech of Lord Radcliffe in *United States of America* v. *Dollfus Mieg et Cie S.A.*, though I arrive at a different conclusion. I need not repeat that citation. I am prepared to accept that the effect of it is correctly stated by their Lordships in the following extract from their judgment ([1957] Ch. 185, 233–234[1]):

> ' From this passage it sufficiently appears, in our judgment, that the prohibition, which is of the essence of the rule, is a prohibition against the assertion by the English court of jurisdiction to entertain proceedings against a sovereign who (or a sovereign State which) is unwilling to submit to such jurisdiction. Whenever, therefore, the rule is invoked in a proceeding to which the sovereign is not made or sought to be made a party, but in which the subject-matter is some property in regard to which the sovereign has or claims some kind of right or interest, the applicability of the rule depends upon the extent to which the prosecution of the claim so affects the right or interest of the sovereign " as to amount in one way or another to a suit against the sovereign ". The proposition is imprecise, no doubt; but as Lord Radcliffe observed, the law cannot be set at rest " by any neat combination of words ".'

" In my opinion, the suit instituted by the Nizam so affects the right or interest of the State of Pakistan as to make this case on a par with the *Dollfus Mieg* case. True it is, as the Court of Appeal point out, that in that case the subject-matter of the suit was chattels, that in the case of chattels a sovereign State must act through individual agents and that this necessity does not apply in the case of a chose in action. In the case of a chose in action the question is, no doubt, one of title, not control, but, in my opinion, the effect of the transfer of the balance into an account in the name of ' Habib Ibrahim Rahimtoola (High Commissioner for Pakistan in London) ' was to vest in the State of Pakistan such title to the balance to the credit of that account as to make any suit against the appellant to recover that balance whether as ' money held in trust for the plaintiff ' or as ' money due and owing to the plaintiff ' a claim which amounts to a suit against a sovereign State.

" Before parting from this part of the case, I would call attention to two points. In the first place, it is to be observed that no question of sovereign immunity arose in any of the cases establishing the exception to the general rule stated in the passage from Halsbury's Laws of England which I have cited. It would be strange indeed if the applicability of the rule of sovereign immunity depended on whether the defendant was the sovereign or his agent.

[[1] *Nizam of Hyderabad* v. *Jung*: see *International Law Reports*, 1956, p. 173.]

"Secondly, I would observe that this point was not taken before Upjohn J., and was only raised in reply in the Court of Appeal. It may, none the less, be a good point, but at least, in such circumstances, I may be allowed to suspect a flaw in the argument and to hope to have exposed it.

There remains the question whether what were called the trustee cases apply. If they do, it matters not whether the transferee was the appellant or the State of Pakistan. In either event Sir Andrew contended that he was entitled to maintain his suit on the ground that the English courts will not be deterred from administering a British trust by reason only that a beneficial interest in the trust fund is claimed by a sovereign State. His argument on this point was rejected by all the members of the Court of Appeal. I am content to express my agreement with them and to adopt the language of Romer L.J., where he says ([1957] Ch. 185, 250–251):

'I think those cases are only properly applicable where the court finds a trust fund in the hands of a person who is an independent trustee, and that they should not be extended to cases in which the person who controls the fund combines the character of trustee with that of agent for the foreign State which is setting up an interest in the fund. The contrary view, as it seems to me, would stretch what has hitherto been regarded as an exception to the doctrine to a point at which it ceases to be reconcilable with the doctrine itself. An additional reason why I should hesitate to hold that the exception applies is that Pakistan has not sought to establish any beneficial interest in the fund; its claim, as urged before the court, is limited to the legal title to the fund and is founded upon agency, and not the trusteeship of Rahimtoola. Such a position, as I am inclined to think, is outside the scope and ratio alike of the relevant authorities which were brought to our attention.'

"My Lords, I agree with Upjohn J. in thinking the quotation he makes from Sir Robert Phillimore in *The Charkieh* ((1873) L.R. 4 A. 7 E. 59, 97) particularly applicable to the present case. It reads as follows:

'The object of international law, in this as in other matters, is not to work injustice, not to prevent the enforcement of a just demand, but to substitute negotiations between governments, though they may be dilatory and the issue distant and uncertain, for the ordinary use of courts of justice in cases where such use would lessen the dignity or embarrass the functions of the representatives of a foreign State.'

I would, therefore, stay the proceedings against the appellant.

"There remains the question whether the action should be allowed to proceed against the bank. In my opinion, it should not. On this point also I agree with Upjohn J. that proceedings must be stayed and for the reasons that he gives ([1957] Ch. 185, 209–10[1]):

[[1] See *International Law Reports*, 1956, at p. 181.]

" 'With regard to the bank, the plaintiffs are suing the bank for the debt due at law to Rahimtoola. Proceedings must be stayed against them, for to continue them is to interfere with the property of the sovereign. That is clearly the proper course when dealing with a claim in detinue: see *Dollfus Mieg* . . . This cannot be likened to the case of a claim for damages for conversion. In this case, unlike the claim in respect of the 13 bars of gold in the *Dollfus Mieg* case . . ., there is no claim for damages against the bank, nor does this case resemble the *Haile Selassie* case. . . . The question there was to whom were Cable and Wireless Ltd. indebted? In this case, so far as the bank is concerned, there is only one answer to that question—Rahimtoola. Both Moin and Mir had authority to operate the account, and the statement of claim does not allege that the bank had any knowledge of the alleged but, as I have held, unproved breaches of duty by Moin or Mir. The plaintiffs can only reach the debt through Rahimtoola. Therefore the action against the bank must be stayed.'

" True it is that evidence not available to Upjohn J. was produced in the Court of Appeal establishing a prima facie case that Moin had been guilty of a breach of duty, but he was acting within the scope of his ostensible authority and neither the bank nor the appellant was aware of the alleged excess of authority when the account was transferred to the appellant. I do not think, therefore, the alleged excess of authority affords any reason why the action should be allowed to proceed against the bank.

" For these reasons, as well as for the reasons given by your Lordships, I would allow the appeal. I only desire to add that I entirely agree with the concluding observations of my noble and learned friend on the Woolsack." (At pp. 404–410.)

Lord Somervell of Harrow agreed with the opinion of Lord Reid, adding only some brief observations on the decision in *Haile Selassie* v. *Cable and Wireless, Ltd.* ([1938] Ch. 839; *Annual Digest*, 1938–1940, Case No. 67).

Lord Denning said: " My Lords, if the State of Pakistan succeed in this case in putting up the ' protective umbrella ' of sovereign immunity, it will be the first time, so far as I know, that the courts of this country have ever allowed it to be raised to ward off a claim to a debt or a chose in action situate here on the ground that a foreign Government own and control it. Your Lordships have heretofore allowed it to be raised in regard to a ship destined for public purposes, and in regard to gold bars likewise destined, but never before in regard to a debt.

" Much of the argument in the courts below and before your Lordships was dominated by the question, To whom does this money —this debt—belong? That question was asked, no doubt, because of the rule stated in Dicey and the ' two propositions of international law ' formulated by Lord Atkin which, so far as applicable to this case, come down to this: Is this debt the property of the State of

Pakistan? or alternatively, Is that State in control of it? for, if so, the action must be stayed.

"Mr. MacKenna argued that the debt was the property of Pakistan because it had the legal title to it. He said that Pakistan could sue the bank at law in its own name for it, or, at any rate, that Rahimtoola could sue for it, and Rahimtoola was the agent of Pakistan.

"The legal title to the debt was originally in the Nizam of Hyderabad. It was assigned by his Finance Minister, acting within the scope of his ostensible authority, to Rahimtoola or to Pakistan—I will consider which in a moment—and that assignment was effective to pass the legal title to the transferee. So much was admitted by Sir Andrew Clark, but, as I pointed out during the argument, the assignment was not complete and perfect so as to pass the legal title until the bank attorned to the transferee. At any moment up to the attornment, the Nizam could have countermanded the instructions to the bank and no one could say him nay: see *Gibson* v. *Minet* ((1824) 2 Bing. 7). Neither Rahimtoola nor Pakistan could have objected up to that point for the simple reason that they gave no value. They paid nothing for the debt. They gave up nothing. They promised nothing. And they could not say that there was a legal assignment within section 136 of the Law of Property Act, 1925, seeing that the arrangements for the transfer were all made by word of mouth. There was nothing in the nature of an 'absolute assignment by writing'. There was only notice in writing to the debtor. Nevertheless, as soon as the assignment was perfected by the attornment of the bank to the transferee, the legal title passed, for the money was thenceforward held by the bank to the use of the named transferee and could be recovered by him from the bank, not in an action of simple contract but in an action of debt or for money had and received to his use: see *Clark's Case* ((1614) Godb. 210) and *Liversidge* v. *Broadbent* ((1859) 4 H. 7 N. 603, 610). A few days after the attornment—before, indeed, it had been acknowledged by the transferee—the Nizam countermanded the instructions to the bank, but it was then too late to stop the legal title passing.

"The transfer being good, however, the question is, To whom was the legal title transferred? Was it to Rahimtoola? Or to the State of Pakistan? This is a question of construction. The named transferee here was not the State of Pakistan but Rahimtoola himself. True, he was described in brackets as '(High Commissioner for Pakistan in London)'. That is a description of his office and shows that he was acting in an official capacity. It shows, indeed, that he was an agent. But he still remained the named transferee. If he had been so named and described in a transfer of land or of shares, or in the assignment of an insurance policy, or in a bill of exchange as the payee or indorsee to whom the money was to be paid, there could be no doubt that the legal title would pass to him and not to Pakistan:

see *Hinson* v. *Burridge* (point 1) (1595) Moore K.B. 701). So also in this transfer the legal title passed to Rahimtoola. If Pakistan had desired to have the legal title in itself, it should have taken care to have the account transferred into its own name, but it did not do so and must take the consequences, just as the principals had to do in *Sims* v. *Brittain* ((1832) 4 B. & Ad. 375, 378) and *Sims* v. *Bond* ((1833) 5 B. & Ad. 389, 394). On the wording of the transfer here, as it stands, Rahimtoola was in law the named transferee just as effectively as if the description ' High Commissioner ' had been omitted. He was the customer of the bank and the sole person entitled to operate the account. If the Foreign Minister of Pakistan had purported to give instructions to the bank, they could properly reply: ' If you want anything done with this account you must tell Rahimtoola and let *him* give us the instructions. He is our customer and the only person we know in this matter.'

" Mr. MacKenna argued, however, before your Lordships—not, I believe, in the courts below—that Pakistan was entitled to sue the bank at law in its own name, without joining Rahimtoola as a party, because it was his principal in the matter. This might be a tenable argument if Pakistan could show that it was the real contracting party who was lending its money to the bank. That appears from the case of *Cooke* v. *Seeley* ((1848) 2 Ex. 746), on which Mr. MacKenna so much relied. But it is not this case. The real contracting party here was the Nizam of Hyderabad, who lent his money to the bank. He, through his Finance Minister, transferred the debt to Rahimtoola, and thereupon Rahimtoola acquired the legal title as transferee, not as contractee. It is just the same as when a piece of property is transferred into the name of a transferee who is acting on behalf of a principal, such as shares transferred to a nominee. The principal, when he is the beneficial owner, is entitled to intervene in equity to protect his interests, but he is not entitled to sue at law without joining the legal owner as a party: see *Performing Right Society Ltd.* v. *London Theatre of Varieties Ltd.* ([1924] A.C. 1.) Here, however, Pakistan was not even the beneficial owner. The only way in which Pakistan might sue the bank alone is if it could show a contract of novation to which it was a principal, with consideration to support it, but none such was ever alleged or proved. In the motion to stay it was only the transfer that was relied upon.

" In the result, I find myself in full agreement with all the judges in the courts below that, upon the transfer, the legal title to the debt became vested in Rahimtoola and not in Pakistan. And as Pakistan admittedly had no beneficial interest, I should have thought that it could not sue in its own name at all, but only in the name of Rahimtoola. Howsoever that may be, it by no means disposes of Pakistan's claim. That State says that, even so, Rahimtoola was its agent and it could tell him what to do with the debt, in particular, whether to sue for it or not, and it could require him to collect the money and hand it over. 'In effect', therefore, the property was in Pakistan or at any rate it was in its control.

"That is a formidable argument, which Upjohn J. accepted, and it was only rejected by the Court of Appeal because it was displaced by new evidence adduced by the Nizam. This was to the effect that the Finance Minister of Hyderabad made the transfer wrongfully in breach of his duty to the Nizam and without any authority from the Nizam in fact. As soon as the Nizam got to know of it—it was within a very few days—and before any money had been withdrawn from the bank, the Nizam gave notice to the bank that the Finance Minister had no authority to make the transfer and asked for it to be retransferred. The bank did not retransfer it but they did not hand it to anyone else. They still have the money.

"On this new evidence (which was not controverted) Sir Andrew Clark argued before the Court of Appeal that any kind of title or control in Pakistan had disappeared. It had been superseded by the right of the Nizam to recover the money from Rahimtoola in an action for money had and received. He referred to *Buller* v. *Harrison* (2 Cowp. 565) for this purpose. Before your Lordships Sir Andrew went further and contended that the Nizam could recover the money at law from the bank likewise. He did not adduce any specific authority for that proposition, but I think it is plainly correct. The matter can be tested by taking a fictitious illustration which I only take because it comes from a decided case and throws the legal points into sharp relief. Suppose the Finance Minister had transferred the money to a lady of high standing whose official position was stated on the transfer, the transfer being within his ostensible authority but without actual authority, and it was later discovered that the lady was his mistress and the transfer made for no consideration. As soon as the bank were told that the transfer was wrongful and unauthorized, they would be bound to return the money to the Nizam. The Nizam could clearly recover the money from the bank, if they still had it in their hands or from the mistress if she had got it, or, indeed from any person who received it from her, except one who received it in good faith and for valuable consideration. That is shown by the well-known decision of the Court of Appeal in *Banque Belge pour l'Etranger* v. *Hambrouck* ([1921] 1 K.B. 321). The gist of it is that an agent, acting within his ostensible authority but without actual authority, handed over his master's money for no consideration. The judgment of Atkin L.J. shows that he regarded such a transaction as voidable and not void. The named transferee obtained a title to the money until the plaintiff elected to avoid it, whereupon the title revested in the plaintiff subject to any title acquired in the meantime by any subsequent transferee for value without notice. So here, when the Nizam elected to avoid this transaction, the title revested in him so that he can sue the bank for the money which they still hold, but Rahimtoola ought to be joined as a defendant so that the bank may be protected from any claim by him, and he may have an opportunity of controverting the facts if he wishes to do so.

" Sir Andrew Clark made a further point which appealed particularly to Romer L.J. There being no consideration for this transfer, and it not being a gift, the money was clearly held by the legal owner, Rahimtoola, on a resulting trust for the Nizam. That gives the Nizam a right of control over it which overrides any claim which Pakistan may have, as principal, to give directions to Rahimtoola.

" Those arguments of Sir Andrew Clark appear to me to be very strong, as they appeared also to the Court of Appeal. Indeed, if it is open to the Nizam to displace the claim of Pakistan by showing a legal title in himself or an equitable title, I think he has done so. He has shown both, and if the matter stopped there I should have found myself in agreement with the Court of Appeal.

" But the question is whether it is open to the Nizam so to displace the claim of Pakistan when the State declines to litigate about it. This throws us back, I think, to the rules which govern sovereign immunity.

" It has sometimes been supposed that there is an absolute rule that a foreign Government cannot be impleaded in our courts in any circumstances, and, as a corollary, that it cannot be asked to come to our courts to litigate about its interest in property. That is supposed to be the result of Dicey's rule and Lord Atkin's two set propositions. But there are difficulties in it. To begin with, the rule about ' not impleading a foreign Government ' is by no means universal or absolute, as I will show. In the next place, the rule about ' property ' only applies, I think, to property which plainly or admittedly belongs to a foreign sovereign, or plainly or admittedly is in his possession or control. It is not appropriate in cases such as the present where the question ' To whom does this debt belong? ' ' Whose property is it? ' is the very question which has to be decided in the action. It cannot also be the question which has to be decided on a summons to stay. It is obvious that, if that is the question to be decided by the courts, it ought to be decided at the trial—or, at any rate, at *a* trial—after full discovery and examination of witnesses, instead of being done imperfectly at this preliminary stage with no discovery and on insufficient materials. Lord Maugham was of that opinion. He thought the foreign Government ought to *prove* its title. But if that is to be done, there is no point in a stay. You might as well have the trial anyway.

" What is the alternative? If the foreign Government has not to prove its title, will a mere claim by it suffice? That is the only logical alternative, as Scrutton L.J. perceived. He pointed out that if the foreign Government is not to be impleaded, directly or indirectly, it must not be called upon for proof of anything, not even to show good cause: see *The Jupiter* [(No. 1)] ([1924] P. 236, 243[1]). But the Privy Council have refused to carry the rule about 'not impleading a foreign Government' to that absolute extreme. It would be far too unjust to a plaintiff in an English court: see *Juan Ysmael & Co. Inc.* v. *Indonesian Government* ([1955] A.C. 72[2]). But is there any halfway house? The privy Council there said (*ibid.* 98) that a foreign Government is not bound to prove its title 'but it must produce evidence to satisfy the court that its claim is not merely illusory, nor founded on a title manifestly defective.' Even this leaves many questions unanswered. What degree of evidence is needed for this purpose? And if the foreign Government produces some evidence, is it not open to the plaintiff to displace it? And if the plaintiff does succeed in displacing it (as the Nizam did here)—so that on the uncontroverted affidavits there is no longer an arguable issue—is the foreign Government still entitled to a stay?

" Again, what does the rule mean when it speaks of 'property' and 'control'? Suppose that a legal title is in Pakistan or its agent, does it follow that the debt is 'property' which belongs to it? It can well be argued that Pakistan should not be entitled to sovereign immunity simply because it has a bare legal title without any equitable right. The Cour de Cassation in France would not grant immunity on such a ground: see *Procureur Général près la Cour de Cassation* v. *Vestwig* ((1946) Sirey, *Recueil Général*, 1947, I, 137; *Annual Digest*, 1946, Case No. 32). And can Pakistan be said to have 'control' over the debt when the Nizam has a good equitable title which has priority in the courts over any direction that Pakistan may give to its agent?

" And where is the line to be drawn between an agent who is the 'organ or alter ego' of a foreign Government and one who is not? Into which category did Rahimtoola, the High Commissioner, fall? It is said that, if he was an 'organ' of the State, the transfer to him was equivalent to a transfer to the State of Pakistan itself and that automatically entitles it to a stay; whereas, if he was only an agent, it must produce evidence to satisfy the rule about 'property'. I agree with the Court of Appeal that Rahimtoola cannot be regarded as an 'organ or alter ego', but I find it difficult to reconcile this with the decision in *Baccus S.R.L.* v. *Servicio Nacional del Trigo* ([1957] 1 Q.B. 438[3]), as to which I would only say that I should have thought that a separate legal entity which carried on commercial transactions for a State was an agent, and not an organ, of the Government, and that it was only if it was an 'organ or alter ego' that it could not be impleaded.

" And why, I ask, should sovereign immunity depend on the finer points of our domestic law? It is a strange proposition of

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[[1] See *Annual Digest*, 1925–1926, Case No. 100.]
[[2] See *International Law Reports*, 1954, p. 95.]
[[3] *Ibid.*, 1956, p. 160.]

international law which depends for its application on whether a satisfied judgment in trover changes the property in the goods (the point which apparently turned the scale in the *Dollfus Mieg* case), or on whether the principal of a transferee can sue in his own name for cash at bank (a point which looms large in the present case). The comity of nations is not offended more or less according to the way such points are resolved.

" Such are the difficulties in the existing rules. I can see no satisfactory answer to them. They are so great that I think we should go back and look for the principles which lie behind the doctrine of sovereign immunity. Search as you will among the accepted sources of international law and you will search in vain for any set propositions. There is no agreed principle except this: that each State ought to have proper respect for the dignity and independence of other States. Beyond that principle there is no common ground. It is left to each State to apply the principle in its own way, and each has applied it differently. Some have adopted a rule of absolute immunity which, if carried to its logical extreme, is in danger of becoming an instrument of injustice. Others have adopted a rule of immunity for public acts but not for private acts, which has turned out to be a most elusive test. All admit exceptions. There is no uniform practice. There is no uniform rule. So there is no help there.

" Search now among the decisions of the English courts and you will not find them consistent. They seem to have different rules about ' property ' according to the subject-matter. On the one hand, there are the cases about ships and other specific chattels. In these cases the courts have tended to apply the rule of absolute immunity. This rule was formed in the days when no action lay against the sovereign in any circumstances. It was thought to offend the dignity of a sovereign and to impinge on his independence if his subjects were allowed to sue him in his own courts. Likewise if he were sued in the courts of another country. Proper respect for sovereign power therefore required that a sovereign should not be impleaded, directly or indirectly, in the courts of his own or any other country without his consent. These cases have received a check lately by the case of *Sultan of Johore* v. *Abubakar Tunku Aris Bendahar* ([1952] A.C. 318, 343–344[1]), where the Privy Council rejected the notion that there was any absolute rule about ' not impleading a foreign Government '.

" On the other hand, there are the decisions about trust funds and other debts. These have a modern look about them. It is more in keeping with the dignity of a foreign sovereign to submit himself to the rule of law than to claim to be above it, and his independence is better ensured by accepting the decisions of courts of acknowledged impartiality than by arbitrarily rejecting their

[[1] See *International Law Reports*, 1952, Case No. 38.]

jurisdiction. In all civilized countries there has been a progressive tendency towards making the sovereign liable to be sued in his own courts; notably in England by the Crown Proceedings Act, 1947. Foreign sovereigns should not be in any different position. There is no reason why we should grant to the departments or agencies of foreign Governments an immunity which we do not grant our own, provided always that the matter in dispute arises within the jurisdiction of our courts and is properly cognizable by them.

"This difference of treatment according to subject-matter is seen very noticeably in the *Dollfus Mieg* case, on which both sides relied. Mr. MacKenna relied on the decision of this House about the 51 gold bars, whereas Sir Andrew Clark relied on the decision about the remaining 13. It is indeed the fact that a stay was granted in respect of the 51 gold bars which were still specific chattels, but not in respect of the remaining 13 which had, by mistake, been sold and melted down, leaving only a chose in action. And there seems, from the report, no difference between them except subject-matter. It must be remembered that the claim against the bank, as finally formulated, was not for delivery of the 64 gold bars but for damages for their conversion. The evidence of conversion of the 51 was the refusal to deliver them, and of the 13 was the sale of them. This difference did not affect the substance of the dispute. It did not matter to the rival claimants whether they received the specific gold bars or the equivalent value in cash. Wherein, then, lies the difference unless it be in subject-matter; that is, in the difference between specific chattels and a chose in action? And the speeches in this House bear this out.

"The reason for granting immunity in respect of the 51 bars was because the Sovereign Governments had the right to immediate possession of them and were entitled to have their bailees kept immune from suit in respect of them, whatever the form of action, whether it was for delivery of the specific 51 bars or for damages for their conversion. Lord Radcliffe said that the Admiralty decisions about ships had much more bearing than the Chancery decisions about trust funds. The 51 bars were specific chattels, and, if the plaintiffs obtained damages for conversion of them, the bank would be able to set up the plaintiffs' title against the Sovereign Governments, and that would materially affect the existing right of the Sovereign Governments to possession of them.

"The reason for refusing immunity in respect of the 13 bars was because, as Lord Tucker put it ([1952] A.C. 582, 622–623), the bank, by its own act, had 'put an end to the bailment which *alone* afforded the protective umbrella of immunity'. It is instructive to consider the consequences. The action by the Dollfus Mieg company was allowed to continue against the bank for conversion of the 13 bars, and in that action the bank could not dispute the bailor's title. No system of jurisprudence could view with equanimity the prospect of the bank being made liable twice over for one and the same conversion. The bank would have a clear right to interplead by inviting the Sovereign Governments to come in and either to maintain or relinquish their claim, or else be barred: see R.S.C., Ord. 57, rr. 1, 3, 5, 10. The rule about 'not impleading a foreign Government' would not be applied so rigidly or so absolutely as to obstruct the justice of that course. The Sovereign Governments, having no immunity in respect of the 13 bars, would therefore have been compelled to come in or lose their right. Even if the bank had not sought to interplead and the Dollfus Mieg company had obtained judgment against the bank (or against the purchasers of the 13 bars), then on satisfaction by the bank of the judgment (or of the claim of the purchasers for indemnity) the bank could set up the title of the Dollfus Mieg company against the Sovereign Governments, because a satisfied judgment in trover changes the property in the goods (see *Brinsmead* v. *Harrison* (1871) L.R. 6 C.P. 584) and is equivalent to eviction by title paramount: see *Biddle* v. *Bond* ((1865) 6 B. & S. 225). So the Sovereign Governments would be prejudiced by the continuance of the action. Yet this House allowed it to continue.

"I have dealt at some length with the position of the 13 bars because it seems to me to be a direct decision of this House about a chose in action. So regarded, the decision falls into line with the decisions of the Court of Chancery about a trust fund or a debt. It has been held, I think rightly, that the court must administer a trust fund which is here in the hands of an English trustee, even though a foreign sovereign is known to claim an interest in it. This is only simple justice to the English trustee and beneficiaries. The court cannot afford to allow the fund to lie stagnant for ever because one of the claimants is a foreign sovereign. In such a case the court does not issue process to the foreign sovereign. It simply gives him notice of the proceedings: see *Strousberg* v. *Republic of Costa Rica* ((1881) 44 L.R. 199, 201), by James L.J. If he, after being given an invitation, does not choose to come to our courts to make good his claim, the court will adjudicate as best it can in his absence, and he will be bound by the decision. Lord Langdale intimated as much in *Duke of Brunswick* v. *King of Hanover* ((1844) 6 Beav. 1, 39), and so did Lord Hatherley L.C. in *Larivière* v. *Morgan* ((1872) L.R. 7 Ch. 550, 560). Likewise with an English debt due in England to a creditor who comes to our courts to enforce it. If a foreign Government wishes to claim the debt, it ought, on being invited, to come to our courts to make good its claim. It cannot ask for the action to be stayed and do nothing more, because that would mean that the debt would remain unpaid for ever, which would be unjust to all others concerned. The creditor's action must therefore be allowed to continue, and in that action the claim of the foreign Government can be adjudicated upon in its absence: see *Haile*

Selassie v. *Cable and Wireless Ltd.* ([1938] Ch. 839, 845[1]) by Lord Greene. If the English creditor succeeds and is paid, and the foreign Government should afterwards seek to make the debtor pay the debt twice over, our courts would not permit it. Seeing that the foreign Government had refused to do the debtor the justice of coming in when given the chance, our courts would not permit it ' to commit that injustice against him '. Those were Lord Eldon's words in *Stevenson* v. *Anderson* ((1814) 2 V. & B. 407, 412), a case of interpleader, which Lord Hatherley said had a great analogy. And if the foreign Government should seek to sue the debtor in any foreign courts, I would assume, as Lord Hatherley did (L.R. 7 Ch. 550, 561), ' that the courts of all countries would recognize the decision of a court of competent jurisdiction in a country where the property was situated, and where the rights were properly to be tried '.

" So much for our English decisions. If it were necessary in this case to choose between the Admiralty decisions and the Chancery decisions, I should have thought that the Chancery decisions had much more bearing. If the Nizam of Hyderabad is not allowed to proceed with this action, the money will lie stagnant in the bank and the debt may remain unpaid for ever. The bank cannot safely pay either Rahimtoola or the State of Pakistan because, once it does so, there will clearly thenceforward be no immunity available to protect the bank. The bank must wait until it is sued by Rahimtoola or the State of Pakistan; and once that is done, the State automatically waives its immunity. If Pakistan succeeds in getting a stay, therefore, it means that it does not choose to sue for the debt itself: and yet by claiming immunity, it can prevent the Nizam from ever getting the money: and it can prevent the bank from ever getting a good discharge. That would not seem to be right. It creates a stalemate. The only way to break it is to allow the Nizam to continue the action but to protect the bank by having Rahimtoola as a party, which has been done. On this ground also I would have been in favour of supporting the decision of the Court of Appeal but for one thing to which I now come.

" I do not think it is right to resolve this case by asking whether it is more like the Admiralty decisions or the Chancery decisions, or whether it is more like the 51 gold bars or the 13 gold bars, or whether it concerns a specific chattel or a chose in action. Such distinctions do not touch the root of the problem. Faced with an inconsistency between two lines of cases, the only course is to see which is more consistent with principle. For this I go back, as Upjohn J. did, to the words of that great international lawyer, Sir Robert Phillimore, in *The Charkieh* (L.R. 4 A. & E. 59, 97), who, after a full review of the authorities, said this:

' The object of international law, in this as in other matters is not to work injustice, not to prevent the enforcement of a just demand, but to

[1] [See *Annual Digest*, 1938–1940, Case No. 67.]

substitute negotiations between governments, though they may be dilatory and the issue distant and uncertain, for the ordinary use of courts of justice in cases where such use would lessen the dignity or embarrass the functions of the representatives of a foreign State."

Applying this principle, it seems to me that at the present time sovereign immunity should not depend on whether a foreign government is impleaded, directly or indirectly, but rather on the nature of the dispute. Not on whether 'conflicting rights have to be decided', but on the nature of the conflict. Is it properly cognizable by our courts or not? If the dispute brings into question, for instance, the legislative or international transactions of a foreign government, or the policy of its executive, the court should grant immunity if asked to do so, because it does offend the dignity of a foreign sovereign to have the merits of such a dispute canvassed in the domestic courts of another country: but if the dispute concerns, for instance, the commercial transactions of a foreign government (whether carried on by its own departments or agencies or by setting up separate legal entities), and it arises properly within the territorial jurisdiction of our courts, there is no ground for granting immunity.

" Such a test, if accepted, would enable the difficulties presented by the *Dollfus Mieg* case to be resolved. The dispute about the 51 gold bars brought into question an international transaction. During the war the bars had been looted by the enemy but recaptured by the Allied forces, and they were held by the Sovereign Governments in a pool for disposal according to international agreement: see the facts stated ([1949] Ch. 369, 370–378[1]). It would not be right for our courts to listen to an attempt to remove them from the pool without the consent of the Sovereign Governments. Whereas the 13 bars had been removed from the pool by the bank's own act and the claim of the Dollfus Mieg company could be regarded as a simple claim for a wrong done by the bank devoid of any international element. It was therefore properly cognizable by our courts.

" I would therefore for myself approach this case somewhat broadly and ask whether the dispute is one properly cognizable by our courts: and I would test it by asking what would be the position if the transaction had taken place, not between the Finance Minister of Hyderabad and the Foreign Secretary of Pakistan, but between the Finance Minister of Hyderabad and the Foreign Secretary of Great Britain, and the money had been transferred, not into the name of the High Commissioner of Pakistan, but into the name of a high officer such as a Custodian of Property? Would an action lie in our courts for the return of the money? Clearly not. The transaction was more in the nature of a treaty than a contract or a trust. Reference would be made to such well-known cases as *Nabob of the Carnatic* v. *East India Co.* ((1792–3) 2 Ves. 56) and *Civilian*

[[1] *Dollfus Mieg et Compagnie S.A.* v. *Bank of England*: *Annual Digest*, 1949, Case No. 36.]

War Claimants' Association Ltd. v. *The King* ([1932] A.C. 14[1]) to show that no action would lie for money had and received or upon a trust. The court would not listen to an inquiry whether the Finance Minister of Hyderabad had authority to make the transfer. It would say that any representations to that effect must be made to the Crown and not to the courts. If our courts would not in like circumstances entertain an action against our own Government or its agent, they should not entertain an action against the State of Pakistan or its agent. Upjohn J. put the point in a sentence when he said ([1957] Ch. 185, 209[2]): 'The present transaction was an intergovernmental transaction; let it be solved by intergovernmental negotiations'. That is the kernel of the matter. I agree with it and would allow the appeal.

" My Lords, I acknowledge that, in the course of this opinion, I have considered some questions and authorities which were not mentioned by counsel. I am sure they gave all the help they could and I have only gone into it further because the law on this subject is of great consequence and, as applied at present, it is held by many to be unsatisfactory. I venture to think that if there is one place where it should be reconsidered on principle—without being tied to particular precedents of a period that is past—it is here in this House: and if there is one time for it to be done, it is now, when the opportunity offers, before the law gets any more enmeshed in its own net. This I have tried to do. Whatever the outcome, I hope I may say, as Holt C.J. once did after he had done much research on his own: I have stirred these points, which wiser heads in time may settle.' " (At pp. 411–424.)

[Report: L.R. [1958] A.C. 379.]

Jurisdiction — Exemptions from — Foreign States — Injunction Against—Action Brought by Foreign State—Whether Constituting Implied Consent to Injunction in Another Action—The Law of the United States of America.

In re CREDITORS OF HUGHES & COMPANY, INC.

United States, Supreme Court of the State of New York, Special Term, New York County.

September 5 *and October* 29, 1957.

THE FACTS.—The Republic of Argentina brought an action against Hughes & Company and its assignee for benefit of creditors for alleged conversion of funds belonging to Argentina. The assignee for benefit of creditors moved in the assignment proceedings for an order enjoining the Republic of Argentina from further prosecuting its separate action for conversion of funds and directing Argentina to prosecute its claim against the assignee in the assignment proceedings.

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[1] See *Annual Digest*, 1931–1932, Case No. 118.]

[2] See *International Law Reports*, 1956, p. 173 (*Nizam of Hyderabad* v. *Jung*), at p. 181.]

Held: that the motion must be denied on the basis of the law of the State of New York. [Reports: 9 Misc. 2d 14, 167 N.Y.S.2d 570.]

On reargument,

Held: that the original decision must be adhered to on the basis of both international and municipal law. By bringing an action in a court, a foreign sovereign did not impliedly consent that motions be made against it in other actions and proceedings pending in that court.

The Court said, with respect to the question of international law: "The jurisdiction of this court to enter an order in the assignment proceeding enjoining a foreign sovereign is not established by cases such as *National City Bank of New York* v. *Republic of China*, 348 U.S. 356, 75 S.Ct. 423, 99 L.Ed. 389,[1] authorizing counterclaims against such sovereigns. The motion sub judice was made in the assignment proceeding, not in the action brought by the Republic of Argentina. By bringing an action in this court, the Republic did not consent that motions be made against it in all actions and proceedings pending in this court."

[Reports: 9 Misc.2d 16, 172 N.Y.S.2d 441.]

Jurisdiction—Exemptions from—Foreign States—"Suggestion" of Immunity—Conclusiveness of—Representative Accredited to the United Nations—Immunity of—The Law of the United States of America.

KNOCKLONG CORP. *v.* KINGDOM OF AFGHANISTAN *ET AL.*

United States, State of New York, Nassau County Court.

March, 27, 1957.

THE FACTS.—This was an action to determine title to property claimed by the plaintiff by virtue of a tax deed from the County Treasurer. The defendants, the Kingdom of Afghanistan and the Chief Representative of Afghanistan to the United Nations, appeared specially and moved to dismiss on the ground that the Court lacked jurisdiction over them. The Kingdom of Afghanistan had bought the property in question in 1954 and had thereafter employed it to house the Chief Representative of Afghanistan as well as to serve as the office of, and repository of records for, the Permanent Delegation of Afghanistan to the United Nations.

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[1] See *International Law Reports*, 1955, p. 210.]

At the request of the Department of State of the United States, the United States Attorney appeared as *amicus curiae* and " suggested " to the Court that the Kingdom of Afghanistan, as a sovereign State, was not subject to the jurisdiction of the Court and that the Principal Representative was likewise immune from suit under the Headquarters Agreement between the United Nations and the United States.

Held: that the motion to dismiss must be granted. The Court must accept the claim of immunity, supported by a suggestion of the Attorney General, both as to the Kingdom of Afghanistan and, under the Headquarters Agreement, as to the Permanent Representative of that country

The Court said: "A foreign government may make a claim of immunity from suit either by a direct appeal to the court in which the matter is pending or through diplomatic channels. In the latter case, if the claim of immunity is recognized and allowed by the executive branch of the government, in this case the Department of State, it is then the duty of the court to accept such claim upon appropriate suggestion made by the Attorney General of the United States or other officer acting under his direction (*Compania Espanola De Navegacion Maritima, S. A.* v. *The Navemar*, 303 U.S. 68, 58 S.Ct. 432, 82 L.Ed. 667[1]; *Lamont* v. *Travelers Ins. Co.*, 281 N.Y. 362, 24 N.E.2d 81[2]). Here, the Attorney General appeared and filed a suggestion of immunity, which suggestion is based on a ' certification of immunity ' issued by the State Department. This certification states that Minister Aziz, as principal resident representative of the Kingdom of Afghanistan to the United Nations, is considered immune from suit by virtue of § 15 of the Agreement between the United Nations and the United States of America Regarding the Headquarters of the United Nations (61 U.S.Stat. [part 4], 3416, 3427–3438, T.I.A.S. 1676) and a joint resolution of the Congress dated August 4, 1947 (P.L. 357, 80th Congress, 61 U.S.Stat. [part 1], 756). The certificate also states that ' the Department further recognizes the sovereign immunity of the Kingdom of Afghanistan in relation to the present action in view of the nature of the property which is the subject of this action.'

" In the light of the above this Court accepts the suggestion of the Attorney General."

[Reports: 6 Misc. 2d 700, 167 N.Y.S. 2d 285.]

NOTE.—The above case is reported in *New York Law Journal*, March 28, 1957, p. 13, col. 2.]

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[1] See *Annual Digest*, 1938–1940, Case No. 68.]

[2] *Ibid.*, Case No. 73.]

Jurisdiction—Exemptions from—Foreign States—Foreign State as Guarantor of Obligation Undertaken by Foreign Municipality —Issue of Loan by Foreign Municipality—Default of Foreign Municipality—Whether Foreign Government Subject to Jurisdiction of Local Courts under Guarantee—The Law of France.

SOCIÉTÉ BAUER-MARCHAL *v.* MINISTRE DES FINANCES DE TURQUIE.

France, Court of Paris. January 29, 1957.

THE FACTS.—In 1913, the City of Constantinople issued loans payable in gold francs, and the relevant loan certificates stated that the Imperial Ottoman Government guaranteed the discharge of the obligation of the City of Constantinople " unconditionally ". In 1931 the Tribunal Civil de la Seine gave judgment against the City of Constantinople in favour of a French holder of loan certificates, and in 1935 the benefit of this judgment was extended (as provided in a French Decree-Law of August 8, 1935) to the plaintiffs herein, who, as holders of loan certificates, accordingly became judgment creditors of the City of Constantinople. The efforts of the plaintiffs to obtain payment from the City of Constantinople were unsuccessful, and they now brought an action for payment against the Turkish Republic in the latter's capacity as guarantors. The Turkish Government claimed immunity from the jurisdiction of the French courts.

Held: that the Turkish Government was immune from the jurisdiction of the French courts. In acting as guarantors for the City of Constantinople the Turkish Government had acted in a sovereign capacity, and the French courts were accordingly not entitled to exercise jurisdiction.

The Court said: " By an order of the President of the Tribunal Civil de la Seine dated August 14, 1935, the appellants—in accordance with the provisions of the Decree-Law of August 8, 1935—obtained the benefit of a judgment of the Tribunal Civil de la Seine of October 28, 1931, in favour of one d'Arjuzon, who was also a bondholder of the same loan issue. . . . This judgment ordered the City of Constantinople to make payment in gold francs. Every sovereign State is entitled to immunity from the jurisdiction by virtue of the general rules of international law. The terms in which the Turkish State guaranteed the loan raised by the City of Constantinople cannot be interpreted as a waiver of the immunity to which the Turkish State is entitled. It is true that these terms are such as to confer upon the intervention of the Turkish State the character of a guarantee for the obligations undertaken by the City of Constantinople. However, notwithstanding that a foreign municipality may be sued in the French courts and adjudged liable to discharge its obligations (as indeed happened when on October 28, 1931, the Tribunal Civil de la Seine gave judgment against the City of Constantinople), the act whereby a foreign State guarantees the activities of that municipality—which in this case are designed to serve the general needs of a public service, such as the execution of public works in the territory of that State—must be considered a sovereign act. The result is that the State concerned—in this case the Turkish Republic—cannot be made subject to the jurisdiction of the court which has exercised jurisdiction over the municipality. The Court below was therefore right in refusing to exercise jurisdiction."

[Reports: *Jurisclasseur périodique*, 1957, II, No. 9779; *Clunet*, 84 (1957), p. 392.]

Jurisdiction—Exemptions from—Waiver of Immunity—State as Charterer Submitting to Foreign Arbitration in Charterparty—Whether Foreign Award Enforceable in Courts of Submitting State—The Law of France.

MYRTOON STEAMSHIP COMPANY *v.* AGENT JUDICIAIRE DU TRÉSOR.

France, Court of Appeal of Paris. April 10, 1957.

THE FACTS.—In 1940, a French government agency chartered a Greek ship. The charterparty contained an arbitration clause whereby disputes between the owners and the charterers were to be submitted to arbitration in London. The owners referred a dispute to arbitration and appointed their arbitrator, but the French Government failed to appoint an arbitrator of its own choice. As a result of the failure of the French Government to act, a single arbitrator decided the dispute, giving a verdict in favour of the owners, and the latter subsequently obtained an *exequatur* against the French Government from the President of the Tribunal Civil de la Seine. The French Treasury now contended that the President of the Tribunal Civil de la Seine had exceeded his powers in granting the *exequatur*, and that the submission of the French Government to arbitration was invalid because the charterparty was not a private contract in respect of which the French Government could validly submit to foreign arbitration.

Held: that this was a private contract and that the French submission to foreign arbitration in the charterparty was valid. Subject to further enquiry into the question as to whether the French officials responsible for signing the charterparty had power to do so, the President of the Tribunal Civil de la Seine was entitled to grant an *exequatur* in respect of the foreign award.

The Court said: " On February 29, 1940, the State Maritime Transport Agency (for whom the French Treasury has since been substituted) chartered the Greek ship *Tasis* for one year. The charterparty contained an arbitration clause conferring competence, in the event of a dispute arising, on arbitrators in London. Certain difficulties arose with regard to the payment of freight charges, and the owners of the *Tasis*, the Myrtoon Steamship Company, appointed their arbitrator who, in default of the French State appointing an arbitrator, gave his award as a single arbitrator on January 26, 1951. On June 11, 1952, the President of the Tribunal Civil de la Seine made the award executory. The Minister of Shipping objects to the order which gives executory force to the award, on the grounds that the measures taken after the conclusion of the Armistice in June 1940 terminated the charterparty, and that the President of the Tribunal Civil de la Seine had no jurisdiction to give executory force to a foreign award. The Minister further relies on the invalidity of the arbitration clause, on the ground that the State is not a trader and that the charterparty cannot be regarded as a private contract.

[The Court then dealt with the powers of the President of the Tribunal Civil de la Seine under French law, and continued:] "The Treasury contends that the State is not entitled to submit to arbitration. This prohibition is limited to municipal contracts and does not apply to contracts of an international character. Article 1004 of the Code of Civil Procedure, by comparison with Article 83 thereof, shows that the injunction against submission to arbitration which applies to public bodies has as its only basis the special protection to which they are entitled in the French courts as a result of all cases concerning them being reported to the Public Prosecutor. It follows that the prohibition provided for in Article 1004 does not pertain to international public policy. It would be contrary to the interests of the State to prevent its agents from agreeing to a mode of settlement of disputes which is in accordance with international commercial usage. . . . A contract relating to maritime transport is a private contract where the owner merely puts his ship and the ship's crew at the disposal of the State and does not take a direct part in the performance of the public service undertaken by the State in the latter's capacity as a charterer. The charterparty does not contain any clause peculiar to public law or unusual in private law. It provides for a time charter of the vessel which is put at the disposal of the State chartering it. The insertion of the arbitration clause underlines the intention of the parties to make their agreement subject to private law."

The Court then dealt with the powers of the various officials who originally concluded the contract on behalf of the French Government and held that, subject to these officials having acted within their competence—a question to be decided subsequently[1]—the French Government could validly submit to arbitration.

[Report: *Clunet*, 85 (1958), p. 1003.]

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[1] In a judgment dated May 19, 1958, *Myrtoon Steamship Co.* v. *The State*, the Tribunal des Conflits held that the question as to whether an official acting on behalf of a Ministry was entitled to insert an arbitration clause in an agreement

Jurisdiction—Exemptions from—Foreign States—Acts *Jure Imperii* and Acts *Jure Gestionis*—Claim for Damages against Foreign State—The Law of Germany.

IMMUNITY OF UNITED KINGDOM FROM JURISDICTION (GERMANY) CASE.

German Federal Republic, Court of Appeal of Schleswig.
March 26, 1957.

THE FACTS.—The plaintiff, a haulage contractor, contended that in 1945 officers of the British army of occupation in Germany had asked him to go to the Soviet-occupied zone of Germany and bring back to the British zone of occupation certain arms and military plans. He alleged that while in the Soviet-occupied zone he was arrested by members of the Soviet armed forces and kept in captivity for some months, and that as a result he sustained injury to his health. In the present action he claimed that the United Kingdom was liable to him in damages for the injuries sustained in the execution of the alleged contract made with the British officers in 1945 (the alleged contract being implicit in the request referred to above), and that he was therefore entitled to an executory order against debts owed by the Government of the German Federal Republic to the Government of the United Kingdom and arising from the London Debt Agreement concluded between the two countries in 1953.

Held: that the application for an executory order must be dismissed.[1] Although a foreign State was subject to the jurisdiction of the German courts in matters arising out of contracts of a commercial character, the alleged contract in the present case was more in the nature of the exercise of sovereign authority by the United Kingdom. Furthermore, the German courts should not, in the interest of reciprocity, exercise jurisdiction over a foreign State where the foreign State concerned—as was the case with the United Kingdom—would not itself claim jurisdiction if an action were brought against another foreign State in its own courts.

The Court said: "It has become doubtful in recent years whether there is in existence a recognized rule of international law

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signed by him was within the competence of the administrative courts (*Dalloz*, 1958, Jurisprudence, p. 699).

In other proceedings brought by the owners of the *Tasis*, it was held that the exercise by the French Government of its right of angary in time of war was not subject to the jurisdiction of the Conseil d'État, and that the latter was therefore unable to interfere with a decision of the Ministry of Public Works and Transport rejecting the claim of the owners for compensation in respect of damage caused by the seizure of the *Tasis*: Judgment of the Conseil d'État dated November 22, 1957. *Re Myrtoon Steamship Co.* (*Dalloz*, 1958, Jurisprudence, p. 10).

[1] It may be noted that the plaintiff received an *ex gratia* payment of 65,000 Deutsche Mark, but he alleged that the damage suffered by him was far in excess of that figure.

that States are exempt from the jurisdiction of other States also in cases where private transactions form the subject-matter of the proceedings. According to the doctrine of absolute immunity there is such a rule of international law, whereas according to the doctrine of restricted immunity there is no such rule. The absolute doctrine has been adopted in the United States of America, in the United Kingdom, and in a number of smaller countries. Belgium, Italy and Switzerland have adopted the restrictive doctrine. The Supreme Court of Austria, in a judgment dated May 10, 1950,[1] has traced the development in various countries from about the middle of the last century, and has itself—contrary to the former jurisprudence of the Austrian courts—followed the restrictive doctrine.

" The restrictive doctrine has recently gained ground in Germany. Although the [former] Supreme Court of Germany still adhered to the absolute doctrine (RGZ., vol. 103, p. 274; vol. 102, p. 306; vol. 63, p. 165), the courts in Western Germany have veered towards the restrictive doctrine. Thus the Court of Appeal of Hamm, in a judgment of April 14, 1951,[2] held that Italy was not exempt from the jurisdiction of the German courts in a case concerning restitution of property. In a judgment of March 19, 1953,[3] the District Court of Kiel held, in an action concerning an accident involving a motor omnibus owned by the Danish State, that Denmark could not claim exemption from the jurisdiction of the German courts. The District Court of Kiel said in its judgment that this was a purely fiscal activity of the Kingdom of Denmark. Further, the District Court of Berlin, in a judgment of October 3, 1953,[4] expressed the view, after referring to the above-mentioned judgment of the Court of Appeal of Hamm, that the Republic of Latvia was subject to the jurisdiction of the German courts in proceedings under the Restitution Ordinance of Berlin. Even if, in accordance with these decisions, foreign States are, as a rule, subject to the jurisdiction in actions concerning private claims, it is nevertheless doubtful whether this is so where the private claim has no connection with commercial activities of the foreign State but is concerned with the latter's sovereign activity. Thus the Court of Appeal of Hamburg, in a judgment given on November 11, 1952, denied the jurisdiction of the German courts in respect of the claim of a solicitor, on the ground that the attacks against the exemption of foreign States from the jurisdiction were mainly concerned with the prosecution of claims connected with 'a commercial enterprise [of the foreign State concerned] having a profit motive '. The work of the solicitor

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[[1] *Hoffman* v. *Dralle, sub nom. Dralle* v. *Republic of Czechoslovakia* (*International Law Reports*, 1950, p. 155).]

[[2] *Restitution of Property* (*Republic of Italy*) *Case* (*International Law Reports*, 1951, p. 221).]

[[3] *In re Danish State Railways in Germany* (*International Law Reports*, 1953, p. 178).]

[[4] *Republic of Latvia Case* (*International Law Reports*, 1953, p. 180).]

in that case was said to be connected with the performance of sovereign functions by the Danish Ministry of Defence. In the present case, it cannot be denied that there is a close connection between the events allegedly giving rise to the plaintiff's claim and the performance of sovereign functions by the British army. On the basis of the judgment of the Court of Appeal of Hamburg, to which reference has just been made, the right of the German courts to exercise jurisdiction will have to be denied even if the plaintiff's claim is of a private character, an assumption which may well be borne out by the wording of the document which has been submitted and which does not contain anything in the nature of an order. On the other hand, other circumstances militate against that assumption, such as the co-operation of German soldiers, to which the plaintiff himself referred. There is all the more reason in the present case to deny the jurisdiction of the German courts as the United Kingdom itself, against which the claim is being brought, has adopted the absolute doctrine and does not subject foreign States to its jurisdiction even in respect of private claims. We ought to apply the principle of reciprocity in the same way as did the Supreme Court of the United States of America in its judgment of March 7, 1955,[1] where it held that such counterclaims against a foreign State should be allowed as the law of procedure of the State concerned would allow against the State of the forum."

[Report: *Jahrbuch für Internationales Recht*, 7 (1957), p. 400.]

Jurisdiction—Exemptions from—Foreign States—*Acta Jure Imperii* and *Acta Jure Gestionis*—Claim against Foreign State for Return of Blocked Assets—Assets Blocked by Legislative Decree of Foreign State—Whether Courts of Forum Competent to Adjudicate on Claim—The Law of Italy.

KINGDOM OF GREECE *v.* GAMET.

Italy, Court of Cassation. June 8, 1957.

THE FACTS.—This was an action by a French citizen against the Kingdom of Greece for the return of shares in a Greek company owned by the plaintiff and in the possession of the defendants. The action arose in the following circumstances: During the Second World War the plaintiff sold shares in a Greek company to an Italian company, Azienda Minerali Metallici Italiani (called "A.M.M.I."). After the end of the war and the entry into force of the Italian Peace Treaty, the Greek Government issued a Decree that all shares in Greek companies owned by Italian citizens or companies were to be deposited in Greece or handed to a Greek consulate abroad. It

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[[1] *National City Bank of New York* v. *Republic of China* (*International Law Reports*, 1955, p. 210).]

was further provided that the shares were to remain blocked until their legal fate was determined.

In proceedings before the Franco-Italian Conciliation Commission[1] the plaintiff was able to establish that A.M.M.I. had acquired its shares by duress, and A.M.M.I. accordingly agreed that the plaintiff was the true owner. This settlement between the plaintiff and A.M.M.I. was formally incorporated as part of the decision of the Conciliation Commission. Thereupon, the plaintiff brought the present action against the Greek Government, claiming the return of the shares (which were at that time deposited in the Bank of Greece and blocked by the Greek Decree referred to above); alternatively, damages for non-delivery. The Greek Government claimed immunity from the jurisdiction of the Italian courts.

Held: that the claim of the Greek government to immunity from the jurisdiction of the Italian courts must be upheld and the action dismissed in *limine.*

The Court said: " These facts inevitably lead to the conclusion that the Italian courts have no jurisdiction in the present case, because the Greek Government is entitled to jurisdictional immunity. At one time it was held that there was a rule of customary international law which compelled States to concede immunity from the jurisdiction to foreign States in respect of all acts performed by them. This view was subsequently abandoned, and doctrine as well as jurisprudence approved the view that customary law requires the immunity of foreign States from local jurisdiction only in so far as foreign States act in a sovereign capacity, but not where they engage in purely private activities which put them on a basis of equality with private individuals. This Court has constantly adopted this view, holding that among the generally recognized rules of international law (with which Italian law, in accordance with Article 10 of the Constitution, must comply) there is a rule which exempts foreign States from the jurisdiction of the courts in all matters which are extraneous to the internal legal order, or in which foreign States act as subjects of international law, or where they act as the holders of sovereign power within their sphere, *viz.*, when they act in the capacity of sovereign entities.

" When a State acts within the scope of its own sovereign authority in the territory of another State, it cannot be made subject to the jurisdiction of that State, in application of the rule *par in parem non habet imperium.* When, on the other hand, the foreign State acts independently of its sovereign authority and puts itself in the position of a private citizen, the exercise of jurisdiction must not be denied because in that case the foreign State performs

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[[1] *Recueil des Décisions*, Part I, p. 38; see also *International Law Reports*, 1951, Case No. 150 (*sub nom. S.A.I.M.I. Claim*).]

its activities as a subject of the legal order of the State of the forum. The application of these rules to the case under review can leave no room for doubt. Greece has blocked the shares of the Greek company in pursuance of executive administrative measures. In so doing, the Greek State has acted in the capacity of a sovereign entity, in order to assert its rights to enemy property in execution of the Peace Treaty. The sovereign character of the legal relationship could hardly be more obvious. The Greek State has never assumed the mantle of a private contracting party or entered into any private legal relations with A.M.M.I. or other persons. It has laid claim to the control of the shares by exercising its sovereign powers and in particular by requiring those in possession of the shares to deposit them. The plaintiff has vigorously contended that the conduct of the Greek Government was illegal and arbitrary and that the action taken by it must therefore be regarded in the same light as an act by a private individual. This contention is clearly ill-founded. Any adjudication upon the question of whether the sovereign activity of a State is in conformity with the rules of international law, which would then become the basis of a judgment concerning the legality of the conduct of a State acting in its sovereign capacity, is entirely outside the province of a judge of the forum. It would involve a subjection to the jurisdiction which—even to the limited extent now accepted by authoritative writings and by the courts—must be decisively rejected. The sovereign or private character of the activity of a State depends upon the sphere within which it is performed, *viz.*, whether it is performed within its own legal order or that of the other State, and not on whether it conforms to the rules governing international relations. Any enquiry into the constitutional legality of the laws of a foreign State would constitute an enquiry into the internal legal order of that State and thus an interference with a legal order which is outside the province of the State of the forum."

[Report: *Rivista di Diritto Internazionale,* XLI (1958), p. 123.]

Jurisdiction—Exemptions from—Foreign States—Action against Hungarian People's Republic for Debt Owed by Hungarian Bank Nationalized by Hungarian Legislative Enactment—Whether Italian Courts Competent to Exercise Jurisdiction—The Law of Italy.

PAUER *v.* HUNGARIAN PEOPLE'S REPUBLIC.

Italy, Court of Cassation. October 17, 1956.

THE FACTS.—The appellant (plaintiff in the Court of first instance) brought an action against the Hungarian People's Republic for certain sums of money owing to him by the Hungarian General Credit Bank which, together with all other Hungarian banks, had been nationalized by a Hungarian law. He contended that as the

Hungarian People's Republic had substituted itself for the Hungarian General Credit Bank, it was liable to repay the debt. The Court of first instance upheld a plea of the Hungarian People's Republic to the jurisdiction, and the appellant now asked for a reversal of that decision. He contended that the effect, as between himself and the Hungarian People's Republic, of the nationalization of the Hungarian General Credit Bank was not a matter arising out of the performance of the sovereign functions of the Hungarian People's Republic and that the latter was accordingly not immune from the jurisdiction of the Italian courts.

Held: that the appeal must be dismissed. In enacting legislation for the nationalization of Hungarian banks the Hungarian People's Republic had acted in its sovereign capacity, and the Italian courts were accordingly not entitled to exercise jurisdiction.

The Court said: "The appellant submits three grounds of appeal against the judgment of the Tribunal of Rome: That the Court below declined to exercise jurisdiction on the ground that international law grants immunity from jurisdiction to a foreign State; that it declined to exercise jurisdiction on the ground that the criteria for which Article 4 of the Code of Civil Procedure provides were not present; that it failed to determine the question of its territorial competence, from which the determination of the question of jurisdiction could have been inferred. The first ground of appeal is put in this way: The appellant is a creditor of the Hungarian General Credit Bank, against which he obtained a judgment holding the Bank liable as guarantor to repay moneys owed by another bank. The appellant says that as the Hungarian People's Republic has nationalized all banks, the Hungarian General Credit Bank has ceased to exist as a separate entity and that there was substituted for it the Hungarian State, which must therefore be held liable to repay the debt. He accordingly brought an action against that State asserting the competence of the Italian courts on the ground that the cause of action is not concerned with the public measure of nationalization of banks—a measure which the defendant State admits and on which it relies—but with the effect of such measure, which is said to be of a private nature. Therefore, he contends, the question of the immunity of the foreign State from the jurisdiction does not arise because this question would presuppose a dispute concerning the performance of sovereign functions of that State. This argument is without merit.

"It is well known that the relations arising from the acts of a foreign State in its capacity as a subject of international law and those in respect of which it acts as the holder of sovereign power are exempt from the operation of municipal law. A rule of international law deriving from the principle of respect for and autonomy of foreign States requires such exemption. Italian law, by virtue of Article 10 of the Constitution, conforms to that rule. The Italian courts are agreed that a foreign State cannot be sued in respect of relations of public law, which bring into operation the concept of immunity from the jurisdiction. On the other hand, the courts assume jurisdiction against a foreign State where the latter has created legal relations of a private nature, *viz.*, has acted *more privatorum.* The application of these principles shows that the decision of the Court below is correct. The Hungarian People's Republic became the successor of the [Hungarian General Credit] Bank and took its place, as far as the contractual relationship between the Bank and the appellant is concerned, by virtue of the legislative enactment providing for the nationalization of banks, that is, in the performance of a sovereign function. Although the legal relationship between the appellant and the Bank is of a private character, the relationship between the appellant and the Hungarian People's Republic is certainly not of a private character. The People's Republic succeeded the original debtor by virtue of a sovereign act of the Hungarian State, which was performed in the exercise of the latter's sovereign functions. We can have regard only to this latter act, because it is only by virtue of that act that the State can become liable. If the succession had come about as the result of a private act, such as that whereby an estate devolves upon the State, the latter would have been substituted without being able to rely on the exercise of its sovereign power, and there would in that case be no reason to regard the State as immune from the jurisdiction. It would be likewise if a contract had been made by the State to take over the liabilities of the Bank. In this case, however, we are concerned with a Law which had nationalized banks in the public interest, in accordance with the policy pursued by the State concerned. It may be added that the contention of the appellant according to which the effect and scope of the Nationalization Law are not in issue is ill-founded, because the Hungarian People's Republic has shown that this Law did not diminish the legal personality and organizational autonomy of the Bank of Hungary and other banks, but confined itself to nationalizing the shares in them which were Hungarian-owned. The Court must therefore deny the competence of the Italian courts, and this makes it unnecessary to consider the second ground of appeal, namely, the question of jurisdiction from the point of view of municipal law according to Article 4 of the Code of Civil Procedure —a question which the Court below decided *ad abundantiam.*"

[Report: *Rivista di Diritto Internazionale,* XL (1957), p. 248.]

Jurisdiction—Exemptions from—Foreign States—The Holy See—*Acta Jure Imperii* and *Acta Jure Gestionis*—The Law of Italy.

PADRI BENEDETTINI DELLA BASILICA DI S. PAOLO *v.* NUNZI.

Italy, Court of Cassation. March 13, 1957.

In this case, the facts of which do not appear from the report, the Court was concerned with two questions: (1) whether the Basilica of St. Paul forms part of the territory of the Republic of Italy, notwithstanding that it enjoys the " immunities which [as Article 15 of the Lateran Treaty of February 11, 1929, expresses it] international law accords to the residences of diplomatic agents of foreign States "; and (2) whether immunity from the jurisdiction of the Italian courts can be claimed in respect of *acta jure gestionis*.

The Court dealt with these two questions as follows: " In the first place, the interpretation of Article 15 of the Treaty between Italy and the Holy See which has been adopted by the Court of first instance is contested, and it is contended that the Basilica of St. Paul and the Monastery do not form part of the Italian State. It is said that the Court of first instance has confused the terms ' territory ', ' State ' and ' place ', and that—like the Vatican City—the Basilica of St. Paul, though completely surrounded by Italian territory, does not belong to the Italian State. The Treaty between the Holy See and Italy draws a clear distinction between territory over which the Holy See has sovereignty and exclusive jurisdiction (Articles 3 and 4), and land which, though within the territory of the Italian State, enjoys diplomatic immunities (Article 15). Sovereignty over such land is vested in the Italian State, notwithstanding that such sovereignty is limited by the immunities to which reference has been made. This follows clearly not only from a comparison between Articles 3 and 4 and the words used in Article 15, *viz.*, ' through forming part of the territory of the Italian State ' (which cannot be interpreted in their customary but only in their technical legal meaning), but also from the consideration that the recognition of diplomatic immunities logically presupposes that the territory concerned belongs to the State which recognizes such immunities.

" The second ground of appeal is concerned with the distinction which has been made by the Court of first instance, so far as concerns immunity from the jurisdiction of the Italian courts, between activities falling within the framework of the performance of the public functions of a foreign State or State entity operating in territory subject to Italian sovereignty, and activities of a purely private character. This distinction is contested, and it is said that the exemption from the jurisdiction of the Italian courts refers to any activity of a foreign State or State entity. This doctrine has already been rejected by this Court (the last occasion being May 24, 1956;

cf. Foro italiano, 1956, I, p. 841[1]). The immunity of a foreign State from the local jurisdiction can be traced to a custom observed by all States belonging to the international community. Originally, this custom was more liberal in the sense that it embraced all activities of a foreign State. Gradually it was narrowed down exclusively to sovereign activities. This tendency in the jurisprudence of various countries is connected with the multifarious activities of the State, which has to a great extent invaded the territory traditionally reserved for private individuals. Immunity from the jurisdiction cannot attach to these various activities, in regard to which the State appears on a basis of equality with private individuals and not as a sovereign body. In the present case the matter in dispute is of a private character. The appeal must accordingly be dismissed and the jurisdiction of the Italian courts affirmed."

[Report: *Rivista di Diritto Internazionale*, XL (1947), p. 245.]

Jurisdiction—Exemptions from—Foreign States—The Holy See —Action by Employees of Hospital Owned by Holy See and Situate Outside Vatican—Claim by Hospital Administration to Immunity from Jurisdiction of Italian Courts—Lateran Treaty of February 11, 1929—The Law of Italy.

BARONCI *v.* OSPEDALE DEL BAMBINO GESÙ.

Italy, Tribunal of Rome. December 17, 1956.

THE FACTS.—The plaintiffs, medical orderlies in a hospital owned by the Holy See and situate in Italian territory, *i.e.*, outside the territory of the Vatican, brought an action against the hospital administration in which they claimed that their contract of employment was governed by the same rules of law as applied in Italy generally to persons employed in Italian hospitals. The defendants contended that they were exempt from the jurisdiction of the Italian courts.

Held: that the plea to the jurisdiction must be overruled. The contract between the parties was not of a " sovereign character ", but one which required the plaintiffs to perform duties of a technical and non-political nature; it was accordingly subject to the jurisdiction of the Italian courts. Further, it would be against the Italian *ordre public* to permit any work to be performed in Italian territory except in accordance with the rules laid down by Italian law.

The Court said: " The plaintiffs performed work as medical orderlies in a hospital owned by the Holy See and situate in the territory of the Republic of Italy. The defendants have raised a plea to the jurisdiction by reference to Articles 14 (ii) and 15 of the

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[1] [*Hungarian People's Republic et Al.* v. *Onori* (*International Law Reports*, 1956, p. 203.]

Treaty between the Holy See and Italy of February 11, 1929, and the provisions contained in Articles 16 and 22 of the said Treaty. As is well known, the Treaty recognizes the sovereignty of the Holy See in the international field (Article 2), and Articles 14 and 15 provide for the immunity of certain land owned by the Holy See and the right of the latter to put such land to the most appropriate use without the need for any permission by the Italian authorities (Article 16). Article 17 exempts such land from liability for rates, and the only requirement asked of the Holy See is to hand over to the Italian State persons whose prosecution is sought for criminal offences and who have taken refuge on such land (Article 22).

" The defendants contend that the immunity here referred to implies the complete exterritoriality of the land as such, with the result that any activity there carried out is exempt from the operation of Italian law and the collective labour agreements in force in Italy, and that such activity is subject only to the autonomous and sovereign power of the Vatican State. The Court is of opinion that such a wide extension of the institution of diplomatic immunity cannot be accepted as part of our law, nor is it recognized by the rules of law governing the relations between the States of the international community, which apply in Italy by virtue of Article 10 of the Constitution. In fact, the modern doctrine of international law and the rules now applicable as between civilized nations no longer regard diplomatic premises as foreign territory, but as part of the territory of the host State. This is the way in which the old and ambiguous term of ' exterritoriality ' is now being interpreted. In the present case the High Contracting Parties intended to apply this more modern interpretation when they laid down the principle of diplomatic immunity, as indeed follows from the wording of Article 15. While Articles 3, 4 and 5 of the Treaty exclude the jurisdiction of the Italian courts in respect of the matters there referred to, Articles 13, 14 and 15 do not exclude it, and no exemption from the jurisdiction results from the status of the defendants as foreign subjects or from the diplomatic immunity as such which has been conferred upon them.

" Diplomatic immunity is conferred upon an organ of a foreign State or entity in respect of the performance of its sovereign functions, and on its representatives acting in that capacity in the territory of the host State. The prevailing doctrine of international law has clarified the concept of immunity in the sense that it does not affect the natural and objective status of the territory of the host State. The concept is confined to laying down the rule that certain activities carried out in the host State are exempt from local law and jurisdiction. The limits within which such activities are recognized and the extent of the privilege of immunity accorded to a foreign State can be ascertained in accordance with the *ratio legis* of the general rule of international law. We have to ascertain the true purpose for which immunity is granted. The basic reason why it is granted is because States must be guaranteed the right to perform in foreign territory those functions which are of the essence of the sovereign State and cannot be performed without that privilege. The status of a subject of international law thus exempts the latter from the jurisdiction of other States only in so far as concerns activities which are truly sovereign. It follows that where a subject of international law engages in activities which are not truly sovereign and which can be carried out by any other person (and not only by a subject of international law), it does not enjoy the benefit of immunity; the relationship in question is then governed by the municipal law of the other States concerned and is subject to the legal control of the competent organs of those States. Once the scope of diplomatic immunity has been limited in this way, there is no longer exemption from the jurisdiction for the relations which a State has established other than in its capacity as a State or subject of international law, *viz.*, those legal relationships which do not presuppose the existence of the status of a subject of international law. In the present case it must be obvious to everyone that the provision of hospital services—whether for reward or gratuitously—cannot be brought within the framework of activities which can be carried out only by subjects of international law. Such activities are not peculiar to States or other public entities but can equally be performed by private individuals. Even if the special protection granted went further than here set out and included all matters even indirectly connected with the sovereign activity of a foreign State, including contracts of employment designed to enable the foreign State as such to give effect to its policy, it would be quite impossible to include—and exempt from the jurisdiction—contracts of employment with a purely technical and non-political content.

" It must also be observed that by virtue of Article 31 of the introductory provisions of the Civil Code, contracts which are contrary to public policy (*ordre public*) can have no legal effect in Italy, where contracts of employment are a matter of public policy, either by reason of the binding force of the provisions governing the legal relationship between employer and employee or by reason of Article 36 of the Constitution, or Article 1 thereof, which has elevated labour to a fundamental State principle. Contracts which are designed to govern the performance of work in a manner other than that laid down by Italian law cannot be enforced in Italy."

[Report: *Rivista di Diritto Internazionale*, XL (1957), p. 246.]

Jurisdiction—Exemptions from—Organs of Foreign State—Hungarian Cultural Institute in Italy—Status of—Whether Functions of Institute Have Sovereign Character—The Law of Italy.

HUNGARIAN PAPAL INSTITUTE *v.* HUNGARIAN INSTITUTE IN ROME.

Italy, Tribunal of Rome. July 31, 1957.

THE FACTS.—A Hungarian Law of 1927 authorized the Hungarian Minister of Culture and Public Education to establish cultural institutes abroad. The persons in charge of such institutes were to be Hungarian civil servants, and their salaries were to be paid by the Hungarian Government. In 1935, Italy and Hungary concluded a Cultural Convention, and, in accordance with that Convention and the Hungarian Law here referred to, the Hungarian Government established the " Hungarian Institute in Rome " (defendants herein). In the present action the plaintiffs, the " Hungarian Papal Institute", claimed that they were entitled to make use of the defendants' premises at such times as the director of the defendants might determine. The defendants contended that as the Hungarian Institute was a Hungarian Government institution, the Italian courts were not entitled to adjudicate upon the plaintiffs' claim.

Held: that the plea to the jurisdiction of the Italian courts must be upheld. The defendants were part of the sovereign State of Hungary and as the functions of the defendant Institute were of a sovereign character, as appeared from the Hungarian Law governing its activities, the Italian courts were not entitled to exercise jurisdiction over the plaintiffs' claim.

The Court said: " It cannot be seriously contested that the Hungarian Institute is an organ of the Hungarian State. The documents submitted by the defendants show that all matters concerning Hungarian cultural institutes abroad are governed by the Hungarian Law No. 13a of 1927. This Law confers power on the Ministry of Culture and Public Education to establish such institutes in the principal cultural centres of foreign countries, and provides that civil servants are to take charge of these institutes and that these civil servants shall be remunerated out of State funds. The same Law authorized the Ministry of Culture and Public Education to acquire premises in Rome in order there to establish a ' Hungarian Institute in Rome ' (in Italian: *Accademia d'Ungheria*). These premises were in fact acquired and are situate at the Palazzo Falconieri, which is the present address of the defendants. The Decree Law of February 25, 1935 (which subsequently became the Law of June 3, 1935), gave legal effect to the Cultural Convention between Italy and Hungary, and in pursuance of that Law the Italian Government accorded to the Hungarian State the right to pursue in Italy, by means of the Hungarian Institute in

Rome, the cultural aims laid down in the Convention, which are of an eminently sovereign nature. The recital and first Article of the said Decree stated that

> 'in view of the cultural bonds of friendship . . . and the desirability of furthering the development of scientific, literary and artistic relations between Italy and Hungary, the Parties have agreed as follows: (1) The Hungarian Government will maintain the Hungarian Institute in Rome for the study and development of Italo-Hungarian relations in science, literature and art.'

" Thus it follows clearly that the Hungarian Institute is an organ of the Hungarian State. Accordingly, the generally accepted rule of law must be applied that a foreign State is exempt from the jurisdiction of the Italian courts so far as concerns its sovereign activities whenever the Italian State would itself be exempt from the jurisdiction of its own courts with regard to similar activities. The Papal Institute, while claiming the exercise of its rights of joint ownership of the library premises and the books contained in it, does not deny —in fact expressly recognizes—that the power to lay down rules for the use of the library is vested in the director of the Hungarian Institute. By a registered letter dated November 17, 1953, the director of the Papal Institute in fact asked the director of the Hungarian Institute to lay down the days and hours during which the library might be used by the holders of scholarships and the students of the Papal Institute and the Hungarian Institute respectively. . . . It is thus obvious that the functions of the director of the Hungarian Institute—in laying down rules for the use of the library, in providing for the hours of closing, and in prohibiting access to the library to certain persons—are functions serving the public purposes of the Institute and, through the Institute, of the Hungarian State. As, according to the principle referred to above, this activity is of a sovereign character, it is exempt from the jurisdiction of the Italian courts."

[Report: *Rivista di Diritto Internazionale*, XL (1957), p. 585.]

Jurisdiction—Exemptions from—Foreign States—*Acta Jure Imperii* and *Acta Jure Gestionis* of Foreign States—Recreation Centre for United States Naval Personnel in Italy—Action against United States Navy by Italian Employee of Recreation Centre—Whether Italian Courts Competent to Exercise Jurisdiction—The Law of Italy.

NOVACO *v.* UNITED STATES NAVY.

Italy, Tribunal of Naples. December 2, 1957.

THE FACTS.—The plaintiff, an Italian citizen, was employed as an interpreter and cashier at a rest centre in Naples established by the United States Navy for United States naval personnel on leave in that city. In the present action the plaintiff claimed that any dispute arising out of her contract of employment with the United States Navy was subject to the jurisdiction of the Italian courts.

Held: that the United States Navy was not entitled to claim exemption from the jurisdiction of the Italian courts. In setting up the rest centre, the United States had not acted in the exercise of sovereign authority and accordingly the legal relationship between the plaintiff and the United States Navy was one of a private nature, which was subject to the jurisdiction of the Italian courts.

The Court referred in some detail to the constant jurisprudence of the Italian courts, according to which foreign States are exempt from the jurisdiction only in respect of *acta jure imperii*, but are subject to the jurisdiction in cases where they have acted in a private or commercial capacity. It then considered the nature of the present claim, and continued: " In considering the matter now before us it cannot be denied that the Italian courts are entitled to exercise jurisdiction over the merits of the action brought by the plaintiff, without violating or impairing the sovereignty of the United States. The defendants have established in Naples a recreation and rest centre for United States sailors who are temporarily in that city or are stationed there. There can be no doubt that by setting up this organization the United States did not intend to carry out an act of sovereignty appurtenant to its essentially military activity, but to engage in activities which have an essentially private purpose. There can be no doubt that the Italian employees, in performing their functions in connection with such activities, rely on their private rights, which give rise to a genuine contract governed by civil law. As appears from the documents in the case, the plaintiff was not entrusted with any functions which served military ends; on the contrary, she did work of a nature accessory to the internal services of the club, performing the duties of cashier, interpreter, clerk at the information desk and book-keeper. It follows that the legal relationship between the plaintiff and the defendants cannot be counted among those in which a subject of international law performs sovereign functions. It is hardly necessary to add that the existence of a contract of employment such as this leads to the conclusion that the international entity has impliedly agreed to submit to the jurisdiction of the Italian courts. The defendants, on a footing of absolute equality with private citizens, have made a contract *jure privatorum* with the plaintiff within the ambit of the legal system of the Italian State. They are therefore subject—like any private citizen—to the jurisdiction of that State."

[Report: *Rivista di Diritto Internazionale*, XLI (1958), p. 452.]

Jurisdiction—Exemptions from—Foreign States—Real Property Purchased by Foreign State—Proposed Use as Embassy—Whether Property Subject to Local Jurisdiction—The Law of Sweden—Relevance of Absence of Applicable Rules of Swedish Law.

BECKMAN *v.* CHINESE PEOPLE'S REPUBLIC.

Sweden, Supreme Court. March 1, 1957.

THE FACTS.—The plaintiffs in this case, Carin Beckman and Åke Beckman, children and heirs of Bengt Johansson, applied to the City Court of Stockholm for a summons against the Chinese People's Republic. They alleged that on October 4, 1954, certain real property situated in Stockholm and belonging to the estate of their deceased father had been sold to the Republic by the administrators of the estate of their late father without their consent and against their protests. They further alleged that the sale had not been required for the administration of the estate and that it had been disadvantageous to them. On this ground they demanded that the purchase—for which the King in Council had granted permission on September 17, 1954—should be declared invalid.

Upon inquiry by the Royal Swedish Ministry for Foreign Affairs, the Chinese Embassy declared that it pleaded diplomatic immunity and that it was not willing to enter a defence.

The City Court of Stockholm thereupon held that the application for a summons against the Republic must be rejected. The Court said: "As the dispute described in the application, which dispute concerns the question of ownership of a property purchased by the Republic and intended for use by its Embassy in this country, is of such a nature that the Republic is entitled to immunity, and as all other circumstances are such that it must be regarded as evident that proceedings on that ground are barred, the City Court considers it right to dismiss the present application for a summons against the Republic." On appeal, the Court of Appeal held that the ruling of the City Court must be confirmed.

On further appeal, to the Supreme Court, permission to bring the case before that Court was granted.

When, on May 9, 1956, the case was presented to the Supreme Court, the latter decided to request the Minister for Foreign Affairs to procure information, to the extent that it conveniently could be done, concerning legal provisions, cases, and doctrinal views on the immunity of a foreign State from suit regarding real property and execution against such property, and especially with regard to property intended for use by the diplomatic mission of a foreign State. As a result of this request, letters and detailed statements from the Swedish diplomatic missions in Washington, Brussels, Paris, Rome, Peking, The Hague, Berne, London and Bonn, and by the Swedish Representative at the United Nations, were transmitted to the Court.

Held: (by a majority of the Supreme Court—Strandberg, Lind, E. Söderlund and Nordström JJ.): that the decision of the Courts below must be upheld.

The reporting Judge who presented the case to the Supreme Court stated in the report: " With a certain exception which may here be disregarded, written Swedish law does not contain any provisions establishing a right for a foreign State to enjoy immunity from action in a Swedish court. Such a right to immunity must, however, be considered as recognized in Swedish law, and has constituted the ground for several decisions by the Supreme Court.

"According to doctrines of international law, Swedish as well as foreign, the right to immunity is considered to be limited in such a way, among others, that actions concerning real property—regardless of the fact that the owner enjoys immunity—may be examined by a court in the State in which the property is situated. This principle—which accords closely with the generally accepted rule of procedure to the effect that the *forum rei sitae* is the exclusive forum for actions regarding real estate—has not, so far as is known, been confirmed in any leading case in Swedish legal practice, but must nevertheless be regarded as expressing Swedish legal opinion.

" In the present case, Carin and Åke Beckman, as part-owners of the estate of the deceased Johansson, have brought an action against the Chinese People's Republic before the City Court of Stockholm and have asked that the Republic's purchase of the real property No. 7 in the block 'Sidensvansen' in Stockholm be declared invalid. The circumstance that the property is used by the Republic for its Embassy in this country cannot be considered as barring examination by the City Court of the case brought by Carin Beckman and Åek Beckman, the object of which examination is to determine the ownership of the real property in question.

" It is my submission, therefore, that the Court should consider it right to set aside the rulings of the Courts below, and to refer the case back to the City Court, the further examination of the case to be resumed by that Court without the necessity for a renewed application by the plaintiffs."

In its majority decision the Supreme Court said: "As the property in this case is used by the Republic for its Embassy in this country, and the Republic for this reason must be regarded as entitled to plead immunity from the action brought by Carin and Åke Beckman, the Court upholds the ruling of the Court of Appeal."

Justice Ljunggren approved the conclusion of the reporting Judge.

[Report: *Nytt Juridiskt Arkiv*, 1957, p. 195.]

Jurisdiction—Exemptions from—Foreign States—Action in Contract—Polish Case-Law—Difference between Foreign State and Foreign National or Diplomatic Representative—Different Base of Immunity of Foreign State and of Diplomatic Representatives Respectively—Law of the Land—Decision Based on International Law—Reciprocity as Basis of Immunity—British Practice with Respect to Immunity.

S. *v.* BRITISH TREASURY.

Poland, Supreme Court. December 14, 1948.

THE FACTS.—The plaintiff, Aldona S., was employed as a typist in the editorial office of *Glos Anglii* (" The Voice of England "), a weekly paper published in Poland on behalf of the British Government. She brought an action in the District Court of Cracow against the Treasury of the United Kingdom of Great Britain and Northern Ireland for the payment of a certain sum of money, alleging that this sum represented part of her salary, to which she was entitled. The District Court dismissed the action without prejudice to the merits of the case, holding that as it was brought against a foreign State the Court was barred by Articles 4 and 5 of the Code of Civil Procedure from deciding the case. This decision was upheld by the Court of Appeal, which found also that the *Glos Anglii* was not an enterprise in the sense of Article 5, paragraph 2 (2), of the said Code, *i.e.*, an enterprise carried on by a person who enjoyed diplomatic immunity. Such an enterprise is not subject to the jurisdiction of the Polish courts.

The plaintiff then applied for cassation of the decision of the Court of Appeal on the ground that it was contrary to decisions of the Supreme Court and to Polish legal writings. In particular, it was contended that the publishing of a periodical was not a diplomatic activity but an economic one, and that the Court of Appeal had wrongly denied the character of " enterprise " to a periodical published by a foreign State on Polish territory.

Held: that the application for cassation must fail. The Court, when deciding whether a foreign State is subject to its jurisdiction, must base itself on the general principles accepted in international intercourse. British courts always accorded immunity to foreign States when the latter were sued in Great Britain. The principle of reciprocity made it imperative for the Polish courts to accord to Great Britain immunity from jurisdiction. Publication of the weekly paper in question did not amount to conducting a commercial enterprise, but even if it did, British courts would be incompetent.

The Court said: " It follows from the reasons adduced in the judgments of the two Courts below and from the written argument submitted on behalf of the plaintiff that in the present case the question arises whether a foreign State is subject to the jurisdiction of the Polish courts. This question has already been twice considered by the Supreme Court, first in 1926 in an action against the Treasury of the Czechoslovak State for damages arising out of an accident caused by a Czechoslovak Government car (decision of March 2, 1926, R. 133/26[1]), and for the second time in 1937, in an action against the Treasury of the German Reich for compensation for damage caused by the unlawful imposition of a tax (decision of July 31, 1937, C. II. 413/37[2]).

" In the first of these two cases the Supreme Court acknowledged that it was without jurisdiction on the ground that Polish courts were not in principle competent to adjudicate in cases against a foreign State; exception could be made only if there were an express rule of the Law of Nations, or in case of voluntary submission to Polish jurisdiction, or in cases involving rights in immovable property. No such exception was present in that case (*Orzecznictwo Sadów Polskich*, 5, Case No. 418). In the second case also, the Supreme Court acknowledged that it was without jurisdiction, on the basis of an intimation by the Ministry of Justice (Articles 343 and 345 of the Code of Civil Procedure) that there existed in Germany a constant custom to the effect that it was not possible to sue a foreign State in the German courts. The German State could not be sued in a Polish court, since established international custom made reciprocity obligatory (*Orzecznictwo Sadów Polskich*, 17, Case No. 306). In deciding the present case the Supreme Court does not find any ground for deviating from existing decisions based on principles of public international law.

" Contrary to what is contended by the appellant, the solution of the problem of the jurisdiction of Polish courts over foreign States cannot be based on the provisions of Articles 4 and 5 of the Code of Civil Procedure. A foreign State cannot be regarded as an alien in the sense of Article 4 of the Code of Civil Procedure, as it is clear that the legislator, being conscious of the principles of international law, could not consider a foreign State to be ' an alien residing in another State '. Neither can one apply to a foreign State the provisions of Article 5 of the Code of Civil Procedure concerning diplomatic representatives of the said State (as is indeed admitted by the appellant), because the legal basis of the jurisdictional immunity of a State is different from that of the immunity of diplomatic representatives. The basis of the latter immunity is the principle of the freedom of diplomatic representatives to perform their function: *ne impediatur legato*; while the basis of the immunity of foreign States is the democratic principle of their equality, whatever their size and power, which results in excluding the jurisdiction of one State over another (*par in parem non habet judicium*) unless there

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[[1] *Orzecznictwo Sadów Polskich*, 5 (1926), p. 440.]

[[2] See *Annual Digest*, 1935–1937, Case No. 95, *sub nom. German Immunities in Poland Case*.]

has been a voluntary submission to that jurisdiction through an express or implied act (Ehrlich, *Prawo narodów*, p. 96). The acquisition of an immovable by a private law title in the territory of another State is to be regarded as such an implied act, 'as rights in immovables shall always be governed according to the *lex rei sitae*'. If there exists a certain coincidence between the immunities as to some of their consequences, this is to be explained by a causal coincidence of those consequences; the fact, however, that similar effects may follow from different causes does not constitute a basis for applying the provisions of the Code of Civil Procedure respecting the immunity of diplomatic representatives, namely, the provisions of Article 5, to the fundamentally different immunity of the foreign State. Thus, in deciding the question concerning the jurisdictional immunity of foreign States one should take a stand directly on the general principles accepted in international intercourse. Among those principles the most essential is that of reciprocity between States, springing from the fundamental principle of their equality. (This principle must also be taken into account with respect to diplomatic immunity, notwithstanding the different aspect of the latter.) The principle of reciprocity consists in one State's recognizing or denying jurisdictional immunity with respect to another State to the same extent as the latter recognizes or denies immunity in relation to other States. Therefore, in case of doubt in this respect, one has to ask for the opinion of the Ministry of Justice, which gives it in agreement with the Ministry of Foreign Affairs.

" The Supreme Court, in passing from the above considerations to the present action against the Treasury of Great Britain, wishes to state the universally known fact that English courts have for very many years respected consistently and strictly the jurisdictional immunity of foreign States. . . . Consequently, in the present case, in view of the consistent attitude of the English courts in recognizing the jurisdictional immunity of foreign States (which by hypothesis includes also the Polish State), Polish courts, according to the principle of reciprocity, were not empowered to entertain the action of Aldona S., even if a commercial enterprise of the British authorities were involved. The latter supposition does not, however, apply, as the Court of Appeal has found as a fact that the publication *Glos Anglii* is not a commercial enterprise.

" Finally, the last contention of the appellant is equally unjustified, namely, the contention that to dismiss her claim would make the debt of the British Foreign Office, in its capacity as publisher of a periodical in the territory of our country, an incomplete and unenforceable obligation; for if the plaintiff does not wish to seek a judicial remedy in the English courts, she may take advantage of a universal international custom connected with jurisdictional immunity and address herself to the [Polish] Ministry of Foreign

Affairs, which is under a duty to take the matter up with the Ministry of Foreign Affairs of the foreign State in order to satisfy a just claim (in the same manner as in a case of diplomatic immunity: *cf.* Article 225 of the Civil Law); this method is sometimes more expedient than suing in a court of justice.

" Seeing that all the objections raised by the appellant against the decision of the Court of Appeal were unfounded and, in spite of what was contended on her behalf, devoid of any support in the opinions expressed by the majority of Polish scholars, the Supreme Court for the reasons set out above, dismisses the application for cassation."

[Report: *Państwo i Prawo*, 4 (1949), No. 4, p. 119.]

Jurisdiction—Exemptions from—Instrumentality of Foreign Government—Civilian Mess under War Department—Relevance of Recognition by Own Government—Comity of Nations—Certificate of Foreign Office.

MASATOSHI SUZUKI *ET AL. v.* TOKYO CIVILIAN OPEN MESS.

Japan, District Court of Tokyo. March 16, 1957.

(Tatsu Miyoshi, President: Yoshikazu Nishikawa and Hiroo Iwamura JJ.)

THE FACTS.—The plaintiffs, Japanese nationals, were former employees of the Tokyo Civilian Open Mess, a " non-appropriated fund organization " of the United States, established in accordance with the United States Army Regulations. The plaintiffs had been discharged because they had joined a trade union, the National Federation of Garrison Forces Workers Union, and participated in its activities. They now brought this action for the discharge to be annulled under Article 7 of the Labour Union Law, 1954,[1] and for reinstatement in their respective positions and payment of wages for the period of discharge up to the time of reinstatement. The defendant Mess did not submit any written pleadings, nor did it appear in court on the day of the oral proceedings.

On the question whether the defendant Mess was subject to the jurisdiction of the Japanese courts,

Held: that the action must fail. The Mess was exempt from the jurisdiction. It was an organization of a kind which was recognized by the United States courts as an instrumentality of the Government, and comity required, in general, that the Japanese courts should similarly so recognize it.

The Court said: "According to the constitution of the Tokyo Civilian Open Mess submitted by the plaintiffs and the statement of the Director of the Treaties Bureau, Ministry of Foreign Affairs, made upon request of this Court, ' defendant is a so-called non-appropriated fund organization established in accordance with No. 210–50 of the Army Regulations of the United States. It is stipulated in the said Regulations that the non-appropriated fund organizations are instrumentalities of the Federal Government and, as such, enjoy all the immunities and special privileges which are given the departments and agencies of the Federal Government based upon the Federal Constitution and Laws and Regulations.'

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[1] See *In re Hoover*: *International Law Reports*, 1956, p. 265.

The Court took notice of the opinion of the Supreme Court of the United States, which had ruled with regard to the United States Army PX, a similar non-appropriated fund organization, that " it is an arm of the Government and an integral part of the War Department"; as well as of the United States District Court's finding that " an officers' club which is a non-appropriated fund organization is an instrumentality of the Government ". "Accordingly," the Court said, " it is clear that the defendant is recognized in the United States as an instrumentality of its Government.

" It would appear to follow that because such recognition is accorded in the United States, the courts of Japan should also recognize it as an instrumentality of the United States. Moreover, in a case where a given organization is recognized as an instrumentality of the State concerned in the eyes of its laws, it is reasonable from the viewpoint of the comity of nations that the Japanese courts, unless special circumstances demand otherwise, should treat it as an instrumentality of that State.

" Whether the jurisdiction of the Japanese courts can or cannot be exercised over such an instrumentality of a foreign State depends upon the right to exercise jurisdiction over that State. But a State is not, in general, subject to the jurisdiction of a foreign State unless it voluntarily submits itself to such jurisdiction. Such an exception should be laid down by treaty or it should be recognized where the State concerned has expressly indicated that it would submit to the jurisdiction of a particular foreign State in connection with a specific lawsuit. In the first place, however, this Court is unable to find any evidence in Article XVIII of the Administrative Agreement under Article III of the Security Treaty concluded in 1952 between the United States of America and Japan, the provisions of which are concerned with the jurisdiction of Japan over civil actions, that the United States has agreed to submit itself or its agencies to the jurisdiction of Japan, nor can this Court find any such evidence in any other treaty concluded between Japan and the United States. . . . However, with respect to the workers employed by a non-appropriated fund organization approved and regulated by the authorities of the United States Armed Forces, Article XV, paragraph 4, of the Administrative Agreement stipulates that . . . except as may otherwise be mutually agreed, the conditions of employment and work, such as those relating to wages and supplementary payments, the conditions for the protection of workers, and the rights of workers concerning labor relations shall be those laid down by the legislation of Japan. . . . On the basis of this stipulation it might be possible to argue that Japanese jurisdiction has been recognized in litigation concerning labor relations between such an organization as in the instant case and the Japanese workers, but the said provision, viewed in its context, is an arrangement concerning only the substantive rights and obligations relative to employment relations: it can hardly be interpreted as an arrangement concerned with Japan's jurisdiction."

[Report: *Japanese Journal of International Law*, No. 2 (1958).]

Jurisdiction — Exemptions from — Foreign States — Sovereign Order of Malta—Action by Doctor Arising out of Contract of Employment with Order—Whether Action Subject to Jurisdiction of Italian Courts—The Law of Italy.

See p. 1 (*Scarfò* v. *Sovereign Order of Malta*).

(b) HEADS OF FOREIGN STATES

Jurisdiction—Exemptions from—Heads of States—Loss of Status as Head of State Resulting from Abdication—Status of Ex-King of Egypt in France—Whether French Courts Entitled to Exercise Jurisdiction in Action against Ex-King.

EX-KING FAROUK OF EGYPT *v.* CHRISTIAN DIOR, S.A.R.L.

France, Court of Appeal of Paris. April 11, 1957.

THE FACTS.—In 1952, the Private Secretary of King Farouk of Egypt ordered a quantity of ladies' clothes from the plaintiffs, a French company. The clothes were intended for King Farouk's wife, Queen Narriman. Shortly after the delivery of the order, King Farouk abdicated, and the plaintiff subsequently brought an action for the cost of the clothes. The Court of first instance gave judgment in favour of the plaintiffs. In the present appeal ex-King Farouk contended that the French courts had no jurisdiction because, *inter alia*, according to the matrimonial régime between ex-Queen Narriman and himself the Queen was responsible for the purchase price, and because all his, Farouk's, property in Egypt had been confiscated.

Held: that the appeal must be dismissed. (i) The matrimonial régime between the ex-King and his wife was immaterial as on the facts the garments had been ordered on behalf of the ex-King; and (ii) the confiscation of the ex-King's property in Egypt was irrelevant so far as concerned an action brought against him in France, and as he was no longer a foreign Head of State the French courts were entitled to exercise jurisdiction.

The Court said: " This is an appeal by ex-King Farouk of Egypt against the judgment of the Tribunal civil de la Seine of March 2, 1955, whereby he was found liable to pay to Christian Dior, S.a.r.l., the sum of 4,825.500 francs for 11 frocks and coats. King Farouk does not dispute the claim of the Dior company, which arises out of the delivery of 11 model frocks and coats on March 14 and May 30, 1952, when he was still King of Egypt, but before the Court of first instance he raised two pleas to the jurisdiction. Both these pleas were rejected, and he now relies on the same pleas. With regard to the first plea, based on the matrimonial régime of the royal spouses, the Judge of first instance held that the order for the clothes was placed by the King's Private Secretary acting on the King's behalf and not on behalf of Queen Narriman, and that as delivery was made at the King's private office, the King is liable for the purchase price, whatever the matrimonial régime between himself and Queen Narriman and whatever the final settlement may be between the spouses. With regard to the second plea, *viz.*, that after his abdication all the King's property was seized and confiscated, the Judge of first instance rightly rejected this contention. In fact, in accordance with Article 14 of the French Civil Code, the plaintiff company is entitled, without any violation of the rules governing the personal status of its opponent, to bring the latter before a French court to answer for debts contracted in France on his behalf when, as from the date of his abdication, he is no longer entitled to claim the immunity from the jurisdiction of the French courts to which Heads of State are entitled. The Egyptian laws providing for the seizure and confiscation of the property of the royal family apply only to property in Egypt and are of no effect so far as concerns the application of Article 14. King Farouk may, if his opponent chooses to apply to the Egyptian courts for an execution of the judgment, plead those laws in Egypt where they apply."

The Court then dealt with the plaintiff company's claim for interest and damages, and in the result dismissed the appeal of ex-King Farouk.

[Report: *Clunet*, 84 (1957), p. 717.]

Jurisdiction—Exemptions from—Heads of States—Position of Rulers of Former Indian States—Ruler Acting as Trustee.

REWA SHANKAR AND ANOTHER *v.* NARASINGHJI MAHARAJ AND OTHERS.

India, Judicial Commissioner's Court of Himachal Pradesh.

(Ramabhadran C.J.)

August 9, 1956.

THE FACTS.—This was an action for possession of certain lands in Kanaur and Bajhar and for mesne profits. The lands in question belonged to the Ruler of the Dhami State and as they had been dedicated to Sri Narasinghji Maharaj, who was the family deity of the ruling house of the Dhami State, the latter appeared as the first defendant in the action while the present Ruler acted as the trustee. The question arose whether in these circumstances the present Ruler was entitled to the immunities granted to Indian Rulers in s. 86 of the Code of Civil Procedure. According to sub-clause (I) of s. 86, no Ruler of a foreign State may be sued in any court otherwise competent to try the action except with the consent of the Central Government. Section 87 (*b*), which was incorporated in the Code of Civil Procedure after the enactment of the Constitution of 1950, applied the provisions of s. 86 to Rulers of the former Indian States who had been under the paramountcy of the British Crown. The Court of first instance held, *inter alia*, that the sanction of the Governor-General of India required by s. 86 had not been necessary for the bringing of the present action, and gave judgment for the plaintiffs. The District Judge, acting as a Court of Appeal, reversed the decision of the Court below and held that the action must fail in view of the provisions of s. 86.

On further appeal,

Held: that the appeal must be dismissed. The immunities of Rulers under s. 86 of the Code of Civil Procedure (which was declaratory of principles of international law) extended to immunity from suit even if the actual Ruler appeared not directly as defendant but as the trustee of interests which were the subject-matter of the proceedings.

The Court said: " It was urged by the appellants that the lower appellate Court has erred in holding that the previous consent of the Governor-General in Council was necessary for the institution of suit. [It was] argued that the suit was not directed against the Ruler of Dhami and no relief was claimed against him. [The Court rejected that argument.] It is noteworthy—as has been pointed out by the District Judge—that the plaint contained a definite allegation that the Raja of Dhami got the suit land entered in the name of the deity in the revenue papers. . . ."

[Report: A.I.R. 1957 Himachal Pradesh 16.]

NOTE.—The Court referred to the following decisions: *Gaekwar of Baroda State Railways* v. *Hafiz Habib-ul-Haq and Others*, A.I.R. 1938 P.C. 165 (*Annual Digest*, 1938–1940, Case No. 78), in which the Court held that an action against the Railways was in reality, though not in form, an action against the Ruler of Baroda and must comply with ss. 86 and 87 of the Code of Civil Procedure; and *Darbar Patiala* v. *Narain Das Gulab Singh*, A.I.R. 1944 Lahore 312, in which the Court held that an action against the Patiala State Bank owned by the Ruler of Patiala could not be instituted without the consent of the representative of the Crown.

(c) Public Ships and Other Property of Foreign States

Jurisdiction—Exemptions from—Property of Foreign States—Real Property Owned by Private Contractor on Trust for Foreign State—Personal Property Owned by Foreign State but in Possession of Private Contractor—Whether Private Contractor Exempt from Municipal Taxation—Property Destined to Public Use—The Law of Canada.

Fraser-Brace Overseas Corporation *et al.* v. Municipality of the City and County of Saint John *et al.*

Canada, New Brunswick Supreme Court (Appeal Division).

(Bridges, Richard and Jones JJ.)

May 9, 1957.

The Facts.[1]—By an agreement made in June 1951, a group of three firms referred to as Fraser-Brace undertook to construct for the United States of America certain works in Canada in connection with a series of radar installations forming part of a continental defence system mutually undertaken by Canada and the United States. Their construction by the United States Government was undertaken pursuant to an agreement between it and the Government of Canada.

The construction contract provided that taxes, fees, duties and charges of all kinds required on account of the performance of the contract shall be reimbursable to the contractor. The contract also contained detailed provisions whereby title to property vested in the United States Government.[2]

Fraser-Brace acquired various necessary buildings and equipment. Fraser-Brace paid for these, being reimbursed by the Government of the United States.

At a later stage, when work on some sites was finished, much of the property and equipment was transferred from Fraser-Brace to a partnership referred to as Drake-Merritt (the second plaintiff in this action) on terms substantially similar to those on which Fraser-Brace had held them. In particular, the provisions respecting title or ownership of property were repeated in the Drake-Merritt contract.

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[1] The facts are set out at greater length in the report of the decision in this case at first instance: see *International Law Reports*, 1956, p. 217.

[2] Article 24 of the contract, entitled "Government Property", ran as follows:

"(a) The Government shall deliver to the contractor the property described in the schedule or the specifications at the times stated therein, or if not so stated in sufficient time to enable the contractor to perform this contract.

"(b) Title to all property furnished by the Government shall remain in the Government. Title to all property purchased by the contractor, for the cost of which the contractor is entitled to be reimbursed as a direct item of cost under this contract, shall pass to and vest in the Government upon delivery of such property by

Taxes were levied by the Municipality on the property which was the subject of the contracts. Fraser-Brace sought to recover from the Municipality various sums which were paid as taxes resulting from assessments made in 1952 and 1953. They also claimed an injunction to restrain the Municipality and its co-defendants, two of the officials of the Parish of Simonds, from collecting or attempting to collect taxes assessed against them in 1954 which were not paid. Drake-Merritt similarly claimed an injunction to restrain the collection of taxes assessed against them in 1954 and 1955 which were not paid. The plaintiffs contested the assessment on two grounds. First, they contended that they at no time had any title to, or right or interest in, such property capable of being assessed, the ownership thereof being vested in the United States of America. Secondly, they contended that the title to the properties was at all times vested in the United States of America and consequently was not liable to assessment since it belonged to a foreign sovereign State.

It was held by the Supreme Court of New Brunswick[1] that legal title to the property was vested in Fraser-Brace and Drake-Merritt, who were therefore properly assessed for taxes; further, it was held that, since the United States Government had neither legal title to nor possession of the property, and since it was not possible to regard the property as the public property of the United States destined for its public use, there was no entitlement to exemption from the assessment on the ground of sovereign immunity. Fraser-Brace and Drake-Merritt appealed.

Held: that the appeal must be allowed. (a) The legal owner of real property was properly assessed for taxes upon it, even if he held it on trust for a foreign Government. (b) Personal property legally owned by a foreign Government was immune from assessment for taxes if it was devoted to public or national purposes, even if it was

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the vendor. Title to other property, the cost of which is reimbursable to the contractor under this contract, shall pass to and vest in the Government upon

" (i) issuance for use of such property in the performance of this contract; or

" (ii) commencing of processing or use of such property in the performance of this contract; or

" (iii) reimbursement of the cost thereof by the Government,

whichever first occurs. All the items to be furnished by the Government, as set forth in the schedule or specifications, together with all property acquired by the contractor title to which vests in the Government under this paragraph, are subject to the provisions of this clause and are hereinafter collectively referred to as ' Government property '.

" (c) Title to the Government property shall not be affected by the incorporation or attachment thereof to any property not owned by the Government, nor shall such Government property, or any part thereof, be or become a fixture or lose its identity as personalty by reason of affixation to any realty. The contractor shall maintain adequate property control records of the Government property and the contractor shall identify the Government property as such in accordance with the provisions of the " Manual of Government Property in possession of Contractors " March, 1951, which is incorporated herein by reference."

[1] See *Fraser-Brace et Al.* v. *Saint John County et Al.*: *International Law Reports*, 1956, p. 217.

in the possession of a private contractor, who, in any event, could not prejudice the foreign Government's immunity.

Richard J., with whose judgment Jones J. concurred and which therefore constituted the majority judgment, set out the facts and said:

[*On ownership of the property*] " The stipulation in the Fraser-Brace, United States contract as to the ownership of the property which was to enter into the whole construction is clear and unambiguous and leaves nothing to conjecture or speculation. All property, whether real or personal, which the contractor was to receive from the United States Government and/or acquire by purchase, and/or supply out of his own property, was to become the property of the United States Government at a given time or on the happening of a certain event. As far as property supplied by the United States Government is concerned it is unnecessary to determine when, or how, it would remain or become the property of the United States Government, because the evidence is to the effect that no such property was supplied, or at least there was no evidence that any was supplied and one must assume that none was supplied. With reference to the material, or property, whether real or personal, which Fraser-Brace was to acquire for the purpose of carrying out its operations with reference to the contract, the terms of the contract are very clear that such property was to be the property of the United States on delivery to the contractors. There is nothing in the plain meaning of the words of Article 24 that would indicate that in any such acquisition or transfer the property to this realty or personalty should pass ' through ' (if one may use that word) the contractors to the United States Government itself. It was not contemplated that during any moment of this passing of property or title the buyer Fraser-Brace should acquire any interest in these goods, or that it should have had these goods in any representative capacity whether as trustee or otherwise before the title passed to the United States. There is no provision in the contract that for any such acquired goods or property Fraser-Brace was to execute any further assurance or release to assure or complete the title of the United States to these goods or property. Fraser-Brace was to be reimbursed as soon as this proprty, whether real or personal, became the property of the United States and there is no provision in this contract, nor does the wording of Article 24 admit the possibility of Fraser-Brace retaining an interest in the goods not used in the whole construction, or having to refund [to] the United States whatever might have been paid by the United States as reimbursement to the contractors. As a matter of fact there was a surplus of unused goods or property at the completion of the work, besides buildings left after Fraser-Brace closed up their offices in Saint John, but these were treated by the United States Government as their own property and turned over to the War Assets Corporation, a branch of Canadian administration, for disposal for the benefit of the United States. In their agreement with Drake-Merritt, the United States Government treats several of these smaller buildings, two on the McDonald lot and one on the Fowler lot, as well as all radio equipment on these lots, as its property. For the proper transfer of this property to Drake-Merritt, Fraser-Brace signed no release although Fraser-Brace did assign their lease to the McDonald lot.

" The learned trial Judge in coming to the conclusion that Fraser-Brace had an interest in all the properties involved in this assessment dispute relied considerably on the manner in which the contractors had purchased these goods, how Fraser-Brace was described as purchasers, etc. and came to the conclusion that the contractors had an interest as trustees of the United States Government. In so far as the buildings and the leased property are concerned I agree with the learned trial Judge that the plaintiffs were properly assessed because they had a legal title to these premises and buildings.

" The buildings were undoubtedly affixed to the soil so as to form part of the leasehold which was vested in the plaintiffs. The plaintiffs put forward two arguments in their submission that the buildings were personal property. They contended that by virtue of Article 24 all materials which went into the construction of the buildings were personal property when acquired by purchase by Fraser-Brace, and that title or ownership to same passed immediately on such acquisition to the United States Government. That argument could have prevailed had this material remained such and not lost its character as personal property when it was used as building material in the construction of buildings which themselves by being attached to the soil became a part thereof. It was also contended by counsel for plaintiffs that this material even if it was converted into buildings could not become a part of the realty because of cl. (c) of Article 24.

"As between the two contracting parties, Fraser-Brace and the United States Government, no doubt this particular clause could have been held binding so that had any dispute arisen between the parties themselves there would not have been any doubt that that particular clause reserved the ownership in the United States Government. Likewise, that particular clause would have received the same interpretation had it been inserted in the lease, but I am of the opinion that it had not that effect in so far as the defendants were concerned.

" Drake-Merritt appeared in the picture at the beginning of 1954. The firm consisted of the plaintiffs, Johnson, Drake & Piper International Corporation and Merritt, Chapman & Scott Corp. of Canada. At first their contract with the United States Government was similar to that of Fraser-Bruce; that is to say, the construction of defence bases for the United States Air Force, and also for the construction of some stations of the Pine Tree defence line. This contract contained a similar clause as the Fraser-Brace contract with reference to title to property. Drake-Merritt took over at the beginning of 1954 the radio installations set up and used by Fraser-Brace, and these were treated as government supplied property. By a supplemental agreement dated April 18, 1954, this cost-plus-a-fixed fee contract was converted to a fixed price contract. The contract contained the following clause:

> " ' 1. Except as otherwise provided under the terms of this Supplemental Agreement, the Government will furnish to the Contractor, without rental requirements, the following government furnished property for use in completion of the works and services described herein:
>
> (a) All buildings, structures, utility plants and systems, evaluated, enumerated and identified on Appendix C. attached hereto and made a part hereof.
>
> (b) Construction equipment, machinery, vehicles, appliances, office equipment and furniture, which are enumerated, evaluated and identified on Appendix D attached hereto and made a part hereof.
>
> " ' 2. Title to property furnished hereunder to the Contractor shall remain in the Government and shall not be affected by the incorporation or attachment thereof to any property not owned by the Government.'

"Appendix C referred to the buildings used for radio installations but not the main buildings occupied and used up to that date by Fraser-Brace. Fraser-Brace assigned their McDonald lease on May 1, 1954, to Drake-Merritt, but, outside of the radio buildings, the other buildings remained in the custody of the United States Government until sold in December 1955. Drake-Merritt had their main office in Moncton, N.B. As already stated, Fraser-Brace were assessed for the 1954 assessment on the buildings, other than radio buildings, for a period of 4 months, and for the personal property other than radio equipment, for a period of two months. Fraser-Brace assessments for these periods amounted to $3,730.32. Drake-Merritt was assessed for the radio equipment for a full year and all the buildings for 8 months for a total assessment of $6,145.92. It is evident that this partition of assessment was made on account of Fraser-Brace having vacated all premises about the end of March and the reason for assessing all the buildings in the name of Drake-Merritt for 8 months was the fact that the McDonald lease had been assigned to it. Drake-Merritt was assessed for buildings and radio equipment for the year of 1955, for a total of $5,473.20.

" In so far as the real property is concerned Fraser-Brace being the trustee of the United States Government, by assigning their lease of the McDonald property to Drake-Merritt passed no greater rights than they possessed and the real estate became vested in

Drake-Merritt subject to the same trust as when held by Fraser-Brace.

" Clause (h) of s. 1 of the Rates and Taxes Act is worded as follows:

> " ' Real estate ' or ' real property ' includes land and all buildings or other things erected thereon, or belonging or affixed thereto, and also any term of years in land.'

" The said real estate and buildings were therefore for the same reasons taxable in the name of Drake-Merritt from the time of the assignment of lease by Fraser-Brace and in my opinion such real estate which would include the buildings was properly assessed against both Fraser-Brace and Drake-Merritt during the respective periods in which they were in possession of the said land and/or buildings.

" Dealing with the personal property, with great respect to the learned trial Judge, I regret that I cannot follow and agree with his reasoning and for two reasons. The first is that Article 24 is plain and clear enough without having recourse to other documents and transactions to ascertain the true meaning of that Article. To do so one risks the danger of confusion resulting in obscurity rather than clarification in the interpretation of Article 24. Secondly, the manner in which the contractors acquired this property is not a departure from what was contemplated in the contract itself. It is not inconsistent with the terms of the contract. In the manner in which this property was acquired there is no deviation from the relationship established between the contractors and the United States Government by the terms of the contract. The contractor was to be the buyer with the right to reimbursement but he was not to acquire any proprietary rights in the goods themselves. That passed immediately on the acquisition to the United States Government. Although there was a clause in each order of purchase stipulating that the goods were being purchased on behalf of or for the United States Government yet that was not necessary to have the title pass directly to the United States Government. Its purpose was to prevent the addition of taxes, such as sales tax, etc., which had already been arranged for with the authorities concerned. In so far as the contractor as purchaser and the supplier as vendor were concerned it was immaterial to whom the property passed. The vendor was entitled to all the benefits of the sale on delivery of the goods, that is, the price of same, irrespective of whether the property in the goods passed to the contractor-buyer or to some one else, and the contractor on acceptance of an order by the seller was entitled to delivery on tender of the purchase-price whether the property in the goods passed to him or to some one else.

" The learned trial Judge looked upon the contract as dealing with goods to be acquired in the future and that necessarily the title to such goods would pass to the purchaser with the United States acquiring a beneficial ownership immediately on the purchase being made. This position of the contractor as legal owner though not owning the beneficial title he finds analogous to that found in *Holroyd* v. *Marshall* (1862), 10 H.L.C. 191, 11 E.R. 999. In my opinion the principle decided in that case has no application in the present matter.

[Richard J. referred in detail to the case of *Holroyd* v. *Marshall*, and continued:] "A similar clause to that of Article 24 was before the Court in *Bennett & White* (*Calgary*) *Ltd.* v. *Mun. Dist. of Sugar City* (*No.* 5), [1951], 4 D.L.R. 129, A.C. 786. The plaintiffs agreed to build a dam for the Government of Canada, the contract reading as follows:

> " 'All machinery, tools . . . and things whatsoever provided by the contractor or by the engineer . . . shall from the time of their being so provided become and until the final completion of the said work shall be the property of His Majesty for the purposes of the said works and the same shall on no account be taken away or used or disposed of except for the purposes of the said works without the consent of the engineer.'

" It was held by the Privy Council that all property by such clause became the property of the Crown when it reached the site of the operation even though it remained in the possession of the contractors: Lord Reid at p. 146 D.L.R., p. 815 A.C.:

" 'The true position, in their Lordships' view, is that while the delivery on the Crown site was a delivery to the Crown and vested the ownership in the Crown, there was a notional or actual bailment or redelivery of possession to the builders for the purpose of carrying out the building contract '.

" In my opinion therefore all personal property acquired by Fraser-Brace and/or by Drake-Merritt whether supplied to them or either one of them or acquired by them or either one of them for the purpose of carrying out the works which they had undertaken to do was personal property wholly owned by the said United States Government. The title to said personal property was at all times in the United States Government, and the said Fraser-Brace or Drake-Merritt had at no period during the possession of this actual property any interest in such property and both companies were therefore wrongfully assessed. This personal property would include all goods warehoused in the building occupied by the said companies, as well as office fixtures, motor vehicles, radio equipment and all personal property upon which the said companies were assessed.

[*On sovereign immunity*] " Could the United States have been assessed for such personal property? Could the United States as owners have claimed immunity from taxation? The criterion is whether such personal property was owned and being used in Canada by the United States, a foreign power, for public or national purposes.

There cannot be very much doubt that the chain of outposts across the northern part of Canada was for the national defence of the whole of America. The evidence was to the effect that the goods warehoused in Saint John were materials and supplies destined to the construction of such defences. That they were in the possession of either Fraser-Brace or Drake-Merritt contractors for the construction of such defences is to my mind immaterial. As such contractors, they were the mere agents of the United States and their role was in no way different than had such goods been in the possession of the army personnel of the United States and no doubt some of this property, such as motor vehicles and office equipment, was used by such personnel, part of the buildings being used by them. By the same token I cannot draw any distinction between materials which went directly into the construction of these defence outposts, and the other personal property such as office and radio equipment as well as motor vehicles which were as necessary as machinery for the carrying our of the works which were being done. This personal property was neither for the convenience nor for the personal benefit of the contractors and if same was far removed from the site of the actual construction, geographical conditions made it necessary that such property be kept in a depot such as was maintained in New Brunswick.

" When does a foreign Sovereign possess immunity from suit or legal proceedings in a foreign country? What is the basis for such immunity and why, and where, is such immunity recognized? The circumstances under which the principle has been applied are set out in *Baccus S.R.L.* v. *Servicio Nacional del Trigo*, [1956] 3 All E.R. 715.[1] This case, not exactly in point with the present matter, nevertheless illustrates the situations and conditions where immunity from legal process has been invoked by a foreign Sovereign and where, notwithstanding that it might appear such immunity may have been waived or lost, yet the principle has been applied because the foreign Sovereign is the only one who can forego such immunity.

" The defendants were a Department of the Spanish State carrying on business in Spain as buyers and sellers of wheat under orders of the Spanish Ministry of Agriculture. They purchased goods from the plaintiff, an Italian company. A dispute arose and the plaintiffs brought an action in England as it had been agreed by the parties that in the case of dispute the matter would be settled by English laws or customs. After the action was brought one Senor Conero, head of the Department in Spain, had retained solicitors in England and they put in an appearance and issued a summons for security for costs and a consent order was granted. Conero did not know that the right to immunity would be prejudiced and acted without the knowledge or authority of the Minister or any representative of the State of Spain able to waive the foreign immunity from suit.

[[1] See *International Law Reports*, 1956, p. 160.]

An order setting aside the writ and other proceedings was granted notwithstanding the objections of plaintiff that the defendants had waived immunity by taking further steps after the issue of writ. On appeal against this order it was held that the defendants were entitled to sovereign immunity from suit as a Department of State of Spain for the following reasons: (1) that the defendants were a Department of State even though they had corporate powers; (2) that the steps taken had not prejudiced the defendants in their right to immunity as they had no authority from their Sovereign.

" Jenkins L.J. [said in the *Baccus* case] :

" [It is contended by plaintiffs] ' that immunity cannot be claimed on behalf of a separate legal entity engaged in trading activities, even though the government of the Sovereign State concerned is interested in those activities.' [At p. 731. [1]]

" ' Each case must . . . depend on its own facts, and it is not to be taken as following from what I have so far said that every corporation in which a foreign sovereign State may be interested, whatever the nature of the activities of the corporation and whatever the nature or extent of the interest taken by the foreign sovereign State, becomes itself a department of State.' [At p. 732. [2]]

" ' The doctrine of immunity comes to no more than this, that the courts of this country will not allow a foreign sovereign to be impleaded directly, or a foreign sovereign's property to be put in jeopardy by a suit in rem. Whether a particular proceeding amounts to an impleading of a sovereign within the meaning of that doctrine seems to me to be a question of fact, and probably also a question of local law, in every case. Once the general principle of immunity is recognised, the fact that a particular transaction is held to fall within the rule does not make a decision to that effect an extension of the doctrine merely because occasion for its application to precisely comparable facts has never before arisen.' [At p. 733. [3]]

" He [Jenkins L.J.] went on to say [quoting Lord Porter in *France* v. *Dollfus*, [1952] 1 All E.R. 572[4] at p. 586] that reciprocity was not essential: ' The question is, what is the law of nations by which civilized nations in general are bound, not how two individual nations may treat one another. '

" In *Re Republic of Bolivia Explorations Syndicate Ltd.*, [1914] 1 Ch. 139, it was held immunity could only be waived with the sanction of the Sovereign. It was held also that even though a diplomatic agent could waive his privilege, which is really the privilege of the Sovereign, he can only do so intentionally, with full knowledge of his rights and with the sanction of his Sovereign or legation. It was held that Senor Conero did not know he was waiving his right to immunity when he submitted to the jurisdiction.

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[1] [*International Law Reports*, 1956, at p. 162.]

[2] [*Ibid.*, p. 163.]

[3] [*Ibid.*, p. 164.]

[4] [*United States of America and Republic of France* v. *Dollfus Mieg et Cie S.A. and Bank of England*: *International Law Reports*, 1952, Case No. 37, at p. 170.]

" According to the learned trial Judge his principal reason for holding that both real and personal property were assessable was because he felt satisfied that it had not been established that any of this property was the property of the United States Government. He has quoted many authorities however which support the proposition that it has always been recognized that the property of a foreign sovereign is immune from taxation. I would gather as well from his judgment that even if he had found the title to this property was in the United States Government that same would not be immune from taxation on the ground that it was not 'property destined for the public use' or 'devoted to the public use in the traditional sense'. Since I disagree with him as to the title to the personal property as well as to whether such property was so used or employed as to make it immune from taxation, it is unnecessary for me to quote from the decisions mentioned in his judgment which inmy opinion support the proposition that this property was not taxable.

" Fraser-Brace was assessed for 1952 on personal property for $10,000 and taxed $460 and having taken advantage of the discount they paid the sum of $437. Another assessment was made the same year 1952 on real property for a period of six months for the sum of $71,250 and billed for the sum of $3,277.50 and having taken advantage of the discount [Fraser-Brace] paid the sum of $3,113.62. In 1953, real estate was assessed for the full year the sum of $142,500 for which they were taxed $6,483.75 and for personal property they were assessed for $171,200 and taxed $7,786.90. They paid this amount without discount. They therefore paid tax on personal property for the years 1952 and 1953 of $8,246.90. Having found that they were not liable for assessment on personal property they are therefore entitled to a refund of $8,246.90. For the year 1954 they were assessed on personal property for 2 months for $23,150 and taxed for $1,222.32 which they refused to pay. On real estate Fraser-Brace were assessed for the following amounts: 1952 assessed for ½ year at $71,250 and taxed $3,277.50; 1953 the full year for $142,500 and taxed for $6,483.75; and for 1954 for 4 months at $47,500 and taxed $2,508. They paid the 1952 and 1953 taxes on real estate but refused to pay the 1954 taxes, which they still owe. Deducting the amount due, viz., $2,508 on real property from the amount of refund due them on personal property $8,246.90 leaves a net mount of $5,738.90 which they are entitled to.

" Drake-Merritt were assessed for the year 1954 on real estate for $95,000 and taxed at $5,016 and on personal property they were taxed for the sum of $1,129.92. For the year 1955 Drake-Merritt were assessed on real property for the sum of $76,000 and for personal property on an assessment of $15,000 for a total tax liability for both real and personal property of $5,478.20. These taxes were not paid.

" The appeal is allowed with costs. Judgment will be entered for the plaintiff Fraser-Brace for the sum of $8,246.90 with costs of appeal and costs below, and an injunction is granted to restrain the defendants from enforcing payment of the taxes levied against them on personal property during the years 1952, 1953, 1954. The plaintiffs Drake-Merritt are entitled to an injunction restraining the defendants from enforcing payment of the taxes levied on personal property for the years 1954 and 1955. The municipality is entitled to collect taxes levied against them for these two years on real property. Since these taxes were not paid by Drake-Merritt and they have only succeeded in their appeal with reference to personal property they are only allowed costs in the Court below on a 50% basis.

" The appellants, Drake-Merritt, are allowed costs of this appeal".

Bridges J., in a partially dissenting judgment, briefly reviewed the facts, and continued: " The findings of the learned trial Judge which are pertinent to the case may, I think, be summarised as follows:

" (1) That all property brought by Fraser-Brace into the Parish of Simonds, including the materials for the buildings, was after-acquired property and not property furnished by the United States Government.

" (2) That the buildings erected were properly regarded by the assessors as real estate and lawfully assessed as such against Fraser-Brace and Drake-Merritt.

" (3) That Fraser-Brace and later Drake-Merritt held all property, both real and personal, which came into their possession in the Parish of Simonds as legal owners in trust for the United States Government.

" (4) That none of the property, either real or personal, was exampt from taxation on the ground that it was owned by a foreign sovereign state.

[*On ownership of the property*] " The first finding is, in my opinion, amply supported by the evidence and there is no need for further discussion of it. I think the learned trial Judge was correct in his view that the buildings were properly assessed as real estate. It was strongly contended on behalf of the plaintiffs that they should have been assessed as personal property. It was claimed that if the legal title to the personal property was vested in the United States Government, the assessment against the plaintiffs in respect to such personal property would be bad, regardless of whether the personal property was exempt from taxation on the ground that it was owned by a foreign sovereign state. If this contention should be correct it would only leave the leases of the two lots of land which could possibly be assessed against the plaintiffs. It might therefore be greatly to the advantage of the plaintiffs to establish that the buildings should be assessed as personal property.

"Counsel for the plaintiffs relied upon cl. (c) of Article 24 in the Fraser-Brace contract with the United States Government, which reads as follows:

> "'Title to the Government property shall not be affected by the incorporation or attachment thereof to any property not owned by the Government, nor shall such Government property, or any part thereof, be or become a fixture or lose its identity as personalty by reason of affixation to any realty.
>
> 'The contractor shall maintain adequate property control records of the Government Property and the contractor shall identify the Government Property as such in accordance with the provisions of the "Manual of Government Property in possession of Contractors" March 1951, which is incorporated herein by reference.'

"Clause (h) of s. 1 of the Rates and Taxes Act, R.S.N.B. 1952, c. 191, is worded as follows:

> "'"Real estate" or "real property" includes land and all buildings and other things erected thereon, or belonging or affixed thereto, and also any term of years in land.'

"While the provision in the contract may be binding between the parties, I fail to see, as did the learned trial Judge, how it has any bearing in view of the clear wording of the provision I have quoted from the Rates and Taxes Act. The effect of the latter, in my opinion, requires buildings whether affixed to land or not to be regarded as real estate by the assessors, who have therefore no option in the matter when making assessments.

"I come now to the question as to whether the plaintiffs were the legal owners of the buildings and personal property. I shall deal with the buildings first and the assessment upon Fraser-Brace in respect to them. The leases to both lots were to Fraser-Brace. Notwithstanding any provision in the contract, it is my opinion that they must be regarded as having the legal title to the leases. Clause (h) of s. 1 of the Rates and Taxes Act provides that real estate includes any term of years in land. The learned trial Judge has held that Fraser-Brace was the legal owner of the buildings and that they were affixed to the real estate, and I am wholly in accord with his reasons for so finding. Counsel for the plaintiffs did not seriously argue that the buildings were not actually affixed to the land. He relied on the term in the contract which in my opinion cannot prevail over the provision in the Rates and Taxes Act. No useful purpose will be served by my dealing further with the question of the ownership of the buildings as I can add nothing to what has been said by the learned trial Judge. The buildings were affixed to the land, which was held under a term of years, of which Fraser-Brace was the lessee. It is my opinion that Fraser-Brace was properly assessed on the buildings unless the equitable interest in them of the United States Government is a ground for exemption from taxation.

" There was no assignment of the Fowler lease to Drake-Merritt. The only small building on that lot was of little value and was disregarded by the assessors in their valuations of the buildings so it need not be considered. The McDonald lease was assigned by Fraser-Brace to Drake-Merritt by indenture dated May 1, 1954. The effect of this assignment placed in my opinion Drake-Merritt in regard to the buildings on the McDonald lot, in exactly the same position as Fraser-Brace, and the legal title to the buildings became vested in them. The assignment contained a covenant by Drake-Merritt to pay all taxes which might be assessed in respect to the lease. It also transferred all interests of Fraser-Brace in the lease to Drake-Merritt and bore a certificate signed by the Contracting Officer, Corps of Engineers, to the effect that it had been approved by the United States Government. It is indeed difficult for me to understand how it can be contended, in view of these circumstances, that the legal title to the lease and buildings on the land did not become vested in Drake-Merritt. Subject to the same question regarding the immunity from taxation of a foreign sovereign state due to the equitable interest of the United States Government in the buildings, as in the case of Fraser-Brace the buildings in question were assessable against Drake-Merritt during the years 1954 and 1955.

" The matter of the ownership of the personal property I find more difficult to determine. Counsel for the plaintiffs in his contention that the legal title was vested in the United States Government relied strongly on cl. (b) of Article 24, which in part reads:

> " ' Title to all property furnished by the Government shall remain in the Government. Title to all property purchased by the contractor, for the cost of which the contractor is entitled to be reimbursed as a direct item of cost under this contract, shall pass to and vest in the Government upon delivery of such property by the vendor. Title to other property, the cost of which is reimbursable to the contractor under this contract, shall pass to and vest in the Government upon (i) issuance for use of such property in the performance of this contract, or (ii) commencing of processing or use of such property in the performance of this contract, or (iii) reimbursement of the cost thereof by the Government, whichever first occurs. All the items to be furnished by the Government, as set forth in the Schedule or Specifications, together with all property acquired by the contractor title to which vests in the Government under this paragraph, are subject to the provisions of this clause and are hereinafter collectively referred to as " Government Property ".'

" I do not think there is any question nor do I believe the learned trial Judge felt otherwise than that the personal property was being purchased by the contractor, for the cost of which the contractor was entitled to be reimbursed as a direct item of cost under the contract.

" In *Bennett & White* (*Calgary*) *Ltd.* v. *Mun. Dist. of Sugar City* (*No.* 5), [1951], 4 D.L.R. 129, A.C. 786, the plaintiffs agreed to build a dam for the Government of Canada, the contract reading:

> " 'All machinery, tools . . . and things whatsoever provided by the contractors or by the engineer . . . shall from the time of their being so provided become and until the final completion of the said work shall be the property of His Majesty for the purposes of the said works and the same shall on no account by taken away or used or disposed of except for the purposes of the said works without the consent of the engineer.'

Provision was also made in the contract upon completion of the work for the return, upon demand, to the contractor of machinery, materials, equipment, etc., as shall not have been used in the works. It was held by the Privy Council that while the agreement did not amount to a sale, the provision that the property should become the property of the Crown when provided at the site of the work was sufficient to render the Crown the owner of such property.

" It is my opinion that the *Bennett & White* case is a strong authority in favour of the plaintiffs' contention. True it is, the personal property in the case before us was not at the site of the work but it must have been in the contemplation of the parties at the time the Fraser-Brace contract was entered into that considerable personal property would be purchased by Fraser-Brace which would never reach the site of the work and that other personal property after being bought would be stored pending shipment to the place of work. The machinery, tools, etc., in the *Bennett & White* case could not in my opinion be regarded as ' provided ' until they were at the site of the work. With all deference to the learned trial Judge, I am of the opinion that the legal title to the personal property purchased by Fraser-Brace and situated in the Parish of Simonds was vested in the United States Government.

" The learned trial Judge in reaching his conclusion that the legal title to the personal property became vested in Fraser-Brace relied in part on the conditions set out in the order form used by Fraser-Brace in the purchase of goods. Frankly, with all respect, I fail to see how it makes any difference if Fraser-Brace purchased goods in their own name. Assuming they did, the effect of cl. (b) in Article 24 of the contract was that on delivery of the goods to Fraser-Brace the legal title to such goods passed to the United States Government. This must have been true of at least some of the materials in the *Bennett & White* case, which would be purchased by the contractor in its own name and delivered at the site. The fact that some of the personal property was sold by Fraser-Brace in their name has in my opinion little or no bearing on the case as an agent often sells the property of his principal in his own name. I am satisfied that the legal title to the personal property of which

Fraser-Brace was in possession in the Parish of Simonds was in the United States Government.

"I have no difficulty in reaching the conclusion that Drake-Merritt never had any title to the radio equipment which was the only personal property they took over. As it is my view that the legal title to such equipment (except that which had been affixed to the realty and which can be disregarded) was vested in the United States Government, Drake-Merritt was, I think, in their possession of such equipment, merely holding as bailee for the United States Government.

[*On sovereign immunity*] "It is necessary to consider if the buildings, in which the United States Government had an equitable interest, are exempt from taxation on the ground that they were the property of a foreign sovereign state. It is apparent from the authorities that it is not necessary for the sovereign state to have the legal title for the doctrine of sovereign immunity to apply. In the case of *Compania Naviera Vascongada* v. *SS. 'Christina'*, [1938] A.C. 160, 1 All E.R. 719,[1] it was held to apply to a Spanish vessel which had been requisitioned by the Government of that country.

"There are not authorities in point or which have much bearing on the facts in this case. In *Reference re Tax on Foreign Legations*, [1943] 2 D.L.R. 481, S.C.R. 208,[2] Duff C.J.C. dealt at length with the question of the exemption of property occupied by an Embassy or Legation of a foreign state from taxation and referred with approval at p. 487 D.L.R., p. 217 S.C.R., to what Davey L.J. said in *Musurus Bey* v. *Gadban* [1894] 2 Q.B. 352 at p. 361, which was as follows:

"'These passages, in my opinion, correctly state the legal principles on which the exemption is founded, and are in accordance with the course of decisions in our own Courts: see for example the latest case of *The Parlement Belge* (5 P.D. 197) in the Court of Appeal, in which it was said . . . that as a consequence of the absolute independence of every sovereign authority and of the international comity which induces every sovereign State to respect the independence of every other sovereign State, each State declines to exercise by means of any of its Courts any of its territorial jurisdiction over the person of any sovereign or ambassador, *or over the public property of any State which is destined to its public use*, or over the property of any ambassador, though such sovereign, ambassador, or property be within its territory.'

"At pp. 491–2 D.L.R., p. 221 S.C.R. [pp. 341–342 of *Annual Digest*, 1941–1942], of his judgment, Duff C.J.C. after referring to the inviolability of an Ambassador's residence said:

"'Parallel with this rule touching the immunity of legations, there runs the principle of the immunity of the *property of a foreign State*

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[1] See *Annual Digest*, 1938–1940, Case No. 86.]

[2] *In the Matter of a Reference as to the Powers of the Corporation of the City of Ottowa and the Corporation of the Village of Rockcliffe Park to Levy Rates on Foreign Legations and High Commissioners' Residences* (*ibid.*, 1941–1942, Case No. 106).]

devoted to public use in the traditional sense. In *The Parlement Belge* (1880), 5 P.D. 197, it was held that this immunity applies to a ship used by a foreign government in carrying mail. The Supreme Court of the United States has held that it is enjoyed by a ship, the property of a foreign sovereignty and employed by the foreign government for trading purposes: *Berizzi Bros.* v. *SS. "Pesaro"* (1926), 271 U.S. 562.[1] It most certainly cannot be said that this is a settled doctrine, in view of the opinions expressed in *Compania Naviera Vascongado* v. *SS. "Cristina"* [1938] A.C. 485,[2] although Lord Atkin, who delivered the judgment of the Judicial Committee in *Chung Chi Cheung* v. *The King*, [1939] A.C. 160[3] at p. 175, uses a general phrase: "The sovereign himself, his envoy, and his property, including his public armed ships, are not to be subjected to legal process".'

"In *The Parlement Belge* (1880), 5 P.D. 197, a case of a ship owned by the King of the Belgians, Brett L.J. uses the expression 'substantially for national purposes' in dealing with the inviolability of such ships from arrest. In *Yin-Tso Hsiung* v. *Toronto* [1950] 4 D.L.R. 209, O.R. 463,[4] Smily J. held that the property of a foreign state occupied by its consul and used for the 'public purposes' of such state was exempt from taxation. While there is dictum to the effect that all property of a foreign state comes under the immunity doctrine, grave doubt has been expressed upon the subject and as pointed out by Duff C.J.C. in the *Reference re Tax on Foreign Legations* case, the matter has not been definitely settled.

"It does seem to me that in determining if the buildings are exempt from taxation one should consider the following questions in regard to them: Were they destined to the public use of the United States Government or were they being used for substantially national or public purposes of the United States? To me, the buildings, except for a small portion, were being used by Fraser-Brace for the purpose of carrying out their contract with the United States Government. Suppose that instead of erecting buildings Fraser-Brace had leased suitable buildings in the Parish of Simonds. No person could surely contend that the use and occupation of such buildings by Fraser-Brace would in such case be a public or national use by the United States Government and I can see little, if any, difference in the fact that they were erected and owned by Fraser-Brace. After Fraser-Brace vacated the buildings they were put to no use by the United States Government. If there was evidence that it was the intention of the United States Government to use the buildings later for some national or public purpose it might be different but the evidence is that they were turned over to Crown Assets Corp. of Canada. It is my opinion that Fraser-Brace was properly assessed in respect to the buildings. It is my opinion that the personal property, although owned by the United States Government, was not exempt from taxation. It was not being used by the United States Government for public or national purposes but by Fraser-Brace in the performance of its contract. To hold the personal property exempt on the ground of sovereign immunity would I think be too great an extension of the doctrine. In the cases in which it has been held to apply, the property has, I think, been under the control or in the possession of the foreign state or a Department thereof which it was not when the assessments in question were made.

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[1] [See *Annual Digest*, 1925–1926, Case No. 135.]

[2] [*Ibid.*, 1938–1940, Case No. 86.]

[3] [*Ibid.*, Case No. 87, at p. 271.]

[4] [See *International Law Reports*, 1950, Case No. 40.]

" The assessments for personal property should have been against the United States Government instead of Fraser-Brace and Drake-Merritt. All taxes levied in 1952 and 1953 were paid by Fraser-Brace. The personal property taxes for those years amounted to $8,226.60 for which Fraser-Brace was reimbursed by the United States Government, so the latter who should have been assessed have in reality paid such taxes. I think the assessments can be corrected. Section 123 of the Rates and Taxes Act provides that if property belonging to one person is assessed in the name of another the assessors may correct such error.

" Section 127 (e) of the Rates and Taxes Act reads as follows:

> " ' 127. On any rule *nisi* being granted for a *certiorari* to bring up any rate, any proceeding touching such rate with a view to the quashing of the same, the court shall have and exercise the following power in reference thereto; . . .
>
> " (e) the Court shall have and exercise, in every and all cases, the full power by order to direct the assessors or other proper parties, to do such act, matter and thing in regard to any assessment and to the rectification thereof, or any part thereof, as shall appear to the Court just and equitable.'

" While the plaintiffs have not expressly asked in their statement of claim that the rate be quashed, their claim is to the same effect and I think a Court under such circumstances has power to direct the assessors to correct the assessments. The plaintiffs have not questioned the power of the assessors to assess property for only a portion of a year, and I shall therefore not deal with the matter though I have grave doubts as to the validity of such action.

" The appeal should in my opinion be dismissed with costs. The judgment of the learned trial Judge dismissing the action should be varied by adding an order directing the assessors for the Parish of Simonds to correct the assessment rolls for the years 1952, 1953, 1954 and 1955 so that the personal property will be assessed in the name of the United States Government. In view of this order the declaration and injunction sought by the plaintiffs should be refused."

[Report: (1957) 9 D.L.R. (2d.) 391.]

NOTE.—This judgment was the subject of a further appeal, to the Supreme Court of Canada ((1958) 13 D.L.R. (2d.) 177), which will be reported in a subsequent volume of the *International Law Reports.*

(d) FOREIGN ARMED FORCES

Jurisdiction—Immunity from—Foreign Armed Forces—Under Treaty — Concurrent and Primary Jurisdiction — Offence by Member of Visiting Force—Whether Committed in Performance of Official Duty—Determination by Sending State—Conclusiveness of—Waiver of Jurisdiction—The Law of the United States of America.

WILSON *ET AL. v.* GIRARD.

United States, District Court, District of Columbia. June 18, 1957.

Supreme Court. July 11, 1957.

THE FACTS.—Girard, a soldier in the United States Army, was engaged with members of his cavalry regiment in a small unit exercise at a range area in Japan. Japanese civilians were present in the area, retrieving expended cartridge cases. Girard and another soldier were ordered to guard a machine gun and some items of clothing that had been left nearby. There was evidence that the other soldier had thrown out expended cartridge cases in order to induce Japanese civilians to come closer. Girard placed an expended 30-caliber cartridge case in the grenade launcher on his rifle and projected it by firing a blank. The first cartridge case went over the heads of the civilians, but the second penetrated the back of a woman who was picking up cartridge cases on the range and caused her death.

By the Protocol to Amend Article XVII of the Administrative Agreement between the United States and Japan, signed at Tokyo on September 29, 1953 (4 U.S.T. 1846, T.I.A.S. No. 2848, 208 U.N.T.S. 376), the two countries had agreed that:

> " 3. In cases where the right to exercise jurisdiction is concurrent the following rules shall apply:
>
> " (a) The military authorities of the United States shall have the primary right to exercise jurisdiction over members of the United States armed forces or the civilian component in relation to
>
> " (i) offenses solely against the property or security of the United States, or offenses solely against the person or property of another member of the United States armed forces or the civilian component or of a dependent;
>
> " (ii) offenses arising out of any act or omission done in the performance of official duty.
>
> " (b) In the case of any other offense the authorities of Japan shall have the primary right to exercise jurisdiction.
>
> " (c) If the State having the primary right decides not to exercise jurisdiction, it shall notify the authorities of the other State as soon as practicable. The authorities of the State having the primary right shall give sympathetic consideration to a request from the authorities of the other State for a waiver of its right in cases where that other State considers such waiver to be of particular importance."

Shortly after the homicide, the Commanding Officer of Girard's company furnished a certificate to the Chief Procurator of Maebashi City, Japan, that Girard's shooting had been " done in the performance of official duty." On the basis of this certificate, the United States maintained that it had primary jurisdiction. Japan insisted that it had proof that Girard's action was without the scope of his official duty and therefore that Japan had the primary right to try him. The difference was referred to the Joint Committee which Japan and the United States had established for the purpose of consultation on matters relating to the stationing of United States forces in Japan. The Joint Committee was unable to agree, and the issue was referred to higher authority. With the approval of the President of the United States, the Japanese authorities were notified that the United States had decided not to exercise, but to waive, whatever jurisdiction it had in the case. Girard was indicted by the Japanese authorities for causing death by wounding. He was meanwhile in the physical custody of the United States forces.

Girard sought release from custody through a writ of habeas corpus.

Held (by the District Court): that the writ must be denied but that the petitioner must be granted declaratory relief and an injunction against delivery to the Japanese authorities. By analogy with the law relating to the scope of civil and military jurisdiction over members of the armed forces within the United States, the petitioner had a constitutional right to be tried by the United States armed forces and not to be turned over to the Japanese authorities. [Report: 152 F.Supp. 21.]

The Secretary of Defense and the other respondents appealed to the Court of Appeals for the District of Columbia, and, without awaiting action by that Court on the appeal, invoked the jurisdiction of the Supreme Court. Girard filed a cross-petition for *certiorari* to review the denial of the writ of habeas corpus.

Held (by the Supreme Court *per curiam*): that the judgment of the District Court must be reversed. A nation had exclusive jurisdiction to punish offences against its laws committed within its borders, unless it surrendered its jurisdiction. In this case, the cession by Japan to the United States of jurisdiction to try American military personnel was conditioned by an undertaking to give " sympathetic consideration " to requests for waivers. There was no constitutional or statutory bar to the carrying out of this provision by the United States.

The Court said: " In the light of the Senate's ratification of the Security Treaty after consideration of the Administrative Agreement, which had already been signed, and its subsequent ratification of the NATO Agreement, with knowledge of the commitment to Japan under the Administrative Agreement, we are satisfied that the approval of Article III of the Security Treaty authorized the making of the Administrative Agreement and the subsequent Protocol embodying the NATO Agreement provisions governing jurisdiction to try criminal offences. . . .

" The issue for our decision is therefore narrowed to the question whether, upon the record before us, the Constitution or legislation subsequent to the Security Treaty prohibited the carrying out of this provision authorized by the Treaty for waiver of the qualified jurisdiction granted by Japan. We find no constitutional or statutory barrier to the provision as applied here. In the absence of such encroachments, the wisdom of the arrangement is exclusively for the determination of the Executive and Legislative Branches.

"A sovereign nation has exclusive jurisdiction to punish offenses against its laws committed within its borders, unless it expressly or impliedly consents to surrender its jurisdiction. *The Schooner Exchange* v. *M'Faddon*, 7 Cranch 116, 136. Japan's cession to the United States of jurisdiction to try American military personnel for conduct constituting an offence against the laws of both countries was conditioned by the covenant of Article XVII, section 3, paragraph (c) of the Protocol that

> " ' . . . The authorities of the State having the primary right shall give sympathetic consideration to a request from the authorities of the other State for a waiver of its right in cases where that other State considers such waiver to be of particular importance.' "

[Reports: 354 U.S. 524, 1 L.Ed. 2d 1544, 77 Sup.Ct. 1409.]

NOTE.—(I) Girard was subsequently turned over to the Japanese authorities and tried in the Maebashi District Court. He was found guilty, and a suspended sentence of three years' hard labour imposed. The proceedings in the Maebashi District Court are reported in *Japanese Annual of International Law*, 2 (1958), p. 128.

The case reported above is noted in *Harvard Law Review*, 71 (1957), p. 140; *Louisiana Law Review*, 18 (1957), p. 173; *Minnesota Law Review*, 42 (1958), p. 825; *Ohio State Law Journal*, 19 (1958), p. 143; *St. John's Law Review*, 32 (1957), p. 117; *Virginia Law Review*, 43 (1957), p. 939; *Wisconsin Law Review*, 1958, p. 52.

See also *Reid* v. *Covert*, reported *infra*, p. 549.

(II) In *United States ex rel. Keefe* v. *Dulles*, 222 F.2d 390 (D.C. Cir. 1954), *certiorari* denied, 348 U.S. 952, 99 L.Ed. 743, 75 Sup. Ct. 440 (1955), the United States Court of Appeals for the District of Columbia refused to grant a writ of habeas corpus to bring about the release of a member of the United States forces confined in a French jail pursuant to a judgment of a French Court. The United States Court denied that the soldier in question had been denied any " constitutional rights " in his trial and that the United States, acting through the President or Secretary of State, had any obligation to intercede on his behalf.

Jurisdiction—Exemptions from—Visiting Forces—NATO Status of Forces Agreement of June 19, 1951—Concurrent Jurisdiction of Receiving and Sending States—Waiver of Primary Right of Jurisdiction by Receiving State—Whether Waiver Effective in Proceedings Instituted Prior to Promulgation of Agreement—The Law of France.

Re LABELLE.

France, Court of Cassation. March 7, 1957.

THE FACTS.—The NATO Status of Forces Agreement of June 19, 1951, was promulgated in France on August 24, 1953. As far as here material, the Agreement provided for the primary right of jurisdiction of the receiving State over offences committed by members of the armed forces of the sending State and not arising out of acts done in the performance of their official duties. The Agreement further provided that the receiving State might waive its primary right of jurisdiction in favour of the sending State.

On March 1, 1952, the appellant's husband was killed at Melun, France, as a result of the alleged negligence of one Z, a member of the United States armed forces stationed in France. Shortly thereafter, the French authorities began an enquiry and opened proceedings for " voluntary homicide " against a person unknown. These proceedings were terminated by an order dated February 28, 1953. This order was quashed and a further enquiry ordered in March 1953. In pursuance of the latter order, an enquiry was opened specifically against Z., the charge being " involuntary homicide ". In October 1953, the United States military authorities claimed the right of primary jurisdiction, and the French Court thereupon decided not to proceed further and declared itself incompetent. The widow of the deceased appealed against that decision and contended (1) that the French Court was not entitled to declare itself incompetent because by so doing it had purported to apply to proceedings instituted in 1952, a Treaty promulgated in 1953, thus infringing the rule of non-retroactivity, and (2) that before declaring itself incompetent the French Court should have made certain that according to the law of the United States a member of the United States military forces was liable to punishment for " involuntary homicide ", and that in fact the United States courts were competent to try a member of the United States forces for this particular offence.

Held: that the appeal must be dismissed. (1) The French Court was entitled to apply the Treaty to a case pending at the time of its promulgation in France, because the rule contained in the Treaty was a rule of procedure, and not of substantive law. (2) The right of the sending State to request the receiving State to waive its right of primary jurisdiction was not subject to any conditions, such as—in particular—a condition that proceedings shall have been instituted in the sending State.

The Court said: " It is contended that the decision under appeal was wrong in holding that the rules laid down in the Agreement of June 19, 1951, on the respective rights of jurisdiction of the French courts and those of the other member States of NATO can be applied to facts occurring prior to the entry into force of the Agreement, and that the Agreement must be treated like a municipal law of procedure which can modify the procedure even in cases already pending. It is said that the Treaty here in issue, which governs the rights of jurisdiction of the various States, modifies not only the rules of competence and procedure but also the rules of substantive law relating to cases brought before the courts of member States and that it is therefore not merely a law of procedure, with the result that it cannot be applied to facts occurring before its entry into force unless retroactive effect is given to it. The Court of Appeal of Paris ceased to exercise jurisdiction and did so in favour of the American military authority, which exercised its rights of priority. It held that it lacked jurisdiction to deal with the prosecution against corporal Z. of the American Army. It is argued that it is axiomatic that once a prosecution is pending, the Court cannot cease to exercise jurisdiction unless it is incompetent, and that the Court was not incompetent in this case because Article VII, paragraph 1, of the Agreement of June 19, 1951, provides expressly for concurrent jurisdiction and provides further that the primary right of jurisdiction of one of the States concerned can only be a primary right affecting prosecutions.

" It is further said that the judgment under appeal has held that the Agreement of June 19, 1951, makes the grant of a request by the home State—a request designed to ensure respect for the primary right of jurisdiction—depend only on proof that the home State has not waived its primary right of jurisdiction and that the receiving State has not asked the sending State to waive this right by reason of specially important considerations which shall be favourably examined. As the Agreement gives to the authorities of the receiving State exclusive jurisdiction to punish offences committed in its territory by a member of the forces of a sending State which are not punishable by the law of the sending State, the Court —so it is said—was under a duty to insist on proof that involuntary homicide is punishable by the law applicable to members of the United States forces stationed in France, and that the American authorities in France were competent to exercise jurisdiction to punish this offence, failing which exclusive jurisdiction would be vested in France. It was also said that the Court could only cease to exercise jurisdiction on proof that an American court was effectively seised of the matter.

" The record shows that after the death of Alfred Gadois, which occurred at Melun on March 1, 1952, in the course of a demonstration, an enquiry was opened at Melun for voluntary homicide against a person unknown, and that this enquiry terminated by an order of February 28, 1953. On appeal by the *partie civile*, the *Chembre des mises en accusation* of the Court of Appeal of Paris quashed this order on March 27, 1953, and ordered a further enquiry with a view to charging corporal Z., of the American Army, with involuntary homicide. The examining Magistrate of Melun, who was entrusted with the enquiry, was notified that corporal Z. had returned to his home country. By a letter dated October 22, 1953, the general staff of the American forces in France claimed the right of primary jurisdiction in accordance with Article VII, paragraph 3 (*a*) (ii), of the Agreement of June 19, 1951, which had come into force on August 24, 1953. In accordance with the request here referred to, the *Chambre des mises en accusation* declined, by the decision which is the subject-matter of the appeal, to exercise further jurisdiction, in favour of the American military authorities. In deciding as it did the *Chambre des mises en accusation* correctly applied the provisions of paragraph 3 (*a*) (ii) of Article VII of the Agreement of June 19, 1951. This Agreement, as the decision under appeal has rightly held, is concerned with the question of concurrent jurisdiction between the sending and the receiving State in dealing with members of the forces or a civilian element of the sending State, and it is a law which is applicable to pending proceedings. The Agreement does not make the request of the sending State subject to any particular condition, such as, in particular, the requirement of proof that a prosecution is already pending."

[Report: *Bulletin des Arrêts de la Cour de Cassation, Chambre Criminelle*, 1957, No. 237, p. 420.]

Jurisdiction—Exemptions from—Foreign Armed Forces—NATO Status of Forces Agreement, June 19, 1951—Primary Right of Jurisdiction—Waiver of Primary Right by Receiving State—Whether Executive or Judiciary of Receiving State Competent to Waive Primary Right—The Law of Italy.

Re SCHULTHIES.

Italy, Court of Cassation. December 10, 1957.

THE FACTS.—A member of the United States armed forces stationed in Italy under the North Atlantic Treaty was charged with robbery alleged to have been committed against an Italian citizen. The Rome Magistrate before whom he was charged, in purported application of Article VII of the NATO Status of Forces Agreement, notified the United States authorities in Rome that he would not exercise the primary right of jurisdiction vested in Italy. The Public Prosecutor appealed against this purported waiver and the refusal of the Magistrate to exercise jurisdiction, on the ground that the right to waive Italy's primary right of jurisdiction was vested in the Executive, and not the Judiciary.

Held: that the appeal must be allowed. The right to waive Italy's primary right of jurisdiction was vested in the Italian Ministry of Justice.

After dealing with certain questions of Italian law governing the right of appeal generally, the Court continued: "According to paragraph 3 (*b*) of Article VII [of the Status of Forces Agreement], the receiving State has a primary right of jurisdiction except over offences committed within its territory by members of [the NATO] armed forces against the property or security of their own State or against the person or property of those armed forces themselves or a civilian component of that State or the dependents of these persons, and over offences arising out of any act or omission done in the performance of official duty. In respect of the offences here mentioned, the sending State has the right to exercise primary jurisdiction. The right of the receiving State is only a subsidiary right, which becomes operative when the sending State waives its primary right of jurisdiction. Paragraph 3 (*c*) provides that the right to waive the primary right of jurisdiction—whether that right belongs to the receiving or sending State—can be exercised only by the State in which it is vested, either on its own initiative or upon the request of the authorities of the other State. If we consider the matter in the context of Italy, which is the receiving State, we must point out that waiver of jurisdiction is an entirely new concept so far as our legal system is concerned. It can, however, be found a long way back in history, though different in scope and extent, in the régime of capitulations whereby less developed countries—and especially oriental countries—waived their right of jurisdiction over the subjects of more developed countries. But, because it is a new concept, we must lay down with precision the effect of such waiver on criminal proceedings pending in our courts against members of the armed forces of NATO who belong to countries other than our own. In particular, it is our duty to lay down in whom is vested the right of waiver of the jurisdiction of our courts. We must identify the competent organ of the State which is entitled to exercise this right of waiver. The waiver of jurisdiction for which the Status of Forces Agreement provides, whether it occurs on the initiative of the State entitled to the right of primary jurisdiction or upon the request of the other State, implies essentially the evaluation of political factors. Such an evaluation must be made in individual cases by reference to ' special considerations justifying the request ' —as paragraph 3 (*c*) expresses it[1]—and it is therefore a matter of discretion. Where a matter is one for the exercise of discretion it belongs to the competence of the Executive and is therefore outside the province of the Judiciary, which cannot be the judge of its own right to exercise jurisdiction.

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[1] Paragraph 3 (*c*) provides:

" The authorities of the State having the primary right shall give sympathetic consideration to a request from the authorities of the other State for a waiver of its right in cases where the other State considers such waiver to be of particular importance."

[The Court then considered the question whether an appeal was permissible in what it called a case of excess of jurisdiction, and, having answered this question in the affirmative, concluded as follows:] "The Presidential Decree No. 1666 of December 2, 1956, which has enacted the rules governing the application of Article VII of the Status of Forces Agreement, provides which of the executive organs of the State have to be notified of criminal proceedings against members of the Allied armed forces. Article 1 (4) of the Decree gives to the Minister of Justice, after consultation with the Minister for Foreign Affairs, the right to exercise the right of waiver. He has to request the Judge in charge of the proceedings to ascertain, from a strictly legal point of view, whether the conditions laid down by law for the validity of a waiver are satisfied. The Judge can then 'declare, in his judgment, that the right to exercise primary jurisdiction is waived'. The Magistrate must comply with these rules. Accordingly, his judgment must be reversed and the case sent to another Magistrate."

[Report: *Rivista di Diritto Internazionale*, XLI (1958), p. 625.]

ix.—Irregular Apprehension

Jurisdiction—Territorial—Irregular Apprehension—In Foreign State—Expulsion—As Affecting Jurisdiction of Court of Receiving State.

WENTZ *ET AL. v.* UNITED STATES.

United States, Court of Appeals, Ninth Circuit. April 19, 1957.

THE FACTS.—The defendants were indicted and convicted in a United States District Court for the federal offence of transmitting a message by inter-state wire communication for the purpose of executing a fraudulent scheme. The message, dispatched in Los Angeles, California, and addressed to the victim in Mexico City, was routed via Dallas and San Antonio, Texas. In addition to contending that the message was a foreign communication and hence did not fall within the scope of a statute relating to inter-state transmission of messages, one of the defendants, Jensen, maintained that the United States Court lacked jurisdiction over him. He alleged that he had been seized and detained by the Mexican authorities, that he was denied an attorney, and that no proceedings were ever taken in Mexico. He further alleged that he was transported to the border between Mexico and the United States (by whom was not stated) and there turned over to "certain agents of the United States government".

On appeal from the judgments of conviction,

Held: that the judgments of conviction must be affirmed. The fact that the Mexican authorities might have acted illegally did not oust the jurisdiction of a United States District Court over the defendant Jensen.

After concluding that the message in question was an inter-state transmission, the Court said: "As noted, the motion requested the indictment be dismissed because of lack of personal jurisdiction, which lack purportedly arose out of the events related above. The non sequitur of the motion (dismissal of indictment because no personal jurisdiction yet) we shall ignore. We do, however, believe we should notice that defendant Jensen's counsel misstates the record facts when in his brief he says, 'Personal jurisdiction of appellant was acquired by the federal court through the illegal acts of federal officers.'

"No illegal act of a United States officer is related by Jensen. In the affidavit no action of officers of the United States begins before the defendant is brought to them in the United States. Therefore, the charge, if true, must be that the defendant was denied 'due process' in Mexico by Mexicans. If true, that is no legal concern of an American court.

"When American officers participate in an abduction from a foreign country (beyond merely receiving a man pushed out of a foreign country) there will then be time to consider whether the forced confession cases relied on by Jensen have some effect on jurisdiction over the person, and, if so, what effect."

[Reports: 244 F.2d 172; *certiorari* denied, 355 U.S. 806, 2 L.Ed. 2d 50, 78 Sup.Ct. 49 (1957).]

Jurisdiction — Territorial — Irregular Apprehension — Alleged Abduction from Foreign State—Whether Constituting Violation of Treaty of Extradition—Right of Accused to Object—The Law of the United States of America.

UNITED STATES *v.* SOBELL.

United States, District Court, Southern District, New York.

June 20, 1956.

Court of Appeals, Second Circuit. May 14, 1957.

THE FACTS.—In 1951, Sobell had been found guilty of conspiring to commit espionage on behalf of the Union of Soviet Socialist Republics. The present action was a petition to set aside the verdict and judgment on the ground that his constitutional rights had been violated and that the Court was without jurisdiction to try him.

Sobell had been apprehended in Mexico City by the Mexican Security Police in 1950 and transported to Laredo, Texas, at which point he was arrested by the United States authorities under a warrant previously issued. He alleged that he had been kidnapped from Mexico by agents of the Mexican Security Police who were acting under orders of the United States Federal Bureau of Investigation and that he was thus forcibly and illegally returned to the United States against his will. He contended that the United States had thereby violated the Extradition Treaty between the United States and Mexico, signed at Mexico City on February 22, 1899 (31 Stat. 1818, T.S. No. 242), and that the United States accordingly lacked jurisdiction to try him for the offence charged. On petitioner's motion to set aside the verdict and judgment of conviction,

Held: (by the District Court): that the motion must be denied. The seizure of a fugitive on foreign soil in violation of international law does not deprive the courts of jurisdiction over the person of the fugitive when he is brought before them. The matter of violation of international law may be raised only by a State and not by an individual. The existence of a treaty of extradition between the two States concerned does not preclude the use of informal expulsion procedures.

The District Court said: " It is Sobell's position that the United States breached the extradition treaty with Mexico in two ways; first, because the offense with which he was charged was not among those enumerated in the treaty as extraditable,[1] and, second, because the manner of this removal from Mexico ' flouted the treaty requirements for specified official removal arrangements with duly constituted authorities of the Government of Mexico and for proceedings under Mexican law to determine probable guilt and justification for removal.' Petitioner's Second Memorandum, p. 22. These two facts, he charges, operate to invalidate the subsequent proceedings against him, because ' [a]n existing extradition treaty fully controls the national power to conduct criminal proceedings involving alleged fugitives found in another treaty country. Absent treaty compliance, the power of the nation—and thus of its judiciary —fails *ab initio.*' Petitioner's Second Memorandum, pp. 11–12. Further, Sobell contends, this lack of judicial power is not merely lack of jurisdiction over the person of the accused who has thus been wrongfully seized, it is total lack of judicial power over the subject matter of the offense.

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[1] Actually this first allegation is two-pronged: his first assertion is that espionage was not one of the crimes listed in the treaty and this is certainly true—although the conclusions he draws from that fact are incorrect. His second is that the treaty specifically excludes political offenses and he claims his was a political offense. This latter contention is, of course, completely meritless. Sobell was charged with and tried for conspiracy to commit espionage—a non-political crime. The fact that he was a Communist was introduced to show motive for the crime, because unless some reason for his actions were shown, such as devotion to the cause of the Soviet Union, it would be difficult to understand why an American would thus spy upon his country for the benefit of the Soviet. And the fact that Sobell and Elitcher were associated in this case also gave probative weight to Elitcher's story that he was approached several times by Rosenberg and Sobell to join their conspiracy; the fact that he was in sympathy with their ultimate cause undoubtedly was what impelled the defendants to trust Elitcher not to divulge their machinations despite his own decision not to take an active role. The jury was specifically and continually warned that Sobell was not being tried for Communism, and I might point out that the jury which was selected was one with which the defense indicated satisfaction before they had used up all their peremptory challenges.

" This final argument defining the type of jurisdictional defect is vitally necessary to petitioner here, as concededly, any question as to the trial court's jurisdiction over his person was voluntarily waived by him, and the court's jurisdiction over his person has been specifically upheld by the Court of Appeals. Indeed, defense counsel stated on oral argument of this motion: ' I am not here urging the matter of personal jurisdiction of the defendant . . . That was litigated . . . and Judge Frank said they raised that too late and . . . it had been waived. Your Honour, if we were dealing with the matter of personal jurisdiction, we are out of court.' (Transcript of Oral Argument, p. 34—hereafter T. 34.)

"Accepting defense counsel's assertion, I find that this motion is raising the precise issue of personal jurisdiction, and that on that score alone, to paraphrase, Sobell is ' out of court '. Further, even assuming the jurisdictional question could be reached, I find that there was no violation of any treaty, that Sobell has no standing to raise this question and that the court properly had jurisdiction of his person. . . .

" Further, Sobell's counsel concede that there would have been no question of the court's power to try Sobell for the offenses charged had it not been for the manner of his apprehension. (T.95.) Thus by counsel's own admission the only lack of power was that over Sobell's person, and the rule is clear that in a criminal case a court has jurisdiction of the subject matter if it has jurisdiction of the crime charged. Moreover, without exception, every single case which petitioner cites to uphold his position makes it patently clear that the jurisdictional question involved in all cases of irregular seizure of fugitives is the question of jurisdiction over the person of the defendant.[1] In the *Cook* case,[2] upon which defense relies so heavily, jurisdiction over a ' person ' was not involved as the case concerned the court's jurisdiction to forfeit a British vessel, illegally seized on the high seas, and it was clear that the sole question was the court's power over the specific vessel.[1] Further, in every one of the cases where relief was granted, the jurisdictional issue was timely raised.[2] Indeed in the case of *Ford* v. *United States*, 1927, 273 U.S. 593, 47 S.Ct. 531, 71 L.Ed. 793[3]—a case on all fours with *Cook*—petitioners were denied relief because the jurisdictional question had not been raised on time. It is apparent, therefore, that no jurisdictional question other than that of personal jurisdiction was raised by the problem of irregular seizure, or else the Court would not have found a waiver. . . .

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[1] *Johnson* v. *Browne*, 1907, 205 U.S. 309, 27 S.Ct. 539, 51 L.Ed. 816; *Cosgrove* v. *Winney*, 1899, 174 U.S. 64, 19 S.Ct. 598, 43 L.Ed. 897; *United States* v. *Rauscher*, 1886, 119 U.S. 407, 7 S.Ct. 234, 30 L.Ed. 425; *United States ex rel. Donnelly* v. *Mulligan*, 2 Cir., 1934, 74 F.2d 220 [*Annual Digest*, 1933–1934, Case No. 144]; *United States* v. *Ferris*, D.C.N.D.Cal. 1927, 19 F.2d 925 [*Annual Digest*, 1927–1928, Case No. 127].

All the other cases cited in petitioner's brief similarly point up the fact that irregular seizure raises solely the question of defendant's personal right to be free of the jurisdiction of an otherwise competent court. These other cases are not relied on by petitioner, however, as they are all completely contra to his present position, and he cited them only in an attempt to distinguish them. The futility of his attempt and the inapplicability of even those cases he has relied on will be discussed *infra*.

[[2] See *Annual Digest*, 1931–1932, Case No. 1, *sub nom. The Mazel Tov* (*Cook* v. *United States*).]

"Although the fact that this motion is but another attack on the court's personal jurisdiction is sufficient reason in itself to deny the first petition, I find that the jurisdictional argument presented is totally lacking in merit, and I shall briefly consider it here, regardless of the principles of waiver and res judicata, lest petitioner urge that he is being deprived of his freedom on a mere technicality. Although this Court cannot consider these basic rules of waiver and res judicata to be ' a mere technicality ', nevertheless in the case of this petitioner I prefer that my decision not be based solely upon these fundamental legal principles but that it also rest upon a consideration of the merits.

" Petitioner's contention with regard to this jurisdictional question is that his seizure violated a treaty, and the courts are bound to uphold the treaty which is the law of the land by finding the United States government to be devoid of power to proceed against him. He argues that *Cook* v. *United States*, 1933, 288 U.S. 102, 53 S.Ct. 305, 77 L.Ed. 641[4] is controlling here. In that case, the United States had seized a British vessel on the high seas and had started forfeiture proceedings against it for violation of the prohibition laws. Because of the liquor smuggling problem during prohibition, the United States and Great Britain had entered into a treaty which permitted British ships to enter United States ports with personal liquor stores on board in return for permitting the United States to seize British smugglers while still on the high seas, if they were within one hour's sail of this country. The ship Mazel Tov had been seized beyond that distance; thus the seizure had been in direct violation of the treaty provisions and the court held that it had no jurisdiction to condemn the vessel. The court at that time distinguished situations where American ships had been seized in foreign waters for violation of American law. Such seizures were in violation of international law, but the Court said this did not operate to deprive the courts of jurisdiction. *The Richmond*, 1815, 9 Cranch 102, 13 U.S. 102, 3 L.Ed. 670; *The Merino*, 1824, 9 Wheat. 391, 22 U.S. 391, 6 L.Ed. 118. Thus the distinction that petitioner relies upon is that where a specific treaty is violated, as opposed to general international law, the courts will find themselves powerless to act.

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[1] I shall spell out the details of the *Cook* case, *infra.*

[2] See the five cases cited in footnote [1], *supra* [p. 258], and *Cook* v. *United States*, *supra.*

[[3] See *Annual Digest*, 1925–1926, Case No. 110.]

[[4] *Ibid.*, 1931–1932, Case No. 1.]

" This distinction is vital to his argument, as he leans upon it entirely in his attempt to avoid the controlling principle of law which the courts of this country have followed for seventy years. The rule is that a seizure of a fugitive on foreign soil in violation of international law will not deprive the courts of the offending state of jurisdiction over the person of the fugitive when he is brought before them. The question of violation of international law, they have continuously reiterated, is to be left to the proper consideration of the political and executive branches of the government should the offended state choose to raise the issue.[1]

" In *Re Johnson*, 1897, 167 U.S. 120, 126, 17 S.Ct. 735, 737, 42 L.Ed. 103, the Court used the following language to explain its rationale:

> " ' The law will not permit a person to be kidnapped or decoyed within the jurisdiction for the purpose of being compelled to answer to a mere private claim, but in criminal cases the interests of the public override that which is, after all, a mere privilege from arrest.'

This principle has been followed again and again, in case after case involving charges of illegal abduction of a criminal defendant from another state or country—cases which petitioner has tried to distinguish on erroneous grounds completely contrary to the language of the courts themselves. See cases cited footnote [1 *infra*]. This principle was most recently re-affirmed in *Frisbie* v. *Collins*, 1952, 342 U.S. 519, 72 S.Ct. 509, 96 L.Ed. 541. That case—decided after *McNabb* v. *United States*, 1942, 318 U.S. 332, 63 S.Ct. 608, 87 L.Ed. 819, had extended the courts' role as supervisors of the administration of justice—indicated clearly that not only are there no jurisdictional issues raised by such abductions but there are no due process problems involved either. Speaking for a unanimous court, Mr. Justice Black stated [342 U.S. 519, 72 S.Ct. 511]:

> ' This Court has never departed from the rule announced in *Ker* v. *Illinois*, 119 U.S. 436, 444, 7 S.Ct. 225, 229, 30 L.Ed. 421, that the power

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[1] *Ker* v. *Illinois*, 1886, 119 U.S. 436, 7 S.Ct. 225, 30 L.Ed. 421; *United States* v. *Dixon*, D.C.E.D.N.Y.1947, 73 F.Supp. 683 [*Annual Digest*, 1947, Case No. 24]; *United States* v. *Insull*, D.C.N.D. Ill.1934, 8 F.Supp. 310; *Ex parte Lopez*, D.C.S.D. Tex.1934, 6 F.Supp. 342 [*Annual Digest*, 1933–1934, Case No. 76]; *United States* v. *Unverzagt*, D.C.W.D.Wash.1924, 299 F. 1015, affirmed 9 Cir., 5 F.2d 492, certiorari denied 1925, 269 U.S. 566, 46 S.Ct. 24, 70 L.Ed. 415 [*Annual Digest*, 1923–1924, Case No. 161].

This listing does not include the numerous decisions reaching similar conclusions regarding interstate abductions, e.g., *Pettibone* v. *Nichols*, 1906, 203 U.S. 192, 27 S.Ct. 111, 51 L.Ed. 148; *Mahon* v. *Justice*, 1887, 127 U.S. 700, 8 S.Ct. 1204, 32 L.Ed. 283.

See also 1 Moore on Extradition, Chap. VII, Irregular Recovery of Fugitive.

of a court to try a person for crime is not impaired by the fact that he had been brought within the court's jurisdiction by reason of a "forcible abduction." No persuasive reasons are now presented to justify overruling this line of cases. They rest on the sound basis that due process of law is satisfied when one present in court is convicted of crime after having been fairly apprized of the charges against him and after a fair trial in accordance with constitutional procedural safeguards. There is nothing in the Constitution that requires a court to permit a guilty person rightfully convicted to escape justice because he was brought to trial against his will.'

"One exception to this general rule follows where the United States has invoked an extradition treaty in order to compel a foreign state to surrender a fugitive. In such circumstances, if the United States then tries the fugitive for a crime other than the one for which extradition was granted, it will be held to have violated the contractual obligations of the treaty and the courts will find themselves to be without jurisdiction over the defendant, unless he waives this issue. This rule was enunciated in *United States* v. *Rauscher, supra*; and followed in *United States ex rel. Donnelly* v. *Mulligan, supra; Cosgrove* v. *Winney, supra*, and *Johnson* v. *Browne, supra*. The compatibility of the *Rauscher* and *Ker* doctrines is illustrated by the fact that both were decided on the same day with the same Justice writing for the Court. Ker clearly distinguished the *Rauscher* situation as one in which the fugitive is clothed in the rights of the treaty.

"It is patently obvious that Sobell is clothed in no such treaty rights. He urges that the fact that there was an extradition treaty in force in itself protected him from seizure or surrender save with reference to it and that his seizure was thus violative of its provisions. This same argument was made by Ker who was kidnapped from Peru by a United States emissary despite the existence of an extradition treaty, and his contentions were rejected. The Court pointed out that the sole obligation the surrendering state undertakes in an extradition treaty is that it will bind itself to extradite fugitives sought for certain enumerated offenses, where formerly it could have used its own discretion. And the sole obligation of the demanding state is that if it invokes formal extradition proceedings, it will try the surrendered fugitive only for the specific crime charged. Informal expulsion procedures are still available to the surrendering state both for enumerated and certainly for nonenumerated crimes, see IV Hackworth, *Digest of International Law*, Chapter XII, and if the demanding state recovers its fugitives through illegal channels in violation of another nation's sovereignty, that creates a question for the political branches of the government, but does not raise any concerning judicial jurisdiction. See Moore, *op cit.*

"Thus the petitioner is certainly not within the rule of the *Rauscher* case, nor is his situation even remotely similar to that of the British ship seized in *Cook*.[1] Further, his own allegations indicate that the Mexican Police were the chief actors in his abduction, although he charges that they were acting illegally. This means his argument is blocked also by the rule that even a diplomatic demand for the return of an illegally seized fugitive need not be honored where officials of the asylum state took part in the illegal seizure. Note Kidnapping of Fugitives from Justice on Foreign Territory, by Lawrence Preuss, 29 American Journal of International Law 502, 507 (July 1935). It is noteworthy that the petitioner has not even suggested that such a demand was ever made by Mexico.

" It is clear that Sobell's argument that this Court lacked jurisdiction to try him because of his alleged illegal abduction would have been rejected as completely fallacious even had it been timely raised, and this is undoubtedly the reason his adroit lawyers refrained from making this motion among their numerous other applications for pre-trial relief.

" Since the trial courts undoubtedly had jurisdiction over the subject matter, we shall now proceed to examine the second motion in order to determine whether the prosecution's actions were of such a nature as to deprive the petitioner of his constitutional rights, and vitiate the proceedings . . ."

(The Court then proceeded to an examination of certain questions of the municipal law of the United States.) [Report: 142 F.Supp. 515.]

On appeal,

Held (by the Court of Appeals): that the judgment of the District Court must be affirmed. The power of a court to try a person for crime was not impaired by the fact that he had been brought within the Court's jurisdiction by way of a " forcible abduction ".

The Court of Appeals, after discussing several questions of the municipal law of the United States, said: "Appellant's supplementary motion also rests upon the charge that he was forcibly abducted from Mexico by the Mexican Security Police as agents of the United States. He contends that the alleged abduction was a violation of the Extradition Treaty between the United States and Mexico, 31 Stat. 1818, and that as a result the United States lacked power to proceed against him. He relies upon *Cook* v. *United States*, 288 U.S. 102, 53 S.Ct. 305, 77 L.Ed. 641,[2] which holds that the United States courts may not acquire jurisdiction by means of a treaty violation. As appellant says, his 'objection to national and, consequently, judicial power does not rest on the kidnapping or abduction of appellant as such, but rather upon the violation of the treaty.' We must inquire, therefore, whether there has been a violation of the treaty with Mexico.

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[1] The sole remaining case cited by Sobell as supporting his position is *United States* v. *Ferris*, D.C.N.D.Cal.1927, 19 F.2d 925, and that case is on all fours with *Cook*.

[[2] See *Annual Digest*, 1931–1932, Case No. 1, *sub nom. The Mazel Tov* (*Cook* v. *United States*).

"It seems too plain for reasonable debate that *Ker* v. *Illinois*, 119 U.S. 436, 7 S.Ct. 225, 30 L.Ed. 421, answers that question in the negative, even if appellant's factual assertions be taken as true. That case involved a treaty with Peru, 18 Stat. 719, in all pertinent respects the same as the one before us, *i.e.*, each treaty provides for extradition for certain named crimes and neither the treaty with Peru nor the treaty with Mexico in terms prohibits abduction by one party of criminals found in the territory of the other. Ker, who had been charged with a crime committed in the United States, had left the country and was located in Peru. The President of the United States issued a warrant and sent a messenger to Peru to receive Ker from the Peruvian authorities in compliance with the treaty. Instead, the messenger kidnapped Ker and returned him forcibly to the United States. Ker excepted to the jurisdiction of the court but was convicted. Upon Supreme Court review of affirmance of his conviction by the Illinois court, Ker urged two other grounds for reversal,

> 'But the main proposition insisted on by counsel for plaintiff in error in this court is, that, by virtue of the treaty of extradition with Peru, the defendant acquired by his residence in that country a right of asylum,—a right to be free from molestation for the crime committed in Illinois, a positive right in him that he should only be forcibly removed from Peru to the state of Illinois in accordance with the provisions of the treaty,—and that this right is one which he can assert in the courts of the United States in all cases, whether the removal took place under proceedings sanctioned by the treaty, or under proceedings which were in total disregard of that treaty, amounting to an unlawful and unauthorized kidnapping.' 119 U.S. at page 441, 7 S.Ct. at page 228.

"Although the language appellant uses is slightly different, there can be no doubt that he is asserting precisely the same claim as did Ker, which claim was rejected by the Supreme Court.

"And the *Ker* case continues to have validity. It was cited in the *Cook* case, relied upon by appellant, and in *Frisbie* v. *Collins*, 342 U.S. 519, at page 522, 72 S.Ct. 509, at page 511, 96 L.Ed. 541, where the Court said:

> 'This Court has never departed from the rule announced in *Ker* v. *Illinois*, 119 U.S. 436, 444, 7 S.Ct. 225, 229, 30 L.Ed. 421, that the power of a court to try a person for crime is not impaired by the fact that he had been brought within the court's jurisdiction by reason of a "forcible abduction".'

"Appellant seeks to avoid the impact of the *Ker* case by insisting that, although there was no treaty violation in that case, there was such a violation in the case at bar. 'Unlike the facts in *Ker*,' appellant says, 'the petition here charges action by the United States Government . . .' Appellant relies on 'The actions of the United

States' agents in initiating, planning and participating in the seizure.' But it can hardly be maintained, still assuming the truth of appellant's charges, that the unlawful and unauthorized acts of the Mexican police acting in behalf of subordinate agents of the executive branch of the United States Government were any more acts of the United States than the unlawful and unauthorized acts of the emissary of the Chief Executive. We think the question presented is indistinguishable from that before the Supreme Court in *Ker*, and that our decision here is controlled by that case."

[Reports: 244 F.2d 520; *certiorari* denied, 355 U.S. 873, 2 L.Ed. 2d 77, 78 Sup.Ct. 121 (1957).]

II.—Personal

i.—Over Nationals in Respect of Crimes Committed Abroad

Jurisdiction — Personal — Criminal Jurisdiction — Place Where Offence Committed—Principle of Objective Territoriality.

PUBLIC PROSECUTOR *v.* Y.

Holland, Supreme Court. May 7 and *September* 24, 1957.

THE FACTS.—On December 12, 1956, the police at Tilburg seized a number of roulette tables and accessories in a building known as " Woodhouse ", situated on a plot of land in Baarle-Nassau, a commune which was then in dispute between the Netherlands and Belgium. The seizure was followed by criminal proceedings against Y., the owner of the gaming house. In two separate actions Y. (*a*) applied for the release of the objects seized, and (*b*) filed an objection to the writ of summons, mainly on the ground that the *locus delicti* was in Belgium and not in the Netherlands.

Held (in both actions): that there was no ground either to grant the application or to quash the writ of summons.

The Court said: " [As regards (*a*)] The accused objected to the seizure and the institution of criminal proceedings on the grounds that there was a dispute pending between the Belgian and the Netherlands Governments concerning sovereignty over the plot of land on which ' Woodhouse ' was located, and that the two Governments had agreed to submit that dispute to the International Court of Justice. In these circumstances, according to the accused, the courts of both countries should abstain from prejudging the controversy in any way. The District Court, while sitting in Chambers, could not accept this view, since it was for the Court on the public hearing of the case to decide whether the uncertainty as to territorial sovereignty necessitated an adjournment of the prosecution until the International Court of Justice should have pronounced its Judgment.

"[As regards (*b*)] There is still less reason for granting the requests of the accused because the Belgian Law of October 24, 1902, '*concernant le jeu*' and Article 305 of the Belgian Penal Code make the keeping of a gaming-house punishable in the same way as does the Netherlands Code. The accused is a Netherlands national so that, even if 'Woodhouse' were situated in Belgium, he could be prosecuted in a Netherlands court on the basis of Article 5 (2) of the Netherlands Penal Code, under which a national of the Netherlands is liable to prosecution in Holland for an offence, committed abroad, which is punishable under Netherlands law and which is also punishable under the law of the country where the offence was committed. It is true that the offence of keeping a gaming-house is not defined in exactly the same way in the Netherlands and in Belgium, but for the application of Article 5 (2) it suffices that the acts for which the accused is prosecuted in Holland come under some provision of the foreign criminal law, even if that provision does not constitute exactly the same offence with the same legal definition."

[Reports: *N.J.*, 1958, Nos. 539 and 540.]

NOTE.—The subsidiary ground for the Court's upholding the seizure and the writ of summons did not in any event turn out to have been redundant, since the International Court of Justice recognized Belgian sovereignty over the disputed plots of land: see Judgment of June 20, 1959, in *Case concerning Sovereignty over Certain Frontier Lands* (*I.C.J Reports*, 1959, p. 209), to be reported in a subsequent volume of the *International Law Reports*.

Jurisdiction—Over Nationals for Offences Committed Abroad—Departure from Principle of Territoriality—The Law of Mexico.

Re GUTIERREZ.

Mexico, Supreme Court. October 18, 1957.

THE FACTS.—The defendant, a Mexican national, while in El Paso, Texas, decided to purchase a truck from A. B. Poe Motors Co. An agent of the Company let him take one of the trucks to try out on the road, and the defendant drove it over the border to Giudad Juarez, Mexico, and later was arrested in that town by the local police upon complaint of the theft from Texas. The defendant declared that he had lost his note case and the car documents, and that he had been drunk for several days, but that he had always intended to return the truck. With depositions from Texas and statements of the local police and his own statements before the Prosecuting Attorney, the defendant was tried in a Federal Circuit Court in Mexico and sentenced to imprisonment and to pay a fine, levied according to the Federal Criminal Code. The Federal Court assumed jurisdiction because the crime was one committed by a national while on foreign territory. The defendant filed a direct *amparo* action with the Supreme Court on the grounds that the Federal Court did not have original jurisdiction; and that the imposition of the penalties was not based on proper evidence, the crime had not been proved, he had not had " due process " in court and had thus suffered a violation of his constitutional guarantees.

Held: that the decision of the Federal Court below must be upheld, both as to competence and as to sentence. There was no violation or infringement of the defendant's constitutional rights, because adequate evidence was to be found in the written documents and depositions before the Court, from which the *corpus delicti* of the theft was clearly established, and the proper penalty was imposed for the type of crime committed.

As to the international aspects, the Supreme Court said: " It is well known that it is the federal judge who has jurisdiction, notwithstanding that it is the principle of territoriality which fundamentally regulates the special application of the penal law in accordance with Article 4 of the Federal Criminal Code, even though this precept, in its first hypothesis—a crime committed abroad by a Mexican national—admits the principle of personal law. This is so because of the respect due . . . to the ties of allegiance which should bind the subject to his State, or because it is not possible to conceive that a State should be transformed into a safe refuge for its own nationals who have committed crimes outside its frontiers, or because the rule of prosecution is merely a just corollary to the non-extradition of nationals, which is the practice of the majority of countries."

[Report: *Semanario Judicial de la Federación*, 6 epoch, vol. 4, Part 2, October 1957, p. 56.]

Jurisdiction—Personal—Over Nationals in Respect of Crimes Committed Abroad—Alleged Violation of Anti-Trust Laws—Committed Abroad—Impact in Territory of State Exercising Jurisdiction—The Law of the United States of America.

See p. 673 (*United States* v. *R. P. Oldham Co. et Al.*).

II.—Jurisdiction on the high seas

i.—For Ensuring the Safety of Traffic. Collisions. Salvage. Pollution of the High Seas

Jurisdiction—On the High Seas—Civil Jurisdiction—Death in Aeroplane Crash—Foreign Aircraft or Vessel—Warsaw Convention of 1929 on International Carriage by Air—The Law of the United States of America.

FERNANDEZ *ET AL.* *v.* LINEA AEROPOSTAL VENEZOLANA.

United States, District Court, Southern District, New York.

October 21, 1957.

THE FACTS.—This was a libel in admiralty brought by the administrators of the estate of a stewardess on board an aircraft of the respondent which crashed into the Atlantic Ocean more than one league from the shore line of the United States. It was alleged that the crash caused the death of the stewardess and had been brought about by the negligent operation of the aircraft. Five causes of action were alleged. The first of these was under the United States Death on the High Seas Act (41 Stat. 537, 46 U.S.C. §§ 761–767); the second under the Convention for the Unification of Certain Rules regarding International Air Transport, opened for signature at Warsaw on October 12, 1929 (49 Stat. 3000, T.S. No. 876, 137 L.N.T.S. 11) (the Warsaw Convention); the third under Venezuelan law; and the fourth and fifth under the law of the United States. The respondent excepted to the five causes of action on the ground that none stated a claim upon which relief could be granted, and moved to transfer the second to fifth causes of action to the civil docket.

Held: that the cause of action under the Death on the High Seas Act was sufficient and that the respondent's motion as to it must be denied, but that the motions to dismiss the other causes of action must be granted. Even though the death occurred in an area not subject to the jurisdiction of the United States, that State had the power to apply its own law to an injury taking place on or over the high seas. The United States Death on the High Seas Act not only preserved a right of action under the law of the flag of the ship or aircraft but also created a new cause of action under the law of the United States. The Warsaw Convention did not of itself create a new cause of action.

The Court said: " The first cause of action alleges that a cause of action has been afforded to libelants by the Death on the High Seas Act, 46 U.S.C.A. §§ 761–767.

" Respondents deny that this act affords a cause of action under the circumstances set forth in the libel. The Court of Appeals for the Second Circuit has expressly reserved ruling on the question of whether this act grants a right of action for death in the airspace. See *Noel* v. *Linea Aeropostal Venezolana*, 2 Cir., 247 F.2d 677.[1] However, the act has been deemed applicable to airplane crashes in a number of cases where the crash occurred over the ocean. *Wilson* v. *Transocean Airlines*, D.C.N.D.Cal.1954, 121 F.Supp. 85; *Higa* v. *Transocean Airlines*, D.C.Hawaii 1954, 124 F.Supp. 13; *Choy* v. *Pan-American Airways Co.*, 1941 A.M.C. 483 (S.D.N.Y.1941). See also, 55 Colum.L.Rev. 907, n. 56; 41 Cornell L.Rev. 243 at p. 245 (1956).

" Respondents do not seek to dismiss the first cause of action on the general ground that the Death on the High Seas Act is not applicable to death resulting from an airplane crash. Rather they contend that the only part of the act applicable is § 4 of the act, 46 U.S.C.A. § 764,[2] which makes recovery contingent upon the right of action granted by the law of the foreign state. Respondents contend that § 1 of the act, 46 U.S.C.A. § 761,[3] does not create a cause of action when death occurs on board a foreign ship or plane outside of the territorial waters of the United States, on the ground that under the circumstances only the law of the flag applies. They urge that the only remedy available to a representative of the person whose death occurred on board a foreign ship or plane outside of the territorial waters of the United States is that accorded by the foreign law, and that although an action may be brought in admiralty in this Court, pursuant to § 764 of Title 46, no independent cause of action (not growing out of the rights granted by the foreign law) may be maintained in this Court. This position would mean that no action would lie for wrongful death on the high seas unless death occurred on a plane or vessel which flew the flag of a nation which had by statute granted a cause of action for wrongful death. This would be a harsh rule and would hardly seem consonant with the intent of Congress in adopting the Death on the High Seas Act. If Congress had intended that only the law of the flag was applicable to actions for death on the high seas, then § 4 of the act would be sufficient to preserve such cause of action. But the act as passed

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[[1] Reported *infra*, p. 580, in this volume.]

[2] "§ 764. Rights of action given by laws of foreign countries

" Whenever a right of action is granted by the law of any foreign State on account of death by wrongful act, neglect, or default occurring upon the high seas, such right may be maintained in an appropriate action in admiralty in the courts of the United States without abatement in respect to the amount for which recovery is authorized, any statute of the United States to the contrary notwithstanding." Mar. 30, 1920, c. 111, § 4, 41 Stat. 537.

[3] "§ 761. Right of action; where and by whom brought

" Whenever the death of a person shall be caused by wrongful act, neglect, or default occurring on the high seas beyond a marine league from the shore of any State, or the District of Columbia, or the Territories or dependencies of the United States, the personal representative of the decedent may maintain a suit for damages in the district courts of the United States, in admiralty, for the exclusive benefit of the decedent's wife, husband, parent, child, or dependent relatives against the vessel, person, or corporation which would have been liable if death had not ensued." Mar. 30, 1920, c. 111, § 1, 41 Stat. 537.

preserved not merely rights under foreign law, but also, by § 1 of the act, gave an additional right to the personal representative of the deceased to maintain an action against the 'vessel, person, or corporation which would have been liable if death had not ensued.' As the court said in *Wilson* v. *Transocean Airlines, supra,* 121 F. Supp. at page 94: 'By these words the statute gives a right of action where none existed before.'

"Whether Congress had the power to create such a cause of action, or intended to create such a cause of action, where death occurred on a foreign ship or plane on the high seas, has been the subject of much discussion.[1] It is urged that in *Lauritzen* v. *Larsen,* 1953, 345 U.S. 571, 73 S.Ct. 921, 97 L.Ed. 1254,[2] a case dealing with the application of the Jones Act, 46 U.S.C.A. § 688 to foreign seamen on foreign ships, the Supreme Court held that in the absence of a clear showing of different Congressional intent, such maritime statutes would be considered to apply only to areas and transactions in which American law would be considered operative under prevalent doctrines of international law. However, the Jones Act was, in practical effect, a labor law regulating the rights of seamen; and in the absence of definite legislative intent to the contrary, it would be proper to assume that it was not intended to regulate the rights of foreign seamen on foreign ships. See *O'Neill* v. *Cunard White Star Lines,* 2 Cir., 1947, 160 F.2d 446, certiorari denied 332 U.S. 773, 68 S.Ct. 56, 92 L.Ed. 358.

"But when we are dealing with death acts, such as Lord Campbell's Act, 9 & 10 Vict., c. 93, or the Death on the High Seas Act, we are dealing with a different situation. The courts have held that in the absence of a statute an action could not be maintained for death caused by negligence. See *The Harrisburgh,* 1886, 119 U.S. 199, 7 S.Ct. 140, 30 L.Ed. 358. These cases did not develop from the principle that no right existed, or that no wrong had been done, but rather that whatever cause of action had existed had died with the death of the person injured and could no longer be asserted even by the next of kin or the estate of the deceased victim. To correct this situation death acts have been passed in nearly all jurisdictions. This still left a vacuum in the case of deaths which might result from accidents on the high seas. To allow actions to be maintained for deaths in this situation the Death on the High Seas Act was enacted. See Hughes, Death Actions in Admiralty, 36 Yale L.J. 115 (1921). While the maintaining of a death action is sometimes loosely referred to as a 'substantive right,' it is, properly speaking, not a 'right' but rather a 'power' which removes a previous 'disability.' See Fundamental Legal Conceptions as Applied in Judicial Reason, by Professor Hohfeld, 26 Yale L.J. 710 (1917). The 'right' depends on whether a wrong has been committed and this, of course, depends upon where the act was committed. An act in one area may be a wrong, but in another area may not be a wrong. The Death on the High Seas Act recognizes this distinction for it does not create a cause of action or grant a right of recovery for death in every situation but only against those defendants 'which would have been liable if death had not ensued.' Thus the liability for an accident causing death would be dependent upon the law of the place where the accident happened—and if it happened on a foreign ship it might well be dependent upon the law which would be applicable to that ship. The right of action for negligence would depend upon the law of the place of the accident, but the 'power' to maintain the action would not be dependent upon the locus of the accident but rather upon the forum which exercised that power. In this country the admiralty courts have assumed jurisdiction to the extent that the laws of the country extend that jurisdiction. Thus in *The Buenos Aires*, 2 Cir., 1924, 5 F.2d 425, the Court of Appeals for this Circuit held that under the Death on the High Seas Act a Spanish vessel was liable in an action *in rem* for the death of a seaman, even though there was no right of action *in rem* under the Spanish law.

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[1] See Magruder & Grout, "Wrongful Death Within the Admiralty Jurisdiction," 35 Yale L.J. 395 (1926); Robinson, "Wrongful Death in Admiralty and the Conflict of Laws," 36 Colum.L.Rev. 406 (1936); Comment, 41 Cornell L.Q. 243 (1956).

[[2] See *International Law Reports,* 1953, p. 197.]

"In *The Scotland*, 105 U.S. 24, 29, 26 L.Ed. 1001, the Supreme Court said:

"'In administering justice between parties it is essential to know by what law or code or system of laws, their mutual rights are to be determined. When they arise in a particular country or State, they are generally to be determined by the laws of that State. Those laws pervade all transactions which take place where they prevail, and give them their color and legal effect. Hence if a collision should occur in British waters, at least between British ships, and the injured party should seek relief in our courts, we would administer justice according to the British law, so far as the rights and liabilities of the parties were concerned, provided it were shown what that law was. If not shown, we would apply our own law to the case. In the French or Dutch tribunals they would do the same. But, if a collision occurs on the high seas, where the law of no particular State has exclusive force, but all are equal, any forum called upon to settle the rights of the parties would, *prima facie*, determine them by its own law as presumptively expressing the rules of justice; but if the contesting vessels belonged to the same foreign nation, the court would assume that they were subject to the law of their Nation carried under their common flag, and would determine the controversy accordingly. If they belonged to different Nations, having different laws, since it would be unjust to apply the laws of either to the exclusion of the other, the law of the forum, that is, the maritime law as received and practiced therein, would properly furnish the rule of decision. In all other cases, each Nation will also administer justice according to its own laws. And it will do this without respect of persons, to the stranger as well as to the citizen. If it be the legislative will that any particular privilege should be enjoyed by its own citizens alone, express provision will be made to that effect. Some laws, it is true, are necessarily special in their application to domestic ships, such as those relating to the forms of ownership, charter-party, and nationality; others follow the vessel wherever she goes, as the law of the flag, such as those which regulate the mutual relations of master and crew, and the power of the master to bind the ship or her owners. But the great mass of the laws are, or are intended to be, expressive of the rules of justice and right applicable alike to all.'

" The admiralty law of the United States, as expressed in the Death on the High Seas Act, now grants power to the admiralty courts to entertain an action for a wrong done on the high seas even though the person injured has died as a result of the wrong. This power granted to the courts is applicable even though the wrong occurred in an area not subject to the laws of the United States.

" The motion to dismiss the first cause of action is denied.

" The second cause of action alleges that a cause of action has been afforded to the libelants under the Convention for Unification of Certain Rules Relating to International Transportation by Air, 49 Stat. Part II, p. 3000 et seq. (1934), usually called the ' Warsaw Convention.' The Court of Appeals for this Circuit has held, in a case growing out of the same airplane accident, that the Warsaw Convention does not provide an independent cause of action. *Noel* v. *Linea Aeropostal Venezolana*, 2 Cir., 247 F.2d 677.[1] The second cause of action is therefore dismissed. . . ."

[Reports: 156 F.Supp. 94, 5 Avi. 17,634, 1957 U.S. & Can. Av. 369.]

E—MISCELLANEOUS

Jurisdiction—Miscellaneous—Over Ships—Flags of Convenience —Conditions of Employment—Law Applicable—Law of Flag and Law of State of Ownership—Vessel Owned by Panamanian Corporation Registered in Liberia—The Law of the Republic of Panama—Application of Liberian Law.

GRIVAS *ET AL.* v. ALIANZA COMPANIA ARMADORA S.A. *ET AL.*

United States, District Court, Southern District, New York.

April 25, 1957.

THE FACTS.—This was a libel by a group of Greek seamen hired in the United States for service as part of a crew of a ship of Liberian registry which was owned by a Panamanian corporation. After the seamen boarded the vessel, various disputes arose between the crew and the ship's officers. The crew went on a sit-down strike and were removed by the police and deported. This action was for wages, certain additional pay, and damages for unjustified discharge and for the alleged false arrest and abandonment of the libelants. The libelants maintained, *inter alia*, that they were entitled to overtime pay and

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[[1] Reported *infra*, p. 580, in this volume.]

special pay for work on Sundays and holidays under the Panamanian Labour Code, which, they argued, was applicable to their employment by reason of the Panamanian ownership of the vessel.

Held: that judgment must be rendered for the respondents, except as to a claim for wages not here relevant. Although the Republic of Panama might justifiably require Panamanian corporations to comply with the law of that country as regards conditions of employment of seamen aboard vessels flying a foreign flag, the law of Panama did not apply to a vessel owned by a Panamanian corporation but not registered in Panama.

In an opinion devoted largely to issues of municipal law, the Court said in part: " Libelants claim they are also entitled to overtime pay and special pay for work on Sundays and holidays, as provided for in the Panama Labor Code, and bring this suit for such amounts, based upon provisions of that Code. Libelants contend that the Court must consider the S.S. Niki as a Panamanian vessel and must determine the rights of the crew members according to the provisions of the Panama Labor Code because the vessel was owned and operated by a Panamanian corporation. Libelants presented in evidence, as Exhibit 10-A, an English translation of the Panama Labor Code.

" The Court has found that the vessel was indeed owned by a Panama corporation but that it flew the Liberian flag and that the Ship's Articles referred to it as a Liberian ship. Is the Court, therefore, to determine the wages of the seamen under the Panama law or under the Liberian law ?

" The Panama Labor Code does not by its terms apply to ships registered in another country and flying the flag of another country, merely because they are owned by a Panamanian corporation. Panama might, of course, impose requirements on Panamanian corporations requiring them to comply with the provisions of the Panama Labor Code, but there has been no evidence offered to the Court that would establish that Panama has imposed such requirements or that the Labor Code applied to a ship of foreign registry merely because it is owned by a Panamanian corporation. Furthermore it appears from Article 1080 of the Commercial Code of the Republic of Panama that the fact that a ship is owned by a Panamanian corporation does not make the ship a Panamanian vessel unless it ' be registered and enrolled as such and their owners submit expressly to the legal provisions of the Republic concerning navigation . . .' See Berguido, ' The Rights of a Seaman on a Ship Under Panamanian Registry,' 19 Temp.L.Q. 458, 460. The Court concludes that the fact that the vessel was owned by a Panamanian corporation did not in and of itself entitle the crew to the benefits of the Panama Labor Code. . . ."

[Report: 150 F. Supp. 708.]

PART V

STATE RESPONSIBILITY

A—NATURE AND KINDS OF STATE RESPONSIBILITY

II.—For Breaches of Treaty Obligations

State Responsibility—For Breaches of Treaty Obligations—European Convention for Protection of Human Rights and Fundamental Freedoms, 1950—European Commission of Human Rights—Individual Applications—Exhaustion of Local Remedies—Scope of Local Remedies—When Remedies Not Exhausted—Action Pending Before Municipal Court—Grounds for Non-Exhaustion —Delay—Special Circumstances—Settled Practice.

Re APPLICATION NO. 27/55 (X. *v.* GERMAN FEDERAL REPUBLIC).

European Commission of Human Rights. May 31, 1956.

(Waldock, President; Eustathiades, Berg, Faber, Beaufort, Dominedo, Süsterhenn, Petren, Janssen-Pevtschin, Sørensen, Crosbie, Jonasson, Akbay, Fuest.)

THE FACTS.—The applicant complained that the Federal Court of Cassation (*Bundesgerichtshof*), by its order of April 20, 1955 (IV ZR 266/54), had violated Articles 9, 10, 11 and 16 of the European Convention for the Protection of Human Rights and Fundamental Freedoms[1] in connection with an application made by him seeking reparation for losses suffered under the Nazi régime. On September 24, 1955, the President of the European Commission of Human Rights invited the Government of the German Federal Republic to present its observations in writing to the Commission on the admissibility of the application, and invited the applicant to present thereafter his reply to the observations of the German Government. In its written observations of November 29, 1955, the Government of the German Federal Republic asked the Commission to reject the application as inadmissible under the terms of Article 26 of the Convention,[1] the applicant not having exhausted the right of appeal on a point of constitutional law (*Verfassungsbeschwerde*) to the Federal Constitutional Court (*Bundesverfassungsgericht*). In his reply of December 27, 1955, the applicant asked the Commission to examine his application on the merits, taking into account the fact that on July 4, 1955, he had duly instituted an appeal on a point of constitutional law before the Federal Constitutional Court, but that the procedure adopted by the Court in such a case frequently necessitated very long delays which it would have been unjust to impose on him. He maintained, moreover, that the appeal in question was not, in principle, a domestic remedy within the meaning of Article 26 of the Convention.

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[1] Articles 9, 10, 11 and 16 of the Convention provide as follows:

Article 9:

" (1) Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.

" (2) Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others."

Article 10:

" (1) Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.

" (2) The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary."

Held: that the application must be rejected. The applicant had not yet exhausted the local judicial remedies available to him.

The Commission said: " The appeal on a point of constitutional law in the Federal Constitutional Court in matters within the competence of that Court, is a domestic remedy falling in principle within the field of application of the provisions of Article 26 of the Convention.

" Having regard to the fact that, on July 4, the applicant instituted before the Federal Constitutional Court an action relating to the matters which are the substance of his present application, and that that action is pending before the said Court, which will

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Article 11:

" (1) Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join unions for the protection of his interests.

" (2) No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others. This Article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces, of the police or of the administration of the State."

Article 16:

" Nothing in Articles 10, 11 and 14 shall be regarded as preventing the High Contracting Parties from imposing restrictions on the political activity of aliens."

[1] Article 26 of the Convention provides as follows:

" The Commission may only deal with the matter after all domestic remedies have been exhausted, according to the generally recognised rules of international law, and within a period of six months from the date on which the final decision was taken."

thus have to pronounce on the question of its own competence in the matter; to the fact that in the present state of the action no undue delay of procedure has occurred before the said Court; and to the fact that the Commission has not noted the existence of any special circumstances in this case—as, for example, a settled judicial practice—which would be of a kind to release the applicant, according to the generally recognized rules of international law (Article 26 of the Convention) from exhausting his right of appeal before the Federal Constitutional Court, the application must, at this stage, accordingly be rejected in pursuance of Article 27, paragraph 3, of the Convention,[1] for non-exhaustion of domestic remedies."

[Report: *Documents et Décisions*, 1955–56–57, p. 138 (in French)].

NOTE.—See, to the same effect, *Re Application No.* 165/56 (*X.* v. *German Federal Republic*), reported *infra*, p. 326; *Re Application No.* 167/56 (*X.* v. *German Federal Republic*), *infra*, p. 372; *Re Application No.* 172/56 (*X.* v. *Kingdom of Sweden*), *infra*, p. 328; *Re Application No.* 182/56 (*X.* v. *German Federal Republic*), *infra*, p. 401; *Re Application No.* 188/56 (*X.* v. *German Federal Republic*), *infra*, p. 404; *Re Application No.* 245/57 (*X., Y.* and *Z.* v. *German Federal Republic—The Saar*), *infra*, p. 408; *Re Application No.* 273/57 (*X.* v. *German Federal Republic*), *infra*, p. 339; *Re Application No.* 276/57 (*Mrs. X.* v. *German Federal Republic*), *infra*, p. 417; *Re Application No.* 277/57 (*X., Y. and Z.* v. *German Federal Republic*), *infra*, p. 341; *Re Application No.* 285/57 (*Mrs. X.* v. *German Federal Republic*), *infra*, p. 360.

State Responsibility—For Breaches of Treaty Obligations—European Convention for Protection of Human Rights, 1950—European Commission of Human Rights—Individual Applications—Exhaustion of Local Remedies (Article 26 of Convention)—Scope of Local Remedies—When Remedies Not Exhausted—Appeal Pending Before Municipal Court—Grounds for Non-Exhaustion—Delay.

Re APPLICATION NO. 115/55 (X. *v.* GERMAN FEDERAL REPUBLIC).

European Commission of Human Rights. May 30, 1956.

(Waldock, President; Eustathiades, Berg, Faber, Beaufort, Dominedo, Süsterhenn, Petren, Janssen-Pevtschin, Sørensen, Crosbie, Jonasson, Akbay, Fuest.)

THE FACTS.—The applicant claimed that from November 1949 to September 1950 he had been arbitrarily confined in an asylum in the *Land* of Z. and that he had been ill-treated there. Not knowing the identity of those responsible for his internment, he had in 1951 requested the Public Prosecutor of B. to open a preliminary investigation against " persons unknown ". Without giving reasons, the Public Prosecutor refused to carry out his request. After an appeal by the applicant to the Federal Minister of Justice, the Public Prosecutor was, in 1955, about to re-open the investigation but on November 5, 1955, the *Procureur* of B. ordered the investigation to be closed. The appeal of the applicant against this decision was rejected by the Attorney-General of C. on January 2, 1956. The applicant claimed that on February 1, 1956, he appealed to the Court of Appeal (*Oberlandesgericht*) of C. against this last decision of the Attorney-General. He now requested the Commission to examine his case without waiting for the decision of the Court of C., having regard to the considerable delay which had elapsed since his first application in 1951.

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[1] [Article 27, para. 3, of the Convention, provides as follows:
"The Commission shall reject any petition referred to it which it considers inadmissible under Article 26" (reproduced *infra*, p. 280, n. 1).]

Held: that the application must be rejected. The applicant's confinement occurred before the coming into force of the European Convention for the Protection of Human Rights. As to his treatment by the *Procureur* of B., there was no evidence that judicial remedies had been denied to the applicant.

The Commission said: "As regards the confinement in an asylum in 1949, the facts complained of relate to a period prior to the entry into force of the Convention in respect of the German Federal Republic (September 3, 1953). The Convention governs only facts subsequent to its entry into force in respect of the Contracting Party concerned, and there are therefore grounds for rejecting the application for this reason as inadmissible *ratione temporis*.

" On the other hand, as regards the refusal of the Public Prosecutor of B., at the request of the applicant, to open an investigation against persons unknown, under the terms of Article 26 of the Convention[1] the Commission cannot deal with the matter except after the exhaustion of the domestic remedies, according to the generally recognized rules of international law. It appears that the applicant has not exhausted the domestic remedies, his appeal being still pending before the Court of C. It is true that the applicant claims that as a consequence of the delay which has elapsed since his first complaint in 1951, he is no longer bound to exhaust the domestic remedies; nevertheless, it does not appear from an examination of the file that, in the matter of judicial protection, the applicant has been accorded treatment which does not conform to the generally recognized principles of international law. It follows from the foregoing that the applicant has not satisfied the conditions laid down in Article 26 of the Convention and that on this ground, in pursuance of Article 27, paragraph 3, of the Convention,[2] the application should accordingly be rejected."

[Report: *Documents et Décisions*, 1955–56–57, p. 137 (in French).]

[[1] See *supra*, p. 274, n. 1.]
[[2] See *supra*, p. 275, n. 1.]

State Responsibility—For Breaches of Treaty Obligations—European Convention for Protection of Human Rights, 1950—European Commission of Human Rights—Individual Applications—Exhaustion of Local Remedies—When Remedies Not Exhausted—Judicial Appeal from Administrative Decision Available—Grounds for Non-Exhaustion—Poverty.

Re APPLICATION NO. 181/56 (X. *v.* GERMAN FEDERAL REPUBLIC).

European Commission of Human Rights. March 6, 1957.

(Waldock, President; Eustathiades, Berg, Faber, Beaufort, Dominedo, Süsterhenn, Petren, Janssen-Pevtschin, Sørensen, Crosbie, Skarphedinsson, Akbay.)

THE FACTS.—The applicant, a German born in Lorraine, was arrested in 1936 by the Nazi secret police at B. on his return to Germany after spending two months in the French Foreign Legion. From 1936 to 1945 he was interned in concentration camps at C. and D., on a charge of espionage. During this internment, he suffered ill-treatment.

The applicant complained that on September 20, 1955, the competent administrative authority of F. (*Regierungspräsident-Entschädigungsbehorde für politisch, rassisch oder religiös Verfolgte*) had refused to grant him compensation as a victim of the Nazi régime, on the ground that he did not satisfy the conditions to which the grant of such an indemnity was subject under Article 1, paragraph 1, of the Federal Law of September 18, 1953, concerning the Compensation of the Victims of Nazi Persecution (*Bundesentschädigungsgesetz*). This decision, according to the applicant, amounted to discrimination on account either of his having been born in Lorraine or of his service in the Foreign Legion. Article 99 of the Law of 1953 gave the applicant the right to lodge a judicial appeal against the said decision within a period of three months from notification of the decision. In a letter of October 13, 1956, to the Commission the applicant acknowledged that he had not availed himself of this right, and maintained that his resources did not allow him to do so. He did not appear to have sought legal aid.

Held: that the application must be dismissed. The applicant's internment had occurred before the coming into force of the European Convention for the Protection of Human Rights, 1950. The applicant had not exercised his right of appeal against the dismissal of his claim for compensation, and so had not exhausted the judicial remedies available to him.

The Commission said: " The applicant, who claims to be ill and without resources, requests the Commission to help him to obtain compensation. As regards the internment and the ill-treatment suffered by the applicant between 1936 and 1945, the facts alleged relate to a period before September 3, 1953, the date of the entry into force of the European Human Rights Convention in respect of the German Federal Republic. According to the generally recognized principles of international law, the Convention governs for each Contracting Party only facts subsequent to its entry into force as regards that Party. The application should therefore be rejected on this ground, as inadmissible *ratione temporis*.

"In so far as the application challenged the administrative decision of September 20, 1955, above mentioned, it is to be noted that under the terms of Article 26 of the Convention,[1] the Commission may only deal with a matter after all the domestic remedies have been exhausted, according to the generally recognized rules of international law. The applicant has not made use of the opportunity for judicial appeal against that decision made available to him under the above-mentioned Law of September 18, 1953. Furthermore, an examination of the file does not disclose the existence of special circumstances which would release the applicant, according to the generally recognized principles of international law, from the obligation to exhaust the domestic remedies available to him. The insufficiency of the resources of the applicant could not in this case by itself be regarded as such a circumstance. It appears, therefore, that the applicant has not satisfied the conditions of Article 26 of the Convention, and that on this ground also, in pursuance of Article 27, paragraph 3, of the Convention,[2] the application should accordingly be rejected for non-exhaustion of the domestic remedies."

[Report: *Documents et Décisions*, 1955–56–57, p. 139 (in French).]

State Responsibility—For Breaches of Treaty Obligations—European Convention for Protection of Human Rights—European Commission of Human Rights—Individual Applications—Exhaustion of Local Remedies—When Remedies Not Exhausted—Further Appeal Available.

Re APPLICATION NO. 199/56 (X. *v*. GERMAN FEDERAL REPUBLIC).

European Commission of Human Rights. March 6, 1957.

(Waldock, President; Eustathiades, Berg, Faber, Beaufort, Dominedo, Süsterhenn, Petren, Janssen-Pevtschin, Sørensen, Crosbie, Skarphedinsson, Akbay.)

THE FACTS.—The applicant complained, in a confused way, of an abuse in the administration of justice in Germany. It appeared from the documents produced by him that he had asked the Prosecutor of the Tribunal (*Landgericht*) of B. to institute against Mr. A., a Judge of the Tribunal (*Amtsgericht*) of C., proceedings for misconduct. The applicant in particular stated that Mr. A. had not worn his gown during the hearing of a civil action brought by a certain D. against the applicant in 1954. The Prosecutor refused to take proceedings against the Judge, on the ground that the latter had not committed any criminal offence. The applicant's appeal against this decision was rejected by the Prosecutor-General of the Court of Appeal of B. as manifestly ill-founded. The applicant lodged a departmental appeal (*Dienstaufsichtbeschwerde*) against this last decision, but this also was rejected, by the Ministry of Justice of the *Land* of F.

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[1] [See *supra*, p. 274, n. 1.]

[2] [See *supra*, p. 275, n. 1.]

Held: that the application must be rejected. The facts alleged did not disclose any violation of a right protected by the European Convention for the Protection of Human Rights and Fundamental Freedoms, 1950. In any event, the applicant had not exhausted the local judicial remedies available to him.

The Commission said: "An examination of the file as it stands does not disclose, in general, a *prima facie* violation of any of the rights recognized in the European Human Rights Convention, and in particular of the right to the proper administration of justice, under the conditions set out and within the limits provided by Article 6 of the Convention.[1] It appears, therefore, that the application is manifestly ill-founded and it should accordingly be rejected in pursuance of Article 27, paragraph 2, of the Convention.[2]

"In any event, under the terms of Article 26 of the Convention, the Commission cannot deal with the matter until the domestic remedies have been exhausted, according to the generally recognized rules of international law. The applicant has not instituted against the decision of the Prosecutor-General of B. the further appeal to the Court of Appeal (*Oberlandesgericht*) of B. allowed to him by law from the decision dismissing the appeal which he did bring. Moreover, an examination of the file as it stands does not disclose the existence of special circumstances such as would relieve

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[[1] Article 6 of the Convention provides, in part, as follows:

"(1) In the determination of his civil rights and obligations . . ., everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law . . ."]

[[2] Article 27, para. 2, of the Convention provides:

"(2) The Commission shall consider inadmissible any petition submitted under Article 25 which it considers incompatible with the provisions of the present Convention, manifestly ill-founded, or an abuse of the right of petition."

Article 25 provides, in part, as follows:

"(1) The Commission may receive petitions addressed to the Secretary-General of the Council of Europe from any person, non-governmental organisation or group of individuals claiming to be the victim of a violation by one of the High Contracting Parties of the rights set forth in this Convention provided that the High Contracting Party against which the complaint has been lodged has declared that it recognises the competence of the Commission to receive such petitions. Those of the High Contracting Parties who have made such a declaration undertake not to hinder in any way the effective exercise of this right. . . ."]

the applicant, according to the generally recognized rules of international law, from the obligation to exhaust the domestic remedies available to him. It appears, therefore, that the applicant has not satisfied the provisions of Article 26 of the Convention and the application should accordingly be rejected, in pursuance of Article 27, paragraph 3, of the Convention,[1] for non-exhaustion of domestic remedies also."

[Report: *Documents et Décisions*, 1955–56–57, p. 141 (in French).]

State Responsibility—For Breaches of Treaty Obligations—European Convention for Protection of Human Rights, 1950—European Commission of Human Rights—Individual Applications—Exhaustion of Local Remedies—When Remedies Not Exhausted—Municipal Remedy Available on Certain Conditions—Grounds for Non-Exhaustion.

Re APPLICATION NO. 225/56 (X. *v.* GERMAN FEDERAL REPUBLIC).

European Commission of Human Rights. July 18, 1957.

(Waldock, President; Eustathiades, Berg, Faber, Beaufort, Dominedo, Süsterhenn, Petren, Janssen-Pevtschin, Sørensen, Crosbie, Skarphedinsson, Erim.)

THE FACTS.—The applicant had already on June 12, 1956, submitted to the Commission an application (No. 149/56)[2] in which he complained of the administration of justice in the *Land* of B. and in particular of having been subjected to a medical examination as to his mental health, ordered by the local Tribunal (*Amtsgericht*) of C., in Germany. The Commission rejected this application on September 28, 1956, as manifestly ill-founded.

In the present new application, the applicant declared that, the said medical examination having been unfavourable to him, the local Tribunal of C. on November 23, 1956, ordered him to be put under the care of a guardian " to prevent the applicant from making any more applications, hitherto drawn up by himself, to administrative authorities and to tribunals ". He contended that this measure had " deprived him of one of his fundamental rights " and that he had appealed against it, later in 1956, to the Federal Constitutional Court. This Court informed the applicant by letter that it had provisionally rejected his request on the ground that the appeal was not instituted by the applicant's guardian.

[[1] Article 27, para. 3, of the Convention provides as follows:

" (3) The Commission shall reject any petition referred to it which it considers inadmissible under Article 26."

Article 26 provides: " The Commission may only deal with the matter after all domestic remedies have been exhausted, according to the generally recognised rules of international law, and within a period of six months from the date on which the final decision was taken."]

[2] Not reported.

The applicant now sought the removal of the prohibition against applications to tribunals, damages corresponding to the injury he had suffered, and the punishment of the officials responsible for the prohibition. He requested the Commission also to examine, in general, the conditions obtaining in the lunatic asylums of the *Land* of B.; to authorize him to present his case orally either directly before the Commission in Strasbourg or before a French consul in Germany; and to hear a witness designated by him.

Held: that the application must be rejected. The applicant had not exhausted the local judicial remedies available to him, and in any event no right protected by the European Human Rights Convention had been violated.

The Commission said: " Under the terms of Article 26 of the Convention,[1] the Commission may only deal with a matter after all the domestic remedies have been exhausted, according to the generally recognized rules of international law. The Federal Constitutional Court declared the appeal of the applicant inadmissible on the sole ground that he could institute proceedings only by his guardian and, on account of this, the said Court has not yet passed judgment on the merits of the case. Furthermore, an examination of the file as it stands does not disclose the existence of special circumstances such as would release the applicant, according to generally recognized principles of international law, from the obligation to exhaust domestic remedies. The application should accordingly be rejected on this ground in pursuance of Article 27, paragraph 3, of the Convention.[2]

" In any case, in general, an examination of the file as it stands does not reveal a violation of any of the rights and freedoms set forth in the Convention. It appears that the application is manifestly ill-founded and it should accordingly be rejected also on this ground, in pursuance of Article 27, paragraph 3, of the Convention.[2] "

[Report: *Documents et Décisions*, 1955–56–57, p. 145 (in French.)]

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[1] [See *supra*, p. 280, n. 1.]

[2] [*Ibid.*]

State Responsibility—For Breaches of Treaty Obligations—European Convention for Protection of Human Rights—European Commission of Human Rights—Individual Applications—Exhaustion of Local Remedies—When Remedies Not Exhausted—Municipal Remedies Available—Grounds for Non-Exhaustion—Opinion of Applicant.

Re APPLICATION NO. 226/56 (X. *v.* GERMAN FEDERAL REPUBLIC).

European Commission of Human Rights. March 7, 1956.

(Waldock, President; Eustathiades, Berg, Faber, Beaufort, Dominedo, Süsterhenn, Petren, Janssen-Pevtschin, Sørensen, Black, Jonasson, Akbay, Fuest.)

THE FACTS.—The applicant, a displaced person of Polish nationality, at present residing in the German Federal Republic and under the supervision of the United Nations High Commission for Refugees, complained in the first place of his internment as a political prisoner, from January 17, 1944, to April 16, 1945, in various Nazi concentration camps, during which he suffered ill-treatment on many occasions and was compelled to undertake forced labour. He alleged, in respect of this, a violation of Articles 3, 4 and 5, paragraph 1, of the European Convention for the Protection of Human Rights and Fundamental Freedoms, 1950.[1] The applicant also complained that he had not received compensation for the harm suffered by him as a result of his internment. From 1948 onwards, he had made numerous representations, in particular to the United Nations High Commission for Refugees and to the Chancellor of the Federal Republic, but without avail. In a letter

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[[1] *Article 3* of the Convention provides as follows:

" No one shall be subjected to torture or to inhuman or degrading treatment or punishment."

Article 4 of the Convention reads:

" (1) No one shall be held in slavery or servitude.

" (2) No one shall be required to perform forced or compulsory labour.

" (3) For the purpose of this Article the term ' forced or compulsory labour shall not include:

" (*a*) any work required to be done in the ordinary course of detention imposed according to the provisions of Article 5 of this Convention or during conditional release from such detention;

" (*b*) any service of a military character or, in case of conscientious objectors in countries where they are recognised, service exacted instead of compulsory military service;

" (*c*) any service exacted in case of an emergency or calamity threatening the life or well-being of the community;

" (*d*) any work or service which forms part of normal civic obligations."

Article 5, para. 1, of the Convention reads, in part, as follows:

" (1) Everyone has the right to liberty and security of person.

" No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:

" (*a*) the lawful detention of a person after conviction by a competent court;

" (*b*) the lawful arrest or detention of a person for non-compliance with the lawful order of a court or in order to secure the fulfilment of any obligation prescribed by law; . . ."]

of September 14, 1956, the official supervising the indemnification procedure (*öffentlicher Anwalt für die Wiedergutmachung*) attached to the Tribunal of B. reminded the applicant that the Federal Law concerning Indemnification (*BEG*) did not provide for indemnification for non-nationals unless Nazi persecutions had caused physical harm to them involving a disability of at least 20 per cent., a condition which the applicant did not satisfy. The applicant seemed to have interpreted this letter as a final decision as to entitlement, rendering pointless the taking of any further steps. In his application to the Commission he protested against the provisions of the Law concerning Indemnification which, by allowing to Polish nationals persecuted by the Nazis treatment much less favourable than that enjoyed by German nationals, embodied, in his view, an inadmissible discrimination. The applicant contended that the refusal of reparation constituted a violation of the right recognized in Article 5, paragraph 5, of the European Human Rights Convention.[1]

Held: that the application must be rejected. Most of the matters alleged occurred before the Convention came into force; as to the remainder, the applicant had not exhausted the domestic remedies available to him.

The Commission said: "As regards the internment, the forced labour and the ill-treatment, the facts alleged relate to a period prior to September 3, 1953, the date of the entry into force of the European Convention on Human Rights in respect of the German Federal Republic. According to the generally recognized principles of international law, the Convention only governs, for each Contracting Party, facts subsequent to its entry into force in respect of that Party, and the application should accordingly be rejected on this ground as inadmissible *ratione temporis*.

" In so far as the application is concerned with the failure of the steps taken by the applicant to obtain compensation, it must be observed that, under the terms of Article 26 of the Convention, the Commission may only deal with a matter after the domestic remedies have been exhausted, according to the generally recognized rules of international law. The applicant did not institute any proceedings before the German courts, although it was open to him to do so; moreover, an examination of the file does not disclose the existence of special circumstances such as would relieve the applicant, according to generally recognized rules of international law, from the obligation to exhaust the domestic remedies available to him. The letter from the *öffentlicher Anwalt für die Wiedergutmachung* to the Tribunal of B. cannot be regarded as constituting such a circumstance. It appears, therefore, that the applicant has not satisfied

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[[1] Article 5, para. 5, of the Convention provides as follows:

" (5) Everyone who has been the victim of arrest or detention in contravention of the provisions of this Article shall have an enforceable right to compensation."]

the provisions of Article 26 of the Convention, and the application should accordingly be rejected on this ground also, in pursuance of Article 27, paragraph 3, of the Convention,[1] for non-exhaustion of the domestic remedies."

[Report: *Documents et Décisions*, 1955–56–57, p. 142 (in French).]

State Responsibility—For Breaches of Treaty Obligations—European Convention for Protection of Human Rights, 1950—European Commission of Human Rights—Individual Applications Exhaustion of Local Remedies—When Remedies Not Exhausted—Further Appeal Available.

Re APPLICATION NO. 254/57 (X. *v.* GERMAN FEDERAL REPUBLIC).

European Commission of Human Rights. December 16, 1957.

(Waldock, President; Eustathiades, Berg, Faber, Beaufort, Dominedo, Süsterhenn, Petren, Janssen-Pevtschin, Sørensen, Crosbie, Skarphedinsson, Erim.)

THE FACTS.—The applicant, of German nationality, was sentenced on August 30, 1956, by the Criminal Court (*Landgericht*) of A. in the German Federal Republic, to three and a half years' imprisonment, a fine of 600DM and the loss of civic rights for five years, on three counts of fraud and one of attempted fraud, not being a first offender. At the same time, the Court ordered his detention for an indefinite period (*Sicherungsverwahrung*) (Articles 20 (*a*) and 42 (*e*) of the German Criminal Code) as a dangerous habitual criminal. The judgment showed moreover, that the applicant, who was born in 1914, had been sentenced thirteen times since 1932 (mostly on counts of fraud), and on eight of these occasions to periods of imprisonment exceeding six months. The applicant appealed to the Federal Court of Justice (*Bundesgerichtshof*) against the judgment of the *Landgericht*, claiming that he had been wrongfully convicted on the basis of false evidence. He also alleged that the Court was prejudiced against him and that some of his previous convictions should not have been taken into account in determining his sentence since they were due to his Jewish origin and anti-Nazi sentiments. He further maintained that all his previous convictions were unjustified. On November 28, 1956, the Federal Court rejected the appeal as " manifestly without foundation ".

In addition, the applicant lodged a series of complaints against B., a German administrative magistrate. This magistrate was alleged to have used intimidation and threats while interrogating the plaintiff before his trial, when he was on remand. He was also alleged to have intercepted two letters addressed to the applicant, informing the latter of his wife's pregnancy. The applicant protested

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[1 See *supra*, p. 280, n. 1.]

on the grounds of his right to keep in touch with his wife and his duty as a husband to afford her all necessary assistance. B. was alleged to have curtly replied that he did not believe the applicant's statement. This, the applicant claimed, was a violation of Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, 1950.[1] The applicant's complaint against B. was rejected on August 7, 1956, by the Chief Prosecutor (*Oberstaatsanwalt*) of the Court (*Landgericht*) of A., as being without foundation. The applicant protested against this rejection to the Ministry of Justice of the *Land* of C., apparently without result. The applicant also alleged that during the period of his detention under remand, a petition addressed by him on March 20, 1956, to the President of the Republic was intercepted by the prison authorities of A. He protested against this interception.

The applicant now asked the Commission to declare that the German authorities had violated Article 5, paragraph 1,[2] Article 6, paragraph 1,[3] and Article 8[1] of the Convention; he asked for a retrial (*Wiederaufnahme des Verfahrens*) of the case culminating in his latest conviction; he claimed damages for himself and a rest-cure for his wife, in compensation for the privations and "mental cruelty" from which she was alleged to have suffered during her pregnancy; and lastly, he asked for the "extradition" of his wife and children to the Netherlands, where he was said to own a hotel and other property.

Held: that the application must be rejected. The applicant had not exhausted all the local judicial remedies available to him; in any event, he had disclosed no violation of the rights protected by the European Human Rights Convention. The Commission was not, in general, a court of appeal from domestic courts.

The Commission said: "With regard to the complaint of the applicant concerning his conviction on August 30, 1956.—On [the] one hand, according to Article 26 of the European Convention for the Protection of Human Rights and Fundamental Freedoms,[4] the Commission may only deal with a matter after all domestic remedies have been exhausted, according to the generally recognised rules of international law and within a period of six months from the date on which the final decision was taken. The applicant did not avail himself of his right to appeal to the Federal Constitutional Court (*Bundesverfassungsgericht*) against the decision of the Court of Justice (*Bundesgerichtshof*) of November 28, 1956. Recourse to the Federal Constitutional Court, for matters within the competence of that Court, is a domestic remedy which in principle falls within the scope of the provision contained in Article 26 of the Convention.

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[1] Article 8 of the Convention provides as follows:

"(1) Everyone has the right to respect for his private and family life, his home and his correspondence.

"(2) There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

[2] See *supra*, p. 282, n. 1.

[3] See *supra*, p. 279, n. 1.

[[4] See *supra*, p. 280, n. 1.]

"Moreover, an examination of the file in its present state does not disclose the existence of any special circumstances which would have released the applicant, according to the generally recognised rules of international law, from the obligation to exhaust the domestic remedies at his disposal. It therefore appears that the applicant has not satisfied the conditions laid down in Article 26 of the Convention in regard to the exhaustion of local remedies; [and] the application should in this respect, in pursuance of Article 27, paragraph 3, of the Convention,[1] accordingly be rejected.

"On the other hand, an examination of the file in its present state does not, generally speaking, disclose any *prima facie* violation of the rights and freedoms set forth in the Convention, in particular the right to liberty and security of person and of the right to the proper administration of justice under the conditions laid down and within the limits defined in Articles 5 and 6 of the said Convention. It should in particular be observed, with regard to the condemnation attacked by the applicant, that the European Commission of Human Rights was not set up as a higher court to examine alleged errors of law or fact committed by the domestic courts of the Contracting Parties acting wholly within their jurisdiction but, in accordance with Article 19 of the Convention,[2] to ensure observance of the obligations undertaken by the Parties in the Convention. Errors of law or fact committed by domestic courts concern the Commission, during its examination of the admissibility of applications, only in so far as they appear to have resulted in the violation of one of the rights and freedoms limitatively listed in the Convention. More generally, the Commission is only competent to pronounce on the judgments of domestic courts if there is a presumption that such judgments were given in disregard of the rights and freedoms guaranteed by the Convention. An examination of the file does not disclose any appearance of such a violation; it therefore appears that the application is in this respect manifestly ill-founded, [and] it should, in pursuance of Article 27, paragraph 2, of the Convention,[3] accordingly be rejected.

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[1] See *supra*, p. 280, n. 1.]

[2] Article 19 of the Convention provides as follows:

"To ensure the observance of the engagements undertaken by the High Contracting Parties in the present Convention, there shall be set up:

"(1) A European Commission of Human Rights, hereinafter referred to as 'the Commission';

"(2) A European Commission of Human Rights, hereinafter referred to as 'the Court'."]

[3] See *supra*, p. 279, n. 2.]

"With regard to the applicant's complaints against Judge B. and against the interception of his petition to the President of the Republic.—The applicant had the right to appeal by way of application (*Beschwerde*) to the Attorney-General (*Generalstaatsanwalt*) of the Court of Appeal (*Oberlandesgericht*) of D. against the above-mentioned decision of the Public Prosecutor (*Oberstaatsanwalt*) of the Tribunal of A. of August 7, 1956; he has not proved that he did avail himself of this right. The applicant could have lodged an administrative appeal against the decision of interception complained of; he has not proved that he did in fact avail himself of this remedy.

"Moreover, in both the above-mentioned instances, an examination of the file does not disclose, in this particular case, the existence of any special circumstances which would have released the applicant, according to the generally recognised rules of international law, from the obligation to exhaust the domestic remedies at his disposal. It therefore appears that the applicant has not satisfied the conditions laid down in Article 26 of the Convention in regard to the exhaustion of local remedies; the application should, also in this respect, in pursuance of Article 27, paragraph 3, of the Convention,[1] accordingly be rejected."

[Report: *Documents and Decisions*, 1955–56–57, p. 150 (in English).]

State Responsibility—For Breaches of Treaty Obligations—European Convention for Protection of Human Rights, 1950—European Commission of Human Rights—Individual Applications—Exhaustion of Local Remedies—When Remedies Not Exhausted—Failure to Raise Relevant Issues Before Municipal Court.

Re APPLICATION NO. 263/57 (X. *v.* GERMAN FEDERAL REPUBLIC).

European Commission of Human Rights. July 20, 1957.

(Waldock, President; Eustathiades, Berg, Faber, Beaufort, Dominedo, Süsterhenn, Petren, Janssen-Pevtschin, Sørensen, Crosbie, Skarphedinsson, Erim.)

THE FACTS.—On January 4, 1956, the applicant was sentenced by the Tribunal (*Landgericht*) of B. to 22 months' imprisonment for having committed embezzlement and theft in the performance of his duties as a railway inspector. His appeal (*Sprungrevision*) was rejected by the Federal Court of Justice (*Bundesgerichtshof*) as "manifestly ill-founded". After the lapse of the month's time allowed for appealing, the applicant instituted an appeal on a point of constitutional law (*Verfassungsbeschwerde*) against the said order,

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[1 See *supra*, p. 280, n. 1.]

which was rejected by the Federal Constitutional Court (*Bundesverfassungsgericht*) in 1957.

The applicant complained that in the course of the preliminary investigations he was prevented from attending the hearing of witnesses during a police visit to the scene of the alleged crimes, and that three of the witnesses heard during that visit were not summoned to appear before the Tribunal of B., which nevertheless based its decision on their depositions without the applicant's being able to contradict them. He also alleged that the authorities of the prison in which he was placed delayed the despatch of the letter by which he instituted his proceedings, so that this letter did not reach the Federal Constitutional Court until after the permitted time-limit of one month had elapsed.

Held: that the application must be rejected. The applicant had not exhausted the local judicial remedies available to him.

The Commission said: "An examination of the file discloses that the Federal Constitutional Court (*Bundesverfassungsgericht*) did not reject the appeal on the sole ground that the applicant had not observed the time-limit of one month available to him; in fact, the Court also held that the applicant had not submitted to the Federal Court of Justice (*Bundesgerichtshof*) those of his complaints which related to the procedure adopted by the Tribunal of B. and that, in consequence, he had not fulfilled the condition to which, by Article 90, paragraph 2, of the Law concerning the Federal Constitutional Court, the exercise of this appeal is subject, namely, the prior exhaustion of available remedies. Without embarking on an examination of the relevance of the facts put forward by the applicant, it must be noted that under the terms of Article 26 of the Convention for the Protection of Human Rights and Fundamental Freedoms,[1] the Commission may only deal with a matter after all the domestic remedies have been exhausted, according to the generally recognized rules of international law. To comply with this Article, it is not sufficient for the applicant to have made use of the domestic remedies open to him within the meaning of Article 26; unless it is impossible or he is prevented, the applicant, so far as it is reasonably incumbent upon him to do so, should also have asserted before the superior judicial authority the rights which he now alleges were violated by the decision of the Court below. The file shows that he omitted to raise before the Federal Court of Justice the complaints in respect of faults of procedure which he brings against the Tribunal (*Landgericht*) of B. He has not established before the Commission the existence of a valid reason capable of justifying this omission.

"Furthermore, an examination of the file does not disclose any special circumstances in this case of a kind to release the applicant, according to generally recognized principles of international law,

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[[1] See *supra*, p. 280, n. 1.]

from the obligation to exhaust the domestic remedies available to him. It appears, therefore, that the applicant has not satisfied the conditions of Article 26 of the Convention in respect of the exhaustion of domestic remedies, and the application should, on this ground, in pursuance of Article 27, paragraph 3, of the Convention,[1] accordingly be rejected."

[Report: *Documents et Décisions*, 1955–56–57, p. 146 (in French)].

State Responsibility—For Breaches of Treaty Obligations—European Convention for Protection of Human Rights, 1950—European Commission of Human Rights—Individual Applications—Exhaustion of Local Remedies—When Remedies Not Exhausted—Failure to Use an Available Remedy—Grounds for Non-Exhaustion—Ill-health of Applicant—Opinion of Applicant.

Re APPLICATION NO. 289/57 (X. *v.* GERMAN FEDERAL REPUBLIC).

European Commission on Human Rights. September 6, 1957.

(Waldock, President; Eustathiades, Berg, Faber, Beaufort, Dominedo, Süsterhenn, Petren, Janssen-Pevtschin, Sørensen, Crosbie, Skarphadinsson, Erim.)

THE FACTS.—The applicant, a German national and established official attached as " Justizinspector " to the Registry of the local Tribunal (*Amtsgericht*) of B. in the German Federal Republic, complained of having been the object, between 1946 and 1957, of various disciplinary measures which he considered were unjust and to be explained by the fact that at the end of the Second World War he was opposed to the entry of former National-Socialists to the magistrature. On February 8, 1952, the applicant instituted before the regional Administrative Tribunal (*Landesverwaltungsgericht*) of C. an appeal against his superior officer, in an attempt to obtain the revocation of some of the disciplinary measures taken against him. He requested in particular the return of certain documents from his personal file which were unfavourable to him, alleging that he was not first given a hearing concerning these documents, contrary to the requirements of the German Law of Public Procedure (*Deutsches Beamtengesetz*) and the Ordinance of June 17, 1949, of the Minister of the Interior of the *Land* of D. The *Landesverwaltungsgericht* dismissed the appeal on October 23, 1952. On April 8, 1957, further disciplinary action was taken against the applicant by the Disciplinary Chamber (*Disziplinarkammer*) of the above-mentioned Administrative Tribunal, with the effect of depriving him of any increase in salary for a period of three years. The applicant stated that the breach of discipline which the Tribunal attributed to him was non-existent. He had the opportunity of lodging an appeal against that decision within two weeks from the notification of the decision, before the disciplinary Chamber (*Disziplinarsenat*) of the Superior Administrative Court (*Oberverwaltungsgericht*) of F., but he did not avail himself of this opportunity. He declared that, on account of his health, he was not in a position to try to bring successful proceedings before courts which he believed in any case to be " unwilling to give decisions in conformity with the principle of the rule of law "; in consequence, he affirmed his renunciation of all further proceedings.

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[1] See *supra*, p. 280, n. 1.

The applicant now complained in particular that, during the last ten years, certain documents unfavourable to him had been put in his file without his being given an opportunity by his superiors to present his defence; that the administrative and judicial decisions given against him had also made use of the information contained in these documents; and that the courts which dealt with his case had not taken into consideration most of the arguments put forward by him. He asked for the quashing of the decision of April 8, 1957.

Held: that the application must be rejected. The applicant had not exhausted the local judicial remedies available to him.

The Commission said: " Certain of the facts alleged, as well as the decision given by the Administrative Tribunal of C. on October 23, 1952, relate to a period prior to September 3, 1953, the date of entry into force of the Convention for the Protection of Human Rights and Fundamental Freedoms in respect of the German Federal Republic. According to generally recognized principles of international law, that Convention governs, for each Contracting Party, only facts subsequent to its entry into force in respect of that Party. The application should therefore be rejected on this ground as inadmissible *ratione temporis.*

" On the other hand, in so far as the application relates to a period subsequent to September 3, 1953, and in particular to the decision given by the same Administrative Tribunal on April 4, 1957, under the terms of Article 26 of the Convention, the European Commission of Human Rights 'may only deal with [a] matter after all domestic remedies have been exhausted, according to the generally recognized rules of international law, and within a period of six months from the date on which the final decision was taken.' The applicant did not exercise the judicial remedy available to him before the *Oberverwaltungsgericht* of F., to challenge the abovementioned decision of April 4. Furthermore, an examination of the file does not disclose the existence of special circumstances such as to relieve the applicant, according to generally recognized principles of international law, from the obligation to exhaust the domestic remedies; in particular, the ill-health of the applicant cannot, in principle and of itself, put an end to this obligation. On the other hand, the personal opinion of the applicant as to the chances of success of an ultimate appeal to the *Obververwaltungsgericht* of F. cannot be taken into consideration, since that opinion does not rest on any factor which could prove that such an appeal would probably be either ineffectual or insufficient. It is apparent, therefore, that the applicant has not satisfied the provisions of Article 26 of the Convention as regards the exhaustion of domestic remedies, and the application should accordingly be rejected on this ground under the terms of Article 27, paragraph 3, of the Convention.[1]"

[Report: *Documents et Décisions*, 1955–56–57, p. 148 (in French).]

NOTE.—*Application No. 232/56* (*X.* v. *German Federal Republic*), decided by the Commission on July 15, 1957 (*Documents et Décisions*, 1955–56–57, p. 143) is practically identical with the above case and is therefore not separately reported in the present volume.

V.—For Other Breaches of Contractual Obligations

State Responsibility—For Breaches of Contractual Obligations—Allegation of Denial of Justice—Exhaustion of Local Remedies—Failure to Call Witness as Denial of Justice—Withholding of Documents as—Interpretation of Expressions " Justice " and " Equity" —Application of Principle of " Unjust Enrichment ".

AMBATIELOS CLAIM (GREECE *v.* UNITED KINGDOM).

Arbitration Commission. March 6, 1956.

(Alfaro, President; Bagge, Bourquin, Spiropoulos, Thesiger.)

NOTE.—The report of the Award of the Arbitration Commission in this case was printed in *International Law Reports*, 1956, p. 306. The Individual Opinion of President Alfaro and the Dissenting Opinion of Professor Spiropoulos, which were omitted from that volume, are now printed below.

Individual Opinion of President Alfaro:

[33] " The Commission has found, in relation to Claim A put forward by the Greek Government, that the claimant failed to exhaust the local remedies because Major Bryan Laing was not called by Mr. Nicholas E. Ambatielos to testify in the proceedings before Mr. Justice Hill. I regret that I am unable to agree with this finding for the reasons hereafter set forth.

" 1. The judgment of the Commission, with regard to the rule of exhaustion of local remedies, contains the following statement in which I concur:

> " ' The rule requires that " local remedies " shall have been exhausted before an international action can be brought. These " local remedies " include not only reference to the courts and tibunals, but also the use of the procedural facilities which municipal law makes available to litigants before such courts and tribunals. It is the whole system of legal protection as provided by municipal law, which must have been put to the test before a State, as the protector of its nationals, can prosecute the claim on the international plane. . . .

[1 See *supra*, p. 280, n. 1.]

> ' It is clear, however, that it cannot be strained too far. Taken literally, it would imply that the fact of having neglected to make use of some means of procedure—even one which is not important to the defence of the action—would suffice to allow a defendant State to claim that local remedies have not been exhausted, and that, therefore, an international action cannot be brought. This would confer on the rule of the prior exhaustion of local remedies a scope which is unacceptable.'

" 2. The ' local remedies ' rule, as enunciated in the preceding lines, means in my opinion that when a claimant appears before municipal courts, either as plaintiff or defendant, he must exhaust the procedural remedies made available to him by the law of the land before each of the several courts in which the case may be tried. The concept of *procedural remedies* must be taken in its general sense. Thus, a claimant may be held not to have exhausted the procedural remedies at his disposal, if he failed, for instance, to adduce evidence despite his necessity to prove the facts of the case, or if he failed to appear in Court to argue his case at the stage of the trial in which he had to argue.

" 3. But the rule cannot be carried so far as to interfere with the actual or concrete use of a given procedural remedy. Thus, a claimant who availed himself of the procedural remedy of adducing evidence, should not be held by an international tribunal to have failed to exhaust local remedies because he did not produce a certain exhibit, or because he did not call a certain witness. Likewise, it would be unfair to apply the sanction of non-exhaustion to a claimant in the international plane, on the ground that his line of reasoning in the argument was not the proper one. This, in the language of the award, ' would confer on the rule of the prior exhaustion of local remedies a scope which is unacceptable.'

" 4. For the reason stated in the preceding paragraph, I consider that the claimant in this case should not be held to have failed to exhaust local remedies because Major Bryan Laing was not called by Mr. Ambatielos as a witness during the proceedings before Mr. Justice Hill.

" 5. Whether Mr. Ambatielos or his advisers were right or wrong in not calling Major Laing to testify, I believe is immaterial. Mr. Ambatielos, represented by his advisers, made use of the procedural remedy of adducing evidence in Court. He adduced such evidence as he thought might prove his case. Whether [**34**] he was clever or made a mistake, whether or not he lost because of an error in handling the instrumentality of evidence, are questions with which an international tribunal cannot concern itself in dealing with the issue of exhaustion or non-exhaustion of local remedies. Such tribunal should not be called upon to pass judgment on the manner in which procedural remedies were used but on the fact that they were used.

" 6. It is stated in the award that in applying the test adopted by the Commission for the determination of the issue of non-exhaustion, it has been assumed that the Greek Government was right in considering the testimony of Major Laing essential to win the case, and that consequently, Mr. Ambatielos failed to exhaust the procedural remedies, by abstaining from calling a witness whose testimony was essential for the success of his defence.

" 7. Such an assumption, adopted by the Commission for the determination of the issue, is however contrary to the realities of the case. The evidence before the Commission does abundantly prove that if Major Laing had been called to the witness box, it was extremely doubtful that his testimony, particularly after cross-examination, would have resulted favourably to Mr. Ambatielos. Hence it can hardly be called essential.

" 8. It is a fact proven by affidavits read in the Court of Appeal on 5th March, 1923, by Mr. Nicholas E. Ambatielos and by his solicitor Mr. F. P. D. Gaspar, as well as by other evidence, that Major Laing was not called to testify because both Mr. Ambatielos and his advisers were not sure that such testimony would be favourable to their cause, chiefly for the reason that at the time of the proceedings before Mr. Justice Hill, Major Laing had refused to make known to them the full contents of his correspondence with Sir Joseph Maclay and had also refused, as Mr. Gaspar said, to give him 'any statement or proof at any time either before or during the trial'.

"9. It seems evident, therefore, that sound considerations of prudence and regard for the interest of their client led the advisers of Mr. Ambatielos while in Court to refrain from calling a witness whose hostile or favourable attitude was decidedly doubtful.

"10. It was after a decision was rendered by Mr. Justice Hill that Major Laing made known to Mr. Ambatielos the contents of his correspondence with Sir Joseph Maclay. It was then that Mr. Ambatielos and his advisers considered the testimony of Major Laing essential to prove his case. It was then that Mr. Ambatielos applied in vain to the Court of Appeal for authority to have the testimony of Major Laing admitted as evidence. Finally, it was after all these events that the Greek Government, in its diplomatic intervention and in subsequent actions before the International Court of Justice and before this Commission contended or affirmed that the testimony of Major Laing was essential.

"11. In view of the above stated facts, it seems difficult to maintain that not calling a witness in 1922 because at that time his testimony was not deemed essential, and on the contrary was considered dangerous or at least doubtful, constituted failure to exhaust local remedies because in 1923 the same testimony was considered essential. Non-exhaustion of local remedies must necessarily take place at the time when the local remedy can be resorted to, but not afterwards.

"12. It is further declared in the award that Mr. Ambatielos failed also to exhaust the local remedies by not prosecuting the general appeal he had lodged against the decision of Mr. Justice Hill. With regard to this point it is my view that according to the evidence before the Commission, particularly the expert opinion of Lord Porter, it would have been clearly futile for the claimant to prosecute his general appeal.

[**35**] "13. The award states that the failure of Mr. Ambatielos to exhaust the local remedy before Mr. Justice Hill by not calling Major Laing as a witness made it futile for him to prosecute his appeal and that for this reason he could not rid himself of the rule of exhaustion of local remedies.

"14. My view regarding this situation is that once it has been established that recourse to appeal is obviously futile, the claimant is exonerated from the responsibility of non-exhaustion of that remedy, without entering into considerations as to the cause of the futility. The two things are separate and distinct. Moreover, if Mr. Ambatielos cannot be held to have failed to exhaust local remedies by not calling Major Laing as a witness, he cannot be held responsible for non-exhaustion on the ground that his decision not to call that witness made the appeal futile."

Dissenting Opinion of Judge Spiropoulos:

"Exhaustion of local remedies

[**36**] "1. The Agreement between the United Kingdom Government and the Greek Government requests the Commission to determine the validity of the Ambatielos claim under the Anglo-Greek Treaty of 1886 having regard to:

> "'(ii) The question raised by the United Kingdom Government of the non-exhaustion of legal remedies in the English Courts in respect of the acts alleged to constitute breaches of the Treaty (of 1886).'

"According to my interpretation of the above terms of reference, the Commission would have to examine the question of the exhaustion of local remedies *only* with regard to acts which, if established, would in fact constitute a breach of the Treaty of 1886, and not with regard to any other acts alleged by the Greek Government as constituting a breach of the said Treaty.

" It seems to me beyond doubt that, when a plea of non-exhaustion of local remedies is put forward by a party before an international tribunal the latter must begin by considering the law to be applied (general international law or Treaty), and then examine whether the person concerned (the plaintiff) has exhausted the local remedies with regard to the act alleged to be contrary to that law. It does seem logical to me to go as far as to enquire whether the person concerned (the plaintiff) has exhausted local remedies with regard to an act *alleged* to be contrary to a system of law *alleged to be applicable*.

"As the Commission has come to the conclusion that the non-disclosure of the documents by the Crown is the *only* act which, if proved to be contrary to the English law of procedure, would constitute a breach of the Treaty of 1886, the Commission ought to have confined itself to an examination of the question whether Mr. Ambatielos exhausted all remedies available, according to English law, at the trial before Mr. Justice Hill, for the purpose of having the documents put before Mr. Justice Hill. The Commission omitted to examine this question which, in my submission, is the only one it should have examined with regard to the question of exhaustion of local remedies.

" Having found that ' general international law ' is not incorporated in the Treaty of 1886 by virtue of the most-favoured-nation clause, the Commission should not, according to its terms of reference, have examined the question whether local remedies were also exhausted with regard to acts which, if established, would have constituted a violation of general international law, but not of the Treaty of 1886.

" Only if it had found that general international law was incorporated in the Treaty of 1886 (by virtue of the most-favoured-nation clause), could the Commission have examined the question whether Mr. Ambatielos exhausted the local remedies with regard to acts alleged to constitute a violation of general international law and, accordingly, also of the Treaty of 1886. Thus, to give an example, if the non-delivery of the ships on guaranteed dates had been held to be a violation of general international law by the United Kingdom authorities (and accordingly also of the Treaty of 1886), Mr. Ambatielos would have been under a duty to exhaust all local remedies provided by English law before his claim could have been brought before an international tribunal. In that case the fact whether or not Major Laing was called as a witness might ultimately have been relevant for the determination of the question as to whether or not Mr. Ambatielos had exhausted local remedies.

[**37**] " However, in view of the fact that the Commission has held that general international law is not included in Article X of the Treaty of 1886, the question of exhaustion of local remedies cannot, in my submission, refer to facts which, if established, would constitute a breach of the Treaty of 1886 by a violation of general international law.

" 2. Let us suppose, however, that general international law is applicable to the present case. On this assumption the question of whether or not Major Laing could have been called might ultimately be relevant to determine whether the local remedies were exhausted by Mr. Ambatielos.

" For the following reasons I am unable to follow the Commission in the way in which it applies the rule of non-exhaustion of local remedies to the present case:

" Writers on international law deal with the question of non-exhaustion of local remedies from the point of view of the legal means of recourse from a lower to a higher court. As far as I know, the question relevant in the present case, *i.e.*, exhaustion of existing remedies *within one and the same court*, has never been considered by writers or international tribunals.

" Now, with regard to the application of the rule of non-exhaustion, the test generally accepted in practice is the ' existence ' and ' effectiveness ' of local remedies.

" The question of non-exhaustion which confronts the Commission in the present case is specific inasmuch as it is concerned with a case of non-exhaustion (that is the omission to call Major Laing as a witness) *within one and the same court.*

"Although writers on international law have hitherto approached the rule of non-exhaustion only from the point of view of possible recourse from a lower to a higher court, I agree with the Commission that the *same* rule must also apply to the exhaustion of local remedies within one and the same court. Whereas, however, in the case of recourse from a lower to a higher court the test to be applied, *i.e.*, the existence and effectiveness, or otherwise, of recourse, is an *objective* one, practical considerations must soften the rigidity of the rule in a case where one and the same court is concerned. The rule then becomes one of determining, having regard to the particular circumstances of the case, what Counsel would have done in the interests of his client. Moreover, the remedy must be such as to affect the course of the proceedings; in other words, it must be an *essential* remedy. But these are, of course, questions which can only be decided by having due regard to the merits of each individual case.

" To adopt a more rigid rule would be tantamount to making the rule of exhaustion of local remedies a bar to any international claim, because it is possible, in almost every case, to find some local remedy which has not been used by the claimant.

" Having thus established the general principle which, in my opinion, should be applied, I have to enquire whether the fact that Major Laing was not called as a witness can be regarded as a non-exhaustion of the remedies provided by the English law of procedure.

" Major Laing was present at the trial before Mr. Justice Hill and he could have been called as a witness, both by the Crown and by Mr. Ambatielos. Without examining whether it was also up to the Crown to call Major Laing as a witness—he was the competent officer of the Ministry of Shipping who had given the delivery dates to Mr. G. Ambatielos—I will assume that it was only up to Mr. Ambatielos to call Major Laing if he wished to avail himself of his evidence in order to prove that dates certain had been promised.

"As appears from the affidavit of the solicitors of Mr. Ambatielos, however, Major Laing had been approached by the solicitors, before as well as during the trial before Mr. Justice Hill, and had been asked whether he was willing to make a statement favourable to the case of Mr. Ambatielos. *He had, however, refused to do so.*

[**38**] "According to English practice, Counsel are rarely prepared, in ordinary circumstances, to call a witness who has refused to give a statement to the solicitor. Whatever the reasons which prompted Major Laing to refuse to make a statement—it may be that as a former officer of the Ministry (at the time of the trial he had left the Ministry of Shipping) he may have thought he was bound by an undertaking not to diclose what had occurred in relation to this matter—the fact remains that the solicitors of Mr. Ambatielos were in the dark as to what he might say if called as a witness. As Mr. Ambatielos had called three other witnesses, and as he was relying in particular on the documents which the Crown might have in its possession, it is very difficult to accept the proposition that in the special circumstances of the case the deliberate omission of Mr. Ambatielos's solicitors to call a witness whose testimony was unknown, who had refused to give a statement and whose evidence might ultimately have been detrimental to the interests of Mr. Ambatielos, can be regarded as a failure to exhaust local remedies.

"Article X of the Treaty of 1886

" I am of the opinion that as the Commission has rejected Claim A, ' justice ' and ' equity ' might have been held to be a suitable basis for Claim B, by applying Article 24 of the Treaty of 1670 with Denmark which the Commission holds to be incorporated in Article X of the Treaty of 1886, and which, in my submission, allows one to complement the rules of domestic law by considerations of equity. The principle to be applied would be that of ' unjust enrichment ', which forms part of the general principles of law applicable in international relations.

" The Commission would then, of course, have to examine the extent to which the Crown was enriched by the £500,000 paid by Mr. Ambatielos over and above the price payable for the ships purchased by him. In so far as concerns interest, the Commission would have to examine for how long Mr. Ambatielos is entitled to interest, because, though lapse of time has, in principle, no bearing on the right to put forward a claim under international law, claims for interest cannot be run on for indefinite periods.

" Article XV of the Treaty of 1886

" 1. The main complaint of the Greek Government under Article XV of the Treaty of 1886 was, firstly, that ' vital evidence ' necessary for the determination of the dates of delivery of the ships was withheld by the Crown, and secondly, that Mr. Justice Hill was guilty of a denial of justice by accepting the claim of privilege without any further enquiry as to whether it could be justified in accordance with English practice.

" At the oral hearing on 1st February, Counsel for Greece withdrew the complaint concerning ' denial of justice ' on the part of the Court of Admiralty, *i.e.* denial of justice by Mr. Justice Hill, with the result that the only complaint now before the Commission concerns the withholding of documents by the United Kingdom authorities.

" Notwithstanding that this complaint, in view of the interpretation adopted by the Commission with regard to Articles X and XV, is not the only complaint on which the Greek Government can base its claim, the award devotes to this question a relatively limited space, thus failing to do full justice to its importance.

" Furthermore, it must be emphasised that Counsel for the Greek Government, at the oral hearing on 14th February, expressly acknowledged that according to English law the Crown was not under a duty to produce minutes and interdepartmental documents, such documents being covered by Crown privileges. Counsel for the Greek Government confined himself to the contention that there must have been some other documents in the hands of the United Kingdom authorities which prove that dates certain had been promised by the Crown.

[**39**] "As a result, the award, as stated above, contains only a rather short passage dealing with this basic question of the Ambatielos claim. The Commission has placed on record the agreement of the Parties on this question of English law. It felt that, as an international tribunal, it was not called upon to deal with this problem of municipal law in greater detail. I am inclined to think that the Commission should not have confined itself merely to placing on record the statements of Counsel for the United Kingdom and Greece as to the law to be applied, but that it should have examined, *ex officio*, the question as to the law which is applicable. With regard to this latter question, I would like to make the following comment:

" Counsel for the United Kingdom referred to the decision of the House of Lords in the case of *Duncan* v. *Cammell Laird and Co. Ltd.* (1942) A.C. 624, in order to establish that the Crown is not under a duty to produce the minutes or interdepartmental documents before an English court. This decision was referred to as stating English law on this matter.

" I have serious doubts whether this is the right view to take.

"According to Viscount Simon, Lord Chancellor, the principle to be applied in the case of Crown privilege is that documents otherwise relevant and liable to production must not be produced if the public interest requires that they should be withheld. This requirement, according to Viscount Simon, may be held to be satisfied where a document is withheld from production, having regard either (*a*) to its contents, or (*b*) to the fact that it belongs to a class which, on grounds of public interest, must at all costs be withheld from production.

" With regard to the criteria to be adopted in deciding whether a document must or must not be produced, Viscount Simon said:

> " ' It is not a sufficient ground that the documents are 'State documents ", or " official " or are marked " confidential ". It would not be a good ground that, if they were produced, the consequences might involve the department or the government in parliamentary discussion or in public criticism, or might necessitate the attendance as witnesses or otherwise of officials who have pressing duties elsewhere. Neither would it be a good ground that production might tend to expose a want of efficiency in the administration or tend to lay the department open to claims for compensation. In a word, it is not enough that the minister of the department does not want to have the documents produced. The minister, in deciding whether it is his duty to object, should bear these considerations in mind, for he ought not to take the responsibility of withholding production except in cases where the public interest would otherwise be damnified, for example, where disclosure would be injurious to national defence or to good diplomatic relations, or where the practice of keeping a class of documents secret is necessary for the proper functioning of the public service.'

" The distinguished judge, in support of the view expressed by him, refers to certain principles enunciated in other cases.

" With regard to the case here referred to, I should like to make the following comment:

> " (*a*) First of all, the opinion of Viscount Simon has been subjected to considerable criticism, not because the documents concerned were not clearly excluded from evidence, but because, as a matter of principle, the judge ought to look at the documents before giving his decision on the objection, and ought not to abrogate his function in favour of the executive. (See 16 (1942) 58 L.Q.R. 436; 59 (1943) L.Q.R. 102, quoting 20 (1942) Can. Bar Rev. 805).
>
> " (*b*) An analysis of the 'Cammell Laird' case leads to the conclusion that its importance does not lie in the general conclusions of his Lordship, [**40**] because on the facts of the case there was little doubt that the documents were privileged. They were concerned with constructional details of a submarine (the *Thetis*), and any disclosure of their contents might therefore have been of value to the enemy. (The case was decided during the last war.)
>
> " (*c*) All the other cases cited by Viscount Simon in support of his views were concerned only with facts where a real public interest was involved. Not one of these cases was concerned with an ordinary *commercial transaction.*
>
> " (*d*) Finally, some of the cases mentioned by Viscount Simon expressly state that the Crown must do its utmost to give a defendant full discovery.

" Thus, in the case of *Deare* v. *Attorney General* (1835), 1 Y. and C. (Ex.) 197, 208, and similarly in *Attorney General* v. *Newcastle-upon-Tyne Corporation* (1897) 2 Q. B. 384, Rigby, L. J. said: 'The law is that the Crown is entitled to full discovery, and that the subject as against the Crown is not. That is a prerogative of the Crown, part of the law of England, and we must administer it as we find it . . . *Now I know that there has always been the utmost care to give to a defendant that discovery which the Crown would have been compelled to give if in the position of a subject,* unless there be some plain overruling principle of public interest concerned which cannot be disregarded. Where the Crown is a party to a suit, therefore, discovery of documents cannot be demanded from it as a right, *though in practice, for reasons of fairmess and in the interests of justice, all proper disclosure and production would be made.*'

" Moreover, it is important to emphasise again that the privilege of the Crown has never been claimed in any commercial transaction.

"Although the significance of the case of *Duncan* v. *Cammell Laird and Co. Ltd.*, cannot be denied, I do not think it contains anything contrary to the view taken by the Greek Government that in cases of commercial transaction the privilege of the Crown ought to be waived.

" The question as to whether the Crown failed to produce documents in its possession at the trial before Mr. Justice Hill must be determined in accordance with the practice prevailing at the time, and not in accordance with the rules of law enunciated in cases decided many years later. *This point is of decisive importance.* I should like to make the following comment with regard to this:

" In order to ascertain what the practice was at the time of the trial before Mr. Justice Hill, reliance should not be placed on the case of *Duncan* v. *Cammell Laird and Co. Ltd.*, which was decided in 1942, but on the case of *Robinson* v. *State of South Australia* (1931) A.C. 704, which was decided by the Privy Council in 1931 and must be regarded as the leading case for the period prior to that year.

" In that case, the appellant (Robinson) had brought an action in the Supreme Court of South Australia against the respondent State claiming damages for alleged negligence in the care of wheat placed in the control of the State under the Wheat Harvest Acts, 1915–17. Upon an order for discovery, the respondent State, by an affidavit made by a civil servant, claimed privilege in respect of 1882 documents comprising communications between officers administering the department concerned; there was exhibited to the affidavit a minute by the responsible minister stating (*inter alia*) that disclosure of the documents would be contrary to the interests of the State and the public.

" The *Privy Council* said that it must not be assumed from certain observations of Lord Justice Turner that documents relating to the trading, commercial or contractual activities of a State can never be claimed as being protected under this head of privilege. It is conceivable that even in connection with the production of such documents there may be ' some plain overruling principle of public [**41**] interest concerned which cannot be disregarded '. But cases in which this is so, must, in view of the sole object of the privilege, and especially in time of peace, *be rare indeed*, and the distinction drawn by the Lord Justice remains instructive and illuminating.

" The *Privy Council* referred to the case of *Queensland Pine Co.* v. *the Commonwealth of Australia* which was decided in 1920. The following passage appears in that case:

> " ' . . . notwithstanding a certificate from the Minister of State of the Commonwealth claiming protection for documents on this occasion in terms direct and unambiguous, the learned Judge at the trial inspected them, and having done so, expressed the opinion that the facts discoverable by inspection would not be detrimental or prejudicial to the public welfare, and he ordered that inspection of all the documents should be given to the Plaintiff.'

"The *Privy Council*, in its judgment in the case of *Robinson* v. *State of South Australia*, then advised His Majesty to discharge the order appealed from and to remit the case to the Supreme Court of South Australia with a direction *that it was one proper for the exercise of the Court's power of inspecting the documents for which privilege was claimed*, in order to determine whether the facts discoverable by their production would be prejudicial or detrimental to the public welfare in any justifiable sense.

"2. In so far as concerns the question of exhaustion of local remedies, I am of opinion that the relevant passage at pages 94 95 of the transcript of the proceedings before Mr. Justice Hill does not leave much room for doubt that Mr. Ambatielos must be held to have exhausted the local remedies in a reasonable manner, in connection with the failure of the Crown to produce the documents.

"3. A passage in a Note of the Foreign Office, dated 7th November, 1934, would not have been without relevance to the decision of the Commission. This Note was a reply to a Note of the Greek Government of 3rd August, 1933, which accused the Crown of not having given to Mr. Ambatielos the same treatment that would have been accorded to a British National. The Greek Note says:

> "'Again it was admitted at the trial that files were kept at the Ministry of Shipping in which particulars of the contracts discussed by the Shipping Control Committee were entered, but when Mr. Ambatielos called for these files, the privilege of the Crown was claimed and they were not produced.'
>
> The Foreign Office replied as follows:
>
>> 'Such complaint could only properly be made if the Greek Government were in a position to show that there is an obligation on Governments when engaged in litigation before their own Courts to produce the minutes written in the Government Department concerned, and in particular that such is the regular practice of the Greek Government itself.'

"The above correspondence shows an admission by the United Kingdom Government that the United Kingdom authorities were under a duty to produce, at the trial before Mr. Justice Hill, the documents which the Ministry of Shipping had in its possession.

"4. The Commission has not, of course, any means of knowing (*a*) whether the Crown had any documents relating to the verbal agreement between Mr. G. Ambatielos (who acted on behalf of his brother, Mr. N. Ambatielos) and Major Laing, and (*b*) whether these documents would have established satisfactorily that the Ministry of Shipping was bound by fixed delivery dates.

"In these circumstances I think that the Commission ought to have examined the question whether the award should not be based on the *assumption* that fixed delivery dates had been agreed. The leading case justifying such an assumption is the well-known case of *Armory and Delamirie* which is referred to in Smith's [**42**] Leading Cases, 13th Edition, and which lays down the rule: 'Omnia praesumuntur contra spoliatorem'. This rule is to the effect that if a man, by his own tortious act, had withheld the evidence to prove the nature of his case, *all presumptions will be against him*.

"5. The Commission having held that the non-production of the documents by the *Crown does not constitute a breach* of Article XV of the Treaty of 1886, I may confine myself to the above comments, without going more fully into the substance of the matter which involves a great deal of responsibility, since my conclusion on the issue of production of documents would not be of any practical purpose."

[Report: *Award of the Commission of Arbitration* (with Annexes) (London, H.M.S.O., 1956), pp. 33–42.]

State Responsibility—For Breaches of Contractual Obligations—Contract between State and Foreign Company—Obligation of State to Fulfil Contract in Good Faith—Effect of Devaluation of Currency.

See p. 761 (*Société Européenne d'Études et d'Entreprises* v. *People's Federal Republic of Yugoslavia*).

VI.—For Wrongs Unconnected With Contractual Obligations

i.—Acts and Omissions of State Organs and Officials

State Responsibility—For Wrongs Unconnected with Contractual Obligations—Acts and Omissions of State Organs and Officials—Failure of Administering Agency to Issue Shares in Respect of Confiscated Property to Dispossessed Owner—Whether Basis of Claim Against State.

See p. 647 (*Sonnino Claim*).

State Responsibility—For Wrongs Unconnected with Contractual Obligations—Acts of State Organs—United States Courts in Germany—Absence of Responsibility of German Federal Republic.

See p. 401 (*Re Application No.* 182/56 (*X.* v. *German Federal Republic*)).

VII.—For Acts and Omissions of Revolutionary or *De Facto* Governments

State Responsibility—Responsibility for Acts of Local Revolutionary Government—Responsibility of Italy for Acts of Revolutionary Italian Government during Second World War.

See p. 303 (*Levi Claim*).

B—CLAIMS

I.—In General

State Responsibility—Claims—In General—Effect of Prior Purported Settlement of Claim—Relevance of Knowledge of Treaty Provisions—Supremacy of Treaty Provisions Over Private Law Acts—Supremacy of Human Rights Over Domestic Law—Waiver of Claims—Presumption Against Waiver.

See p. 654 (*Wollemborg Claim*), at pp. 662, 663.

State Responsibility—Claims—In General—Claim Relating to Requisitioned Property—Set-off in respect of Charges of Administering Agency.

See p. 879 (*Mannella Claim*).

State Responsibility—Claims—In General—Agreement to Guarantee Against Claims of Private Persons—Agreement of Sale Between Belligerent Occupant and Government of Occupied Territory—The Law of the United States of America.

See p. 952 (*Oakland Truck Sales, Inc.* v. *United States*).

II.—Nationality of Claims

State Responsibility—Claims—Nationality of—Defence of Dual Nationality—Rebuttal of—Effect of Oath of Allegiance.

GATTONE CLAIM.

Italian-United States Conciliation Commission. January 22, 1957.

(Matturri, Sorrentino.)

THE FACTS.—Gattone was a claimant against the Italian Government under Article 78[1] of the Treaty of Peace of 1947. He was born in Italy of a naturalized American father, formerly an Italian national; he resided in Italy until 1935 or 1937, served in the Italian forces and exercised political rights in Italy. The claim was rejected by the Italian Government on the ground that on these facts the claimant possessed Italian, as well as United States, nationality and that, for the purposes of the application of Article 78 of the Treaty of Peace, his Italian nationality must be considered dominant over his United States nationality. On a petition to this Commission, it was contended on behalf of the United States of America that " the claimant's predominant nationality was American since he had maintained his residence in the United States since 1935 and that his economic, social, political, civic and family life evidenced a closer and more effective bond with the United States than with Italy." On behalf of Italy it was contended that " since the facts of this case do not come under any of the exceptions as stated in the *Mergé* decision . . ., paragraph 9 of that decision would apply,[2] *i.e.*:

" ' 9) In all other cases of dual nationality, Italian and United States, when, that is, the United States nationality is not prevalent in accordance with the above, the principle of international law, according to which a claim is not admissible against a State, Italy in our case, when this State also considers the claimant as its national and such bestowal of nationality is, as in the case of Italian law, in harmony (Article 1 of the Hague Convention of 1930[3]) with international custom and generally recognized principles of law in the matter of nationality, will re-acquire its force.'

It was further contended that " an individual who has lived in Italy uninterruptedly for 37 years since birth; who served in the Italian

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[1] For the relevant parts of that Article see *infra*, p. 305, n. 1.]
[2] See *International Law Reports*, 1955, p. 443 (*sub nom. Mergé Claim*), at p. 456.]
[3] On Certain Questions Relating to the Conflict of Nationality Laws.]

Army; who exercised political rights; who, when departing for America in 1937, left his family, home and furniture in Italy; who also left in Italy cattle and tools—carpenter's bench etc.—kitchen and table utensils including a large tomato squasher, has not shown any intention of transferring to the Starred [*sic.*] Republic that closer and more effectual bond which until then had unquestionably tied him to Italy."

Evidence was filed tending to show that " the claimant was considered to be an American national subsequent to his return to the United States ", together with a copy of section 336 (b) of the Nationality Act of 1940 which prescribes the form of oath of renunciation and allegiance required to be taken by a petitioner for naturalization. The oath required under this section is as follows:

> " I hereby declare, on oath, that I absolutely and entirely renounce and abjure all allegiance and fidelity to any foreign prince, potentate, state or sovereignty of whom or which I have heretofore been a subject or citizen; that I will support and defend the Constitution and laws of the United States of America against all enemies, foreign and domestic; that I will bear true faith and allegiance to the same; and that I take this obligation freely without any mental reservation or purpose of evasions; So help me God. In acknowledgement whereof I have hereunto affixed my signature."

Held: that the claim must succeed. No question of dual nationality arose in this case, seeing that the claimant had renounced Italian citizenship and established a residence abroad.

The Commission said: " From the evidence contained in the record it appears that the claimant, who acquired American nationality at birth and therefore not of his own volition, went to America (it is disputed whether in 1935 or in 1937, but the exact date is immaterial) where he established his residence; it also appears that, prior to securing a certificate of derivative citizenship, the claimant was requested to take an oath of allegiance which includes, as can be seen from the wording cited above, a formal renunciation of every other citizenship.

" The instant case, therefore, comes under paragraph 2 of Article 8 of Italian Law No. 555 of June 13, 1912, which provides that nationality is lost by any individual who subsequent to acquiring, not of his own volition, a foreign nationality, declares that he renounces Italian citizenship, and establishes or has established his residence abroad."

[Report: Unpublished (Decision No. 156).]

State Responsibility—Claims—Nationality of—Sequestration of "Jewish Property" in Italy—Owner Naturalized Subsequent to Date of Peace Treaty—Meaning of Expression "have been treated as enemy"—Whether Anti-Jewish Legislation of Local Revolutionary Government Constitutes Treatment as Enemy of Jews Affected Thereby—Legislation of Italian Socialist Republic—Whether Constituting "laws in force in Italy during the war".

LEVI CLAIM.

Italian-United States Conciliation Commission. May 6, 1957.

(Matturri, Sorrentino, Bolla.)

THE FACTS.—The claimants, Mr. and Mrs. V. L. Levi, were Italian Jews originally domiciled in Turin, where they owned a house in via Messina, in which they lived, and three other dwelling houses. After racial persecution had begun in Italy they went to the United States, where they were naturalized on April 15, 1946.

The claimant's property in Turin was confiscated by the Italian authorities under the Legislative Decree of the Head of the Government dated January 4, 1944 (No. 2), published in the Official Gazette of January 10, 1944, which provided (in part) as follows:

> "Article 1. Italian nationals belonging to the Jewish race . . . cannot, in the territory of the State:
>
> "(a) . . . .
>
> "(b) be the owners of land or buildings and related items
>
> "(c) own stocks, valuables, credits and participation rights, whatever the nature, nor can they be the owners of other real property, whatever the nature, . . ."
>
> "Article 7. Real property and related items, personal property, industrial and commercial enterprises and any other source of profit in the territory of the State owned by Italian nationals belonging to the Jewish race . . . shall be confiscated on behalf of the State and given to E.G.E.L.I.[1] for administration."
>
> "Article 8. The decree of confiscation shall be issued by the Chief of the Province who has jurisdiction over the territory where the individual property is located."
>
> "Article 13. The sale of the property confiscated under Article 7 shall be effected by E.G.E.L.I."
>
> "Article 15. The sums collected under the preceding Article 14 shall be paid in to the State as partial recuperation of the expenses sustained in assisting and in paying subsidies and compensation for war damage to persons rendered homeless by enemy air attacks."
>
> "Article 21. This decree shall come into force on the same day on which it is published in the Official Gazette of Italy."

In addition, the house in via Messina was requisitioned by the German Standortkommandatur (Military Quartering Authority) of

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[1 "Ente di Gestione e Liquidazione Immobilare": see *infra*, p. 648.]

Turin, by decree No. 1811 of July 20, 1944, of the Chief of Police of Turin. While the house was under requisition, the furniture there was seriously damaged and may items of furniture and of clothing were looted. The other properties were damaged in air-raids between 1942 and 1944.

On July 4, 1945, after the termination of hostilities, such of the claimants' furniture as remained was returned to their attorneys by E.G.E.L.I.

The real and personal property owned by Mr. and Mrs. Levi in Turin was entered on the rolls of the special progressive tax on property,[1] under which heading they paid various sums totalling 192,630 lire. Further sums, under the same heading, were claimed by the Italian fiscal authorities.

By a Note dated June 13, 1950, addressed to the Embassy of the United States in Rome, the Ministry of Foreign Affairs of the Italian Republic recognized the applicability, under the Italian-United States Agreement of 1947,[2] of paragraph 6 of Article 78 of the Treaty of Peace to the special progressive tax on property and to the special proportional tax on the property of companies and corporations. Paragraph 6 reads as follows:

> " United Nations nationals and their property shall be exempted from any exceptional taxes, levies or imposts imposed on their capital assets in Italy by the Italian Government or any Italian authority between September 3, 1943, and the coming into force of the present Treaty for the specific purpose of meeting charges arising out of the war or of meeting the costs of occupying forces or of reparation payable to any of the United Nations. Any sums which have been so paid shall be refunded."

On February 19, 1951, the United States Embassy requested the Ministry of the Treasury of the Italian Republic that, in application of Article 78 of the Treaty of Peace, (a) Mr. and Mrs. Levi be compensated for the losses suffered by their property in Italy as a result of the war, (b) the sums paid for the purposes of the special progressive tax on property be reimbursed, and (c) it be recognized that the property owned by Mr. and Mrs. Levi was exempt from this tax. This request was rejected on the following grounds, set forth in the opinion of the Inter-Ministerial Commission:

" The Commission,

" Considering that the American nationals Levi Vittorio Leone and Amalia Levi née Sacerdote submitted a claim under Article 78 of the Treaty of Peace to obtain compensation for damage sustained by their real and personal property, as well as reimbursement of the extraordinary tax on patrimony paid in 1947 and of the costs of the claim;

" Considering that the claimants, Italian nationals who acquired American nationality on April 15, 1946, are not therefore entitled to invoke the application of Article 78 of the Treaty of Peace since they did not possess the nationality of one of the United Nations on September 3, 1943, or American nationality at the time of [the] damage which occurred in the period 1942–1944;

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[1] As to this tax see *Re Italian Special Capital Levy Duties* (*International Law Reports*, 1951, Case No. 128).

[2] See *infra*, p 655.

" That it does not appear that the claimants were treated as enemy under Italian war laws in that the measures taken against only part of their property were adopted in application of racial laws, which also applied to Italian nationals, and not by virtue of war laws which, moreover, did not apply to the claimants who were then Italian nationals;

" Expresses the opinion that the claim of Mr. Leone Vittorio Levi and his wife Amelia Sacerdote is to be rejected."

On May 20, 1954, a petition was filed with the present Commission requesting that it—

" (A) Decide that the claimants have been treated as enemy under the laws in force in Italy during the war within the meaning of paragraph 9 (*a*) [of Article 78] of the Treaty of Peace[1] in view of the fact that during the war and after all Jews were declared to belong to enemy nationality, concrete measures were taken against property belonging to them under Italian anti-Semitic legislation and property belonging to them was requisitioned as Jewish property by Decree No. 1181 issued on July 7, 1944, by the Head of the Province of Turin;

" (B) Order that the claimants are entitled to receive from the Italian Government the entire amount (in view of the Exchange of Notes of February 24, 1949) necessary to make good the loss suffered by them through damage to their property, which loss was estimated as of the date of the filing of the claim, February 19, 1951, to be 1,073,335 lire plus the sum of 91,730 lire, the reasonable costs incurred in preparing the claim;

" (C) Order the Italian Government to exempt under paragraph 6 of Article 78 of the Treaty the claimants and their property from the Extraordinary Progressive Patrimonial Tax and to reimburse the claimants for the sum of 192,630 [lire] which they paid as Extraordinary Progressive Patrimonial Tax before the claim was submitted [and]

" (D) Give such further or other relief as may be just and equitable."

On behalf of the claimants, it was contended that they were " formerly United Nations nationals within the meaning of paragraph 9 of Article 78 of the Treaty of Peace, because they were

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[[1] Paragraph 9 (*a*) of Article 78 of the Treaty provides:

" 9. As used in this Article:

" (*a*) ' United Nations nationals ' means individuals who are nationals of any of the United Nations, or corporations or associations organised under the laws of any of the United Nations, at the coming into force of the present Treaty, provided that the said individuals, corporations or associations also had this status on September 3, 1943, the date of the Armistice with Italy.

" The term ' United Nations nationals ' also includes all individuals, corporations or associations which, under the laws in force in Italy during the war, have been treated as enemy; . . ."]

treated as enemies under the laws in force in Italy during the war. This treatment consisted in the sequestration and confiscation of their real and personal property located at via Messina 92. These concrete measures were taken because the property involved was Jewish-owned; and in compliance with the anti-Semitic legislation of the Salò-Republic.[1] The first Assembly of Republican Fascism, which was the legislative authority of the Republic of Salò and which effectively controlled the part of Italy which had not yet been liberated by the Allied Forces, issued a policy for the program of action; point 7 thereof affirmed:

> " ' Individuals belonging to the Jewish race are aliens. During the war they belong to enemy nationality.'

While the United States have no intention of extending an *ex post facto* recognition of the Republic of Salò, it contends that the above-mentioned provisions of law of the Republic of Salò were laws in force in Italy during the war within the meaning of paragraph 9 (*a*) of Article 78 of the Treaty of Peace. In this connection the United States Agent cites the Decision of January 17, 1953, issued by the Italo-French Conciliation Commission in the *Mossé-Goldschmit* case."[2]

On behalf of the Italian Government, it was " denied that Mr. and Mrs. Levi were treated as enemies under the laws in force in Italy during the war, in view of the fact that the anti-Jewish law enacted by the so-called Italian Social Republic could not be considered as law. This Republic was either an Agency of the German Reich, through which the Reich operated as an occupying power within the limits of international lawfulness proper to an occupying power, or a *de facto* legal system, or it was not even a *de facto* legal system nor a Government of insurgents but the transient rise of a faction to the nominal holding of power. The so-called Italian Social Republic can be considered as a system only in the event that one excludes from that system the essential constituent element of the characteristic of legality or at least of juridicity [*sic.*]. But even if the system were admitted, there is a very considerable difference between a system and a State. The acts performed by these Governments cannot have any legal value until such time as said Governments, when the stage of violent insurrection is over, are constituted and organized as a stable power in a certain territory and precariously replace the previous lawful Government. But when the so-called *de facto* Government is conquered and wiped out in a very short time, its acts cannot acquire legal importance except within the limits permitted by the system of the lawful State. Furthermore, any ' law ' is generally a political act; and it is certainly so whenever a law is enacted in execution of a political policy program of the insurgent. Now, the anti-Jewish 'law' of 1944, enacted by the Italian Social Republic, was not of an 'impersonal nature' nor was it in the nature of an administrative routine; therefore it must be considered as a 'non-law', and hence radically null. The *Mossé-Goldschmidt* decision which has been referred to does not deal with the capacity of the Italian Social Republic to enact laws but with the question of charging a State with international responsibility for acts and facts performed within the national territory by an illegal group."

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[1] *I.e.*, the Italian Social or Socialist Republic, set up in Northern Italy between 1943 and 1945.

[2] See *International Law Reports*, 1953, p. 217, *sub nom. Mossé Claim.*

It was further contended "that the time-limit of September 3, 1943, specified in the first [sub-] paragraph of paragraph 9 (*a*) of Article 78 of the Treaty of Peace, should be valid also for the second [sub-] paragraph, and thus, under the terms of this second [sub-] paragraph, treatment as enemy could have occurred only prior to September 3, 1943; that this . . . [had] not occurred in the instant case. Furthermore . . . [according to the decision of the Commission in the *Bacharach Claim*[1]] 'to be treated as enemy necessarily implies on the one hand that there be an actual course of action on the part of the Italian authority (and not an abstract possibility of adopting one) and on the other hand the said course of action be aimed at obtaining that the individual who is subjected to it be placed on the same level as that of enemy nationals'; these conditions . . . [did] not occur in the case of Mr. and Mrs. Levi."

Held: that the claim must succeed. The claimants were United Nations nationals within the meaning of the Treaty of Peace and were therefore exempt from the special progressive tax on property. They were entitled to recover the sum of 192,630 lire paid by them for that tax. They were also entitled to compensation for war damage.

The Commission said: "1.—Article 78 of the Treaty of Peace affirms the principle, in paragraph 1, that 'Italy shall restore all legal rights and interests in Italy of the United Nations and their nationals as they existed on June 10, 1940, and shall return all property in Italy of the United Nations and their nationals as it now exists'.

"The following paragraphs 2 and 6 [of Article 78] derive from this principle a certain number of corollaries which they specify by charging the Italian Government with the obligations of returning property, of paying compensation and expenses, of annulling measures or transfers, of exempting from taxes. Paragraph 7 broadens the territorial scope of the principle affirmed in paragraph 1. Paragraph 8 admits the possibility of deviating from the system established by Article 78, through agreements entered into between the owner of the property and the Italian Government. Paragraph 9 gives a definition of the expressions 'United Nations nationals' (letter *a*), 'owner' (letter *b*) and 'property' (letter *c*).

[[1] See *International Law Reports*, 1955, p. 646.]

" Letter (*a*) of paragraph 9 is composed of two sub-paragraphs. According to the first, ' " United Nations nationals " means individuals who are nationals of any one of the United Nations, or corporations or associations organized under the laws of any one of the United Nations, at the coming into force of the present Treaty, provided that said individuals, corporations or associations also had this status on September 3, 1943, the date of the Armistice with Italy.' Under the second sub-paragraph ' The term " United Nations nationals " also includes all individuals, corporations or associations which, under the laws in force in Italy during the war, have been treated as enemy.'

" The Agent of the United States contends on the other hand that Mr. and Mrs. Levi must be considered as ' United Nations nationals ' within the meaning of the Treaty of Peace because they were treated as enemies under the legislation in force in Italy during the war. The Agent of the Italian Republic denies that the legislative enactments of the Italian Social Republic can be considered as laws in view of the fact that the State alone can enact laws and that the Italian Social Republic was not a State—even less the Italian State; the Italian Agent further denies that, in the application of the legislation of the Italian Social Republic against Mr. and Mrs. Levi there has been a material conduct on the part of the Italian authority of the nature that would justify the claimants being placed on the same level as enemy nationals; in any event such conduct would have occurred after September 3, 1943, and is therefore irrelevant with regard to the Treaty. This is the subject of the dispute.

" 2.—With regard to the time-limit of September 3, 1943, this is mentioned in the first [sub-] paragraph of paragraph 9 (*a*) of Article 78 of the Treaty of Peace, while the second [sub-] paragraph makes no reference thereto. The Agent of the Italian Government contends that the regulation should be understood to be included in the second [sub-] paragraph in view of the fact that the second [sub-] paragraph only serves as a clarification of the first.

" In actual fact, the two [sub-] paragraphs deal with essentially different questions. The first, in order to avoid fraudulent manoeuvres which may have been made at a time subsequent to the Armistice, establishes a time-limit after which any change in the *status civitatis* must be considered as irrelevant in the application of the Treaty of Peace: physical persons shall not be considered as ' United Nations nationals ' unless they possessed this status on September 3, 1943, nor will companies and associations be considered as ' United Nations nationals ' unless they were established under the laws of one of the United Nations prior to September 3, 1943. The second [sub-] paragraph of paragraph 9 (*a*) draws a similarity between ' United Nations nationals ' and physical persons, companies and associations that never were such nationals, but were treated as enemies under the legislation in force in Italy during the war; as the facts on which this similarity depends (legislation and treatment in Italy) are completely foreign to the initiative of the physcial person, company or association affected thereby (an initiative which would have further represented a phenomenon of self mutilation), the drafters of the Treaty of Peace had no reason to guard against fraudulent manoeuvres subsequent to the Armistice and directed at obtaining a more favorable treatment in the application of the Treaty of Peace to come, by the insertion of a time-limit.

" On the other hand, one cannot consider as applicable, in the sphere of the second [sub-] paragraph, the time-limit of September 3, 1943, for the very reason that the second paragraph establishes, at least implicitly, a different time-limit with the proposition ' during the war '. In order that the similarity intended by the Treaty may have its effect, it is sufficient that a person, whether physical or moral, have been treated as enemy under the legislation in force in Italy *during the war*, without letting the letter or the spirit of the Treaty authorize a distinction according to whether such a treatment occurred before or after September 3, 1943, which is not the date of the end of the war.

" On this point this Commission comes to the same conclusions that were reached by the Italian-United States Conciliation Commission, Judge Emil Sandstrom acting as Third Member, in the Decision issued in December 1954 in the *Jack Feldman* case.[1] The dissenting opinion drawn up on that occasion by the Italian Representative, in the views of this Commission, does not appear to raise any decisive argument against the theory that prevailed at that time and which is adopted here. If treatment as enemy is a criterion which is added to that of effective nationality in order to broaden the number of the beneficiaries of Article 78 of the Treaty, there is no reason whatever why the time limit established to restrict the efficacy of the changes in the *status civitatis* should be valid also to distinguish, in terms of time, the treatment as enemy. If subsequent to the Armistice, and as is asserted by the Italian party, the national Government (which had its seat at Brindisi first, then at Salerno and finally at Rome) subjected to war measures only German nationals and Italian companies in which German interests were prevalent, these physical and legal persons could not benefit by the provisions imposed by the Allied and Associated Powers on Italy, and certainly not in behalf of Germany, their principal enemy, or of German nationals.

" If the Italian theory were to be accepted, the conclusion would be reached that the Italian companies placed under sequestration in Italy by the Italian Social Republic after the Armistice because of an Allied participation, could not avail themselves of the United Nations nationality; nor can one see why the victors should have

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[[1] See *International Law Reports*, 1955, p. 642, *sub nom. Feldman Claim.*]

accepted such a difference in treatment with that to which similar companies sequestered before September 3, 1943, were subjected. Article 78, second [sub-] paragraph of paragraph 9 (*a*), refers solely to conditions which no longer existed at the time the Treaty was drafted; the drafters thereof were certainly not unaware that the racial legislation enacted in Italy before the war (see principally the Law of November 17, 1938), had become much more severe after the Armistice at the hands of the authorities of the Italian Social Republic (*Enciclopedia Italiana*, Appendice 1938–48, vol. I, pp. 811–812) and must have borne in mind the fact that the second [sub-] paragraph of paragraph 9 (*a*) of Article 78 would have largely failed one of its specific purposes, which was that of lessening the harmful consequences of racial persecution, should this persecution have been considered as relevant only until September 3, 1943; hence, the complete and intentional absence of this time-limit in the afore-mentioned second paragraph.

" 3.—Coming to the other defensive arguments of the Agent of the Italian Government, it should be first of all recalled that after the Armistice with the Allies, announced the evening of September 8, 1943, the German forces became *de facto* the masters of Italy from the Alps to the south of Naples. They did not however take over the direct Government of this part of the country. Hitler had Mussolini liberated from imprisonment on September 12, 1943, and reinstated him in power. On September 28, 1943, Mussolini took over the duties of Provisional Head of the State . . . and in that capacity he jointly covered the offices of Head of the Government and Minister of Foreign Affairs; the seats of the Government were established in northern Italy and Mussolini himself took up residence in the vicinity of Salò; thus the Republic of Salò was born with the officially adopted name of Italian Social Republic. When Mussolini was shot (April 28, 1945) and the German forces in Italy surrendered unconditionally (April 29/May 2, 1945) the Italian Social Republic ceased to exist (*Enciclopedia Italiana*, Appendici 1938–48, vol. II, pp. 102, 373, 686). For nineteen months, and therefore not transiently, there were thus, *de facto*, two Italys, each claiming to be the lawful one. Each had its territorial base. At the outset the Italian Social Republic was more extended and had a larger population, but the territory controlled by it in the peninsula became gradually increasingly smaller. Also the Italian Social Republic, which cannot be considered as an Agency of the German Reich, had its Government, a local one but one which aimed at losing this quality and which exercised legal powers with effective extrinsicality by means of appropriate agencies; these agencies carried out a legislative, jurisdictional and executive activity; the legislative enactments had the force of law for all citizens subjected to that system, and were enforced, as far as was permitted by the presence of foreign troops, by the war fought by these troops in the territory of the peninsula, by the civil war, by the deepening of internal contrast in the Italian spirit which was to give rise to the phenomenon of resistance. The Italian Social Republic specifically enacted laws, let alone the Jewish persecution, for the repression of the enemies of the new regime, for the punishment of 'traitor' fascists, for the establishment of a new Fascist army, for the establishment of a General Confederation of Labor; it also enacted laws in the technical and artistic fields and on the socialization of enterprises (*Enciclopedia Italiana, loc. cit.*, vol. II, p. 102).

"4.—As is clearly indicated by the letter of the provision, the second [sub-] paragraph of paragraph 9 (*a*) of Article 78 intended that the obligations imposed on Italy with regard to 'United Nations nationals' were to be valid also on behalf of physical and legal persons who, *ope legis*, had been treated as enemies in Italy during the war. For the purposes of the text of Article 78, Italy must be here considered as the entire Italian territory recognized as such by the Treaty itself (*cf.* Decision dated March 16, 1956, of the Franco-Italian Conciliation Commission on the *Interpretation of Article* 78, *paragraph* 7[1]), and therefore also that part of the territory which was actually controlled by the Italian Social Republic, excepting those portions ceded to France or Yugoslavia in compliance with the Treaty, or those destined to constitute the Free Territory of Trieste. The only matter of importance in the minds of the drafters of the Treaty was therefore focussed on the laws which had actually been in force in that part of Italy where the treatment had occurred and which had brought about that treatment; they did not and could not give any consideration to the legality of said laws vis-à-vis the Italian system as it existed prior to the Armistice and, later, in force in southern Italy. Likewise they could give no consideration to the fate that said laws would suffer in the legal system of post-war Italy.

"There are no grounds for assuming that the second [sub-] paragraph of paragraph 9 (*a*) of Article 78 of the Treaty of Peace, intended to give an *ex post facto* recognition, for some reason or other, to the Italian Social Republic or render an opinion in favor or against the lawfulness of the so-called Salò legislation and thus clearly exceed the limits of the problems it was intended to solve. In order to attain the specific purpose of the provision it would have sufficed that the enforcement, at the desired time, of the discriminatory legislation of Salò were considered as a condition of fact of the right accorded by the Treaty to the physical or legal persons, victims of such discrimination, to avail themselves of the privileges accorded to United Nations nationals against Italy.

"In other words, the term 'legislation' contained in the second paragraph of paragraph 9 (*a*) of Article 78 of the Treaty of Peace does not constitute a formal judgment nor does it represent

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[1 Reported *infra*, p. 602.]

any reference to the *present* Italian legal system but should be interpreted bearing in mind the conditions prevailing in Italy during the war, and recalled above. By using the term legislation, the drafters of the Treaty intended to avoid that similarity could be claimed by physical or legal persons who were the victims in Italy during the war of oppression or discriminatory measures not based on a provision of law but due for instance to the arbitrary action of an individual official (arbitrary act connected with the legislation that said official had been called upon at the time to implement.) Legislation generally means an aggregate of provisions which have legally the specific aim of governing the State collectivity. Doubtless, this is the purpose aimed at by the laws of the Italian Social Republic.

" On the other hand, even at this point one could ask oneself whether the drafters of the Treaty would not have foregone the pursuit of one of their clearly recognizable aims—at least a partial reparation of the damage caused by racial persecution—had they excluded from the expression ' legislation in force in Italy during the war ' the anti-Jewish laws of the Italian Social Republic, which were generally more drastic than those of pre-Armistice Italy and which were enforced with greater severity. But the text does in no way justify the theory that such an exclusion was intentional.

" 5.—There remains to be seen whether or not Mr. and Mrs. Levi were the victims of an effective conduct on the part of the Italian authority permitted by the laws of the Italian Social Republic and directed at placing them on the same level as enemy nationals.

" The answer can only be in the affirmative. Mr. and Mrs. Levi had their property confiscated in Turin in application of Decree No. 2 of the Duce dated January 4, 1944. Certainly, no provision of this decree rules that Italian nationals belonging to the Jewish race, as far as their property is concerned, shall be considered or treated as enemies under the Italian War Law. But the second [sub-] paragraph of paragraph 9 (*a*) of Article 78 does not require an abstract statement of similarity to enemy persons, and even less to persons having a specific enemy nationality; it is sufficient that the effective treatment (' traitée ', ' treated ') intended by the law and applied by the Italian authority was meted out to enemy persons. As regards enemy property, the Italian War Law provides conservatory seizure; the Decree of January 4, 1944, orders confiscation on behalf of the State, that is, not only administration by E.G.E.L.I. but the sale and the transfer of the price collected ' to the State as partial recuperation of the expenses sustained in assisting and in paying subsidies and compensation for war damage to persons rendered homeless by enemy air attack.' In other words, Italian nationals belonging to the Jewish race were doubtlessly considered to be responsible for certain war damage caused by the enemy and therefore, in actual fact, considered as enemies. The Decree of the Duce of January 4, 1944, thus only gave material form to the principle no. 7 set before the First Assembly of Republican Fascism: ' individuals belonging to the Jewish race are aliens. During the war they belong to enemy nationality,' and confirmed a practice already followed, as is shown in a decree contained in the records of the case dated December 28, 1943, of the Head of the Province of Brescia; this decree placed under sequestration the property of Mr. Vittorio Cohen by invoking the War Law and ' having seen that the Jews are considered as subjects of an enemy State '.

" 6.—It must therefore be admitted that Mr. and Mrs. Levi had the status of ' United Nations nationals' within the meaning of the second [sub-] paragraph of paragraph 9 (*a*) [of Article 78] of the Treaty of Peace. Wherefrom Mr. and Mrs. Levi derive their active right to claim under Article 78, paragraph 4 (*a*) of the Treaty itself (and subsequent Italian-United States Agreements related thereto). Italy has admitted to the United States that the aforesaid paragraph 6 is applicable to the special progressive tax on property. It is not denied, and in any event it appears from the receipts included in the records of the case, that Mr. and Mrs. Levi have paid to the Italian Government the sum of 192,680 lire for the purpose of the special progressive tax on property; this amount must be reimbursed to them (Article 78, paragraph 6, *in fine*, of the Treaty) and no further sums can be claimed from them under this heading (see Note of June 13, 1950, of the Ministry of Foreign Affairs of the Italian Republic to the Embassy of the United States of America in Rome).

" With regard to the war damage (Article 78, paragraph 4, of the Treaty of Peace) and to the reasonable expenses sustained during the proceedings (Article 78, paragraph 5, of the Treaty of Peace) it would be proper to accord a short time-limit to the Agent of the Italian Government in order that he may express an opinion on the amount claimed."[1]

[Report: Unpublished (Decision No. 145).]

NOTE.—I. The Italian Representative on the Commission filed a Dissenting Opinion.

II. See also the *Treves Claim*, decided by the same Commission on September 24, 1956 (Decision No. 144), in which the facts were somewhat similar save that the owner of the confiscated property in Italy was presumed to have died in 1943. His heirs (the claimants) were naturalized as United States nationals in 1945 and 1946 respectively. Their claim for exemption from tax on the property was rejected by the Italian authorities on the ground that the claimants had acquired their United States nationality after September 3, 1943, and were therefore not United Nations nationals at that date, nor had they been " treated as enemy " prior to that date, as provided by Article 78, paragraph 9 (*a*), of the Treaty of Peace. The Commission (the Italian member dissenting) *held* that the claim must succeed. Legislation of the Italian Social

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[1] The amount ultimately ordered to be paid was 1,279,560 lire.

Republic was within the expression "laws in force in Italy during the war"; the claimants came within the term " United Nations nationals "; and they were entitled to exemption from payment of the tax on the property in Italy which they had inherited from their father. Although the claimants could not invoke the first sub-paragraph of paragraph 9 (*a*) of Article 78 of the Treaty (see *supra*, p. 305, n.1), because their American naturalization was obtained after the date of the Armistice with Italy, the Commission—as in the *Levi Claim*, *supra*—found that, there being no time limit in the second sub-paragraph, the claimants could claim under it as " United Nations nationals ".

The Commission also considered whether the claimants had been treated as enemies " under the legislation in force in Italy during the war ", and adopted the reasoning set out in pp. 310–312 *supra*. On the argument whether there was sufficient evidence to prove that Elia Emanuele Treves, the claimants' father, was the victim of treatment on the part of the Italian authorities, permitted by the legislation of the Italian Socialist Republic, which was directed at placing him on the same level as enemy nationals, the Commission said: " Even before the Legislative Decree of the Head of the Government, No. 2, of January 4, 1944, published in the Official Gazette No. 6 of January 10, 1944, came into effect, Elia Emanuele Treves was arrested by the nazi-fascists, imprisoned and, after December 2, 1943, transferred to Germany in the extermination camps and has never been heard of since. The question may be left open as to whether or not the Italian authorities in applying the laws at the time in force in the Salò Republic, were responsible in depriving Elia Emanuele Treves of his freedom, a dispossession which later cost him his life. But there can be no serious doubt with regard to the treatment suffered by the property owned by Elia Emanuele Treves. The decree, included in the records of the case, which confiscated on behalf of the State Elia Emanuele Treves' property in the territory of the Municipality of Bianzè, 13 Edison shares and 137 coupons attached to said shares, was issued by the Chief of the Province of Vercelli and in application of the aforementioned Decree of the Duce of January 4, 1944. That his other property suffered the same fate, which was the legal fate, appears from other documents also contained in the records: the letter dated March 10, 1945, of the Prefecture of Turin which shows that certain items of personal property owned by Treves to be inventoried and to be delivered to E.G.E.L.I.[1] were located at the Prefecture itself; and the statement of January 19, 1944, of the Istituto di San Paolo at Turin, wherein mention is made of delivery effected to that Institute, by an official of the Prefecture of Turin, of ' no. 9 packages containing valuables coming from the sequestration of the property owned by the Jew Elia Treves '. On the other hand there is no document mentioning any interference on the part of German troops stationed in northern Italy against Treves' property; the question which should have come up for consideration had there been any such interference may therefore be left open.

" Certainly, no provision of the legislative decree of January 4, 1944, rules that the Italian nationals belonging to the Jewish race, as regards their property, shall be considered or treated as enemies under the Italian War Law. But the second paragraph of paragraph 9 (*a*) of Article 78

[[1] " Ente di Gestione e Liquidazione Immobilare ": see *infra*, p. 648.]

does not require an abstract statement of similarity to enemy persons, and even less to persons having a specific enemy nationality; it is sufficient that the effective treatment (' *traités* ', ' treated ') intended by the law and applied by the Italian authorities is that reserved to enemy persons. As regards enemy property, the Italian War Law provides conservative seizure; the Decree of January 4, 1944, ordered confiscation on behalf of the State, that is, not only the administration on the part of E.G.E.L.I., but the sale of the property involved and the transfer of the price collected ' to the State for the partial recuperation of expenses sustained in assisting and in paying subsidies and compensation for war damages to the persons rendered homeless by enemy air attacks '. In other words, Italian nationals belonging to the Jewish race were doubtless considered to be responsible for certain war damages caused by the enemy and therefore, in actual fact, considered as enemies. The Decree of the Duce of January 4, 1944, thus only gave material form to principle no. 7 put before the First Assembly of Republican Fascism: ' Individuals belonging to the Jewish race are aliens. During the war they belong to enemy nationality ' and confirmed a practice already followed, as is shown by a decree contained in the records of the case dated December 28, 1943, of the Chief of the Province of Brescia; this decree placed under sequestration the property of Mr. Vittorio Cohen by invoking the War Law and ' having seen that the Jews are considered as subjects of an enemy State '.

" It is true that by decision of June 21, 1951, Elia Emanuele Treves was declared presumed dead as of December 2, 1943, at 24 hours, and that this date is prior to the coming into force of the Legislative Decree of January 4, 1944.

" But Elia Emanuele Treves' property was transferred to his sons on December 2, 1943, and thus it is the claimants who were treated as enemies by the confiscation effected in the implementation of Legislative Decree of January 4, 1944.

" Or, Elia Emanuele Treves' property was transferred to the claimants only following the decision of June 21, 1951, and in that event they can avail themselves of the fact that their father was treated as enemy by the seizure of his property effected in application of the Legislative Degree of January 4, 1944. Paragraph 6 of Article 78 of the Treaty of Peace does not in fact exempt, from the taxes referred to by it, United Nations [nationals] only but their property as well; the related privilege would therefore have simply followed the property of the late Elia Emanuele Treves."

State Responsibility—Claims—Nationality of—Critical Date—Claimant Acquiring Nationality After Date of Treaty but Before Date of Damage.

See p. 654 (*Wollemborg Claim*), at pp. 658, 659.

State Responsibility—Claims—Nationality of—Right of Dual National to Claim under Treaty—Dominant Nationality That of a Third State.

See pp. 455, 457 and 464 (*Salvoni Estate Claim, Ruspoli Claim* and *Vereano Claim,* respectively).

State Responsibility—Claims—Nationality of—Continuity of Nationality—Requirement of Continuity from Time of Injury—State Control of Claims—Lump-Sum Settlement of Claims—When Accompanied by Waiver—Whether Applicable to Claims of Non-Nationals at Time of Injury—The Law of the United States of America.

See below (*Haas* v. *Humphrey et Al.*).

IV.—State Control Over Private Claims

State Responsibility—Claims—State Control Over—Lump-Sum Settlement of Claims by Treaty—When Accompanied by Waiver—Applicability Only to Claims of Nationals of State Concerned—Continuity of Nationality—Right of Private Person to Share in Proceeds—The Law of the United States of America.

HAAS *v.* HUMPHREY *ET AL.*

United States, Court of Appeals, District of Columbia Circuit.

May 16, 1957.

THE FACTS.—The plaintiff, whose property had been taken from her by the Government of Yugoslavia, subsequently, in 1952, became a citizen of the United States. Her claim before the Foreign Claims Settlement Commission to share in the fund made available under the Agreement between the Governments of the United States of America and the Federal People's Republic of Yugoslavia regarding Pecuniary Claims of the United States and its Nationals, signed at Washington on July 19, 1948 (62 Stat. 2658, T.I.A.S. No. 1803, 89 U.N.T.S. 43),[1] was denied on the ground that she was not a national of the United States at the time the property was taken. The pertinent portions of Articles 1 and 3 of this Agreement are set forth in the opinion of the Court (see *infra*, p. 318, n. 1). The plaintiff thereupon brought suit against the Secretary of the Treasury and the members of the Commission in the United States District Court, seeking judgment that the decision of the Foreign Claims Settlement, Commission " be declared to be contrary to law and null and void and that plaintiff's claim be declared to be eligible for compensation from the Yugoslav Claims Fund ". The District Court granted the Government's motion to dismiss, and the plaintiff appealed.

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[1] See, as to the Commission and the Agreement, *International Law Reports*, 1955, p. 332, n.1.

Held: that the judgment of the District Court must be affirmed. The decision of the Commission was not reviewable under the International Claims Settlement Act of 1949. Although the Court did not find it necessary to decide whether the plaintiff's claim against Yugoslavia had in fact been released by the United States, Article 3 of the Agreement excluded from the settlement and discharge of claims those claims possessed by nationals of the United States who did not have that nationality at the time of the taking of the property in question. It would thus appear that the plaintiff's claim remained in existence and that there had been no taking of her property.

The Court said: " It appears that the plaintiff was not a national of the United States at the time the property in question was taken by the Government of Yugoslavia, and that the decision of the Commission denying her claim was based on that ground.[1] The plaintiff admits non-citizenship, but says that this should not be a ' disqualifying obstacle ' in this case for a number of stated reasons, of which the principal ones are that the United States Government undertook to release her claim against the Government of Yugoslavia; that this was a taking of her property for which the Constitution requires compensation; and that officials of the State Department, prior to the signing of the treaty, had taken the position that she should be included among the beneficial owners of a claim which the State Department had undertaken to support and to negotiate with the Yugoslav Government.

" The decision of the Commission denying Mrs. Haas' claim is not—under the circumstances—one that we are permitted to review under Section 4 (h) of the International Claims Settlement Act of 1949,[2] as interpreted in *De Vegvar*.[3] We may point out, however, that the Commission seems to have observed procedural due process in the consideration of her claim, and that its conclusion that she was barred by the terms of the treaty and of the Act from participation in the Fund because of her non-citizenship can hardly be said to be based on an unreasonable construction of the law. Appellant urges, contrary to the Commission's conclusion, that her claim against Yugoslavia was in fact released by the United States. But that is something we need not undertake to decide, as our disposition of the case would not in any event turn on the point. The Government cites to us Section [Article] 3 of the underlying treaty, and interprets it to mean that inasmuch as Mrs. Haas was not entitled to the treaty's benefits her claim against Yugoslavia was

[1] The Commission's final decision says in part:

" The Commission, therefore, concludes that the claim of Lise Haas was not a claim of a national of the United States at the time of the taking of [the property] and was not settled by the Agreement of July 19, 1948, or within the jurisdiction of this Commission."

[2] 64 Stat. 13–18, 22 U.S.C.A. §§ 1621–1627.

[[3] *De Vegvar* v. *Gillilland et Al.*: see *International Law Reports*, 1955, p. 405.]

not released and remains alive.[1] If that is so, there has been no taking whatever of Mrs. Haas' property. If that is not so, it does not follow that the taking—if any there was—can or should be compensable from the Yugoslav Claims Fund, unless and until there has been an award by the Commission. See *Meade* v. *United States*, 1869, 9 Wall. 691, 76 U.S. 691, 19 L.Ed. 687. In any event, it does not follow that this court is empowered to set aside the Commission's adverse determination. See *De Vegvar, supra*, and *Dayton* v. *Gillilland* . . . [see Note, *infra*]."

[Reports: 100 App. D.C. 401, 246 F.2d 682; *certiorari* denied, 355 U.S. 854, 2 L.Ed. 2d 63, 78 Sup.Ct. 83 (1957).]

NOTE.—In *Dayton* v. *Gillilland et Al.*, 100 App. D.C. 75, 242 F.2d 227 (1957), the United States Court of Appeals for the District of Columbia Circuit *held*, following *De Vegvar* v. *Gillilland et Al.* (97 App. D.C. 126, 228 F.2d 640 (D.C. Cir. 1955), *certiorari* denied, 350 U.S. 994, 100 L.Ed. 859, 76 Sup.Ct. 543 (1956), *International Law Reports*, 1955, p. 405), that it was without jurisdiction to review a decision of the Foreign Claims Settlement Commission.

The *Haas Case* was followed in *American and European Agencies, Inc.* v. *Gillilland et Al.*, 101 App. D.C. 104, 247 F.2d 95 (D.C. Cir. 1957), *certiorari* denied, 355 U.S. 884, 2 L.Ed.2d 114, 78 Sup.Ct. 152 (1957), in which it was *held* that, in the face of the statutory provision against judicial review, the Court was without power to review either the merits of the case or the procedure followed by the Commission, in the absence of a denial of a constitutional right.

State Responsibility—Claims—State Control Over Private Claims —Effect of Compromise of International Claims by State of Which Claimant is a National.

See p. 761 (*Société Européenne d'Études et d'Entreprises* v. *People's Federal Republic of Yugoslavia*).

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[1] The appellees' brief says:

" The Agreement [the Yugoslav Claims Agreement of 1948, 62 Stat. 2658 et seq.] does indeed provide for the payment by Yugoslavia of $17,000,000 ' in full *settlement and discharge* of all claims of nationals of the United States against the Government of Yugoslavia ' (Article 1 (a) . . .). It is perfectly obvious, however, that this over-all ' settlement and discharge ' of claims of nationals did not effect the settlement or release of any *individual* claim until such time as that claim was ' determined to be valid ' by an ' adjudication made by the agency established or otherwise designated by the Government of the United States to *adjudicate* claims *settled* under [the] Agreement . . . (Article 1 (c) . . ., emphasis added). This is particularly apparent with reference to claims in which nationality was a factor, since Article 3 specifically provides that ' the claims of nationals of the United States to which reference is made in Article 1 of this Agreement *do not include* claims of individual nationals of the United States *who did not possess such nationality at the time of the nationalization or other taking, which claims shall be subject to compensation by the Government of Yuglo-slavia* . . . ' (. . . emphasis added). This provision demonstrates not only that *no* individual claims were unconditionally settled, discharged or released on July 19, 1948, but that the obligation of Yugoslavia to appellant in particular was not released, since she did not acquire United States nationality until 1952."

D—DAMAGES (MEASURE OF DAMAGES)

I.—Award of Damages in General. Grounds for Awarding Damages

State Responsibility—Damages—Measure of Damages—Expert Evidence.

See p. 879 (*Mannella Claim*).

E—INTEREST

I.—In General

State Responsibility—Claims—Interest—Necessity for Provision in Treaty.

See p. 654 (*Wollemborg Claim*), at p. 663.

PART VI

THE INDIVIDUAL IN INTERNATIONAL LAW

A—IN GENERAL

I.—Position of Individuals in International Law Human Rights and Freedoms

[*See also* PART I, INTERNATIONAL LAW IN GENERAL: IV, Relation to Municipal Law; *and* PART VIII, TREATIES: B, VII, Operation and Enforcement of Treaties.]

The Individual in International Law—Human Rights and Freedoms—European Convention for Protection of—European Commission of Human Rights—Individual Applications—Rights and Freedoms Guaranteed in Convention—Right to Pursue Trade or Calling Not Guaranteed—Principle of Non-discrimination.

Re APPLICATION NO. 86/55 (X. *v.* GERMAN FEDERAL REPUBLIC).

European Commission of Human Rights. December 16, 1955.

(Waldock, President; Eustathiades, Berg, Faber, Beaufort, Dominedo, Süsterhenn, Petren, Janssen-Pevtschin, Sørensen, Black, Jonasson, Akbay, Fuest.)

THE FACTS.—The applicant, an Italian national born in 1908 at B. (Germany), where he was an itinerant toy-salesman, complained that his licence was only valid in the town of B. and that, to exercise his calling in other places, he had to obtain from the authorities of the district concerned either a specific extension of his licence or a new licence after having proved the necessity for it. He applied on September 13, 1954, simultaneously and in identical terms, to the Council of Europe, to the Inter-Allied Control Council, to the Federal Chancellery, to the Chancellery of the Senate of B. and to the Office of Trades of B., alleging a violation of the Statute of the Council of Europe, of the German " Fundamental Law " (Articles 3 and 25), and of Law No. 3 of the Inter-Allied Control Council, 1945. The Office of Trades of B. replied on September 16, 1954, repeating a reply previously given on April 5, 1954, that aliens did not enjoy the same rights as German nationals: the latter were and the former were not able to obtain general licences. The Federal Ministry of Commerce, to whom the matter had been referred by the Federal Chancellery, also wrote to the applicant, on October 14, 1954, stating that the measure objected to did not contravene any of the texts cited by the applicant, but that it was intended to amend the legislation in force (which dated from November 27,

1896) in a way favourable to foreign itinerant salesmen. The applicant now asked for equality of treatment between Germans and foreigners in the trade in question.

Held: that the application must be rejected. The right to carry on a trade was not one protected by the European Convention for the Protection of Human Rights and Fundamental Freedoms, 1950.

The Commission said: "Article 14 of the European Human Rights Convention[1] embodies the principle of non-discrimination, particularly as regards nationality, only in the enjoyment of the rights and freedoms set forth in the Convention. The Convention guarantees only the rights and freedoms enumerated in its first Section; and only the alleged violation of one of these rights and freedoms by one of the Contracting Parties can be the object of an application before the Commission. The right to the pursuit of commercial callings is not to be found among the said rights and freedoms. Moreover, an examination of the papers in this case does not disclose a *prima facie* violation of any of the rights recognized in the Convention, including Article 14. Accordingly, the application should be rejected in pursuance of Article 27, paragraph 2, of the Convention,[2] also as manifestly ill-founded."

[Report: *Documents et Décisions*, 1955–56–57, p. 198 (in French).]

NOTE.—See also *Re Application No.* 95/55, reported *infra.* p. 323; *Re Application No.* 165/56, *infra*, p. 326; and *Re Application No.* 238/56, *infra*, p. 337.

The Individual in International Law—Human Rights and Freedoms—European Convention for Protection of—European Commission of Human Rights—Individual Applications—Rights and Freedoms Guaranteed in Convention—Right to Pension Not Guaranteed.

Re APPLICATION NO. 92/55 (X. *v.* BELGIUM).

European Commission of Human Rights. December 16, 1955.

(Waldock, President; Eustathiades, Berg, Faber, Beaufort, Dominedo, Süsterhenn, Petren, Janssen-Pevtschin, Sørensen, Black, Jonasson, Akbay, Fuest.)

THE FACTS.—The applicant was employed by the Belgian State Railways from 1905 to 1944, ultimately holding the position, between October 5, 1935, and October 23, 1943, of main line station porter at the station of A. In fact, he carried out the duties of main

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[[1] Article 14 of the Convention provides as follows:

"The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status."]

[[2] See *supra*, p. 279, n. 2.]

line station head-porter, the three men who held this rank at the station of A. being unable, according to X., to carry out the duties attached to their grade. On June 4, 1938, he told his employers that he would accept transfer to any other area, with a view to ultimate promotion to the rank of head-porter which he expected. On July 3, 1942, the Railway Administration offered him a post as head-porter at B. or C., but he was obliged to reply that for family reasons he would not be able to make a move for a while. On December 1, 1943, he accepted a similar offer (at D.) but, having fallen ill in the meantime, he could not take up the post. He was then successively put on sick-leave (October 15, 1943), on permanent leave (November 3, 1944), and on pension (January 1, 1945). He then complained that he had not obtained his appointment to the rank of head-porter at A. (although there was a post vacant—a fact which the Administration disputed), nor was he paid any allowance for the performance of duties beyond those of his official rank. He also complained that the pension he now received was that of a porter and not that of a head-porter. He brought proceedings before the Belgian *Conseil d'État* in 1949, against the Belgian State Railways; but in 1950 the *Conseil d'État* rejected his application as inadmissible *ratione temporis* by virtue of Article 58 of the Constitutive Law of December 23, 1946. The applicant now asked for the revision of his pension with retroactive effect to January 1, 1945, together with the payment of an allowance for the superior functions performed by him from 1935 to 1944.

Held: that the application must be rejected. The facts alleged occurred before the entry into force of the European Convention for the Protection of Human Rights and Fundamental Freedoms, 1950; in any event the right to a pension was not one protected by the Convention.

The Commission said: " The facts alleged relate to a period prior to the entry into force of the Convention in respect of Belgium (June 14, 1955). The Convention only governs facts subsequent to its entry into force in respect of the Contracting Party concerned, and the application should therefore be rejected as inadmissible *ratione temporis*.

" On the other hand, the European Human Rights Convention guarantees only the rights and freedoms enumerated in its first section; and only the alleged violation of one of these rights and freedoms by one of the Contracting Parties can be the object of an application before the Commission. The right to a pension is not to be found among the said rights and freedoms. In general, an examination of the application does not disclose a *prima facie* violation of any of the rights recognized in the Convention, in particular in Article 6.[1] The application should accordingly be rejected, in pursuance of Article 27, paragraph 2, of the Convention,[1] also as manifestly ill-founded."

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[1] See *supra*, pp. 342–3, n. 1.]

[Report: *Documents et Décisions*, 1955–56–57, p. 199 (in French).]

The Individual in International Law—Human Rights and Freedoms—European Convention for Protection of—European Commission of Human Rights—Individual Applications—Rights and Freedoms Guaranteed in Convention—Right of Entry to Public Service Not Guaranteed—Principle of Non-Discrimination—Irrelevance of Protection of Right in Universal Declaration of Human Rights, 1948.

Re APPLICATION NO. 95/55 (X. *v.* BELGIUM).

European Commission of Human Rights. December 16, 1955.

(Waldock, President; Eustathiades, Berg, Faber, Beaufort, Dominedo, Süsterhenn, Petren, Janssen-Pevtschin, Sørensen, Black, Jonasson, Akbay, Fuest.)

THE FACTS.—In 1919 the applicant, a Belgian national, passed the examination for clerks in the Belgian Ministry of the Interior. In 1921, the *Chef de Cabinet* of the Minister informed him that he was in competition with certain former soldiers who, under a Law of August 3, 1919, had the benefit of a right of priority although they had taken the same examination after him. Later in the same year, the Ministry informed the applicant that he would be considered for promotion on the results of a further examination. Subsequently, he was offered a temporary position, without reference to the provisions of the above-mentioned Law. He refused the offer, since the position of temporary employee was not equivalent to the position to which he considered himself to be entitled, and any acceptance on his part would, according to him, have risked compromising his rights, in particular the right to compete for the superior post of draftsman. He protested without success, on various occasions between 1921 and 1945, to the competent administrative authorities, complaining of discrimination in the application of the Law of August 3, 1919, the principle of which he did not attack. In fact, this Law was only invoked to cover the appointment of one former soldier in the 1920 competition. On the other hand, certain Belgian citizens who, like the applicant, did not qualify as former soldiers, nevertheless obtained posts as clerks in the same Ministry at the time when the applicant, owing to his military duties, could not take up his work.

In 1948, the applicant commenced proceedings before the Belgian *Conseil d'État*. The Ministry of the Interior, as defendant,

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[1 See *supra*, p. 279, n. 2.]

without disputing the merits of the claim, objected to it as inadmissible *ratione temporis*, under Article 58 of the Constitutive Law of December 23, 1946. In 1949, the *Conseil d'État* accepted the argument of the Ministry and rejected the claim. The applicant now appealed to the Commission, contending that before the creation of the *Conseil d'État* in 1946 there was no judicial remedy available to him, that his many protests had given to his case " an undeniably perennial character ", and that " prescription does not operate against one who, by reason of *force majeure*, is prevented from taking action ". He relied on Article 21, paragraph 2, of the Universal Declaration of Human Rights, 1948, under the terms of which every person has the right to enter, on conditions of equality, the public service of his country. He asked for the recognition of his rights and compensation for the damage suffered.

Held: that the application must be rejected. The matters complained of occurred before the coming into force of the European Convention for the Protection of Human Rights and Fundamental Freedoms, 1950. In any event, the right of entry to the public service is not a right protected by the Convention.

The Commission said: " The facts alleged relate to a period prior to the entry into force of the Convention in respect of Belgium (June 14, 1955); the Convention only governs facts subsequent to its entry into force in respect of the Contracting Party concerned; and the application should accordingly be rejected, as inadmissible *ratione temporis*.

" On the other hand, Article 14 of the European Human Rights Convention[1] embodies the principle of non-discrimination in the enjoyment only of those rights and freedoms set forth in the Convention. This guarantees only the rights and freedoms enumerated in its first Section, and only an alleged violation of one of these rights and freedoms by a Contracting Party can be the object of an application before the Commission. The right of entry to the public service is not among the said rights and freedoms, the Convention containing no provision corresponding to that of Article 21, paragraph 2, of the Universal Declaration of Human Rights. Moreover, in general, an examination of the papers in this case discloses no *prima facie* violation of any of the rights set forth in the Convention, including Articles 6[2] and 14. The application should accordingly be rejected in pursuance of Article 27, paragraph 2, of the Convention,[3] as manifestly ill-founded."

[Report: *Documents et Décisions*, 1955–56–57, p. 201 (in French).]

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[1] See *supra*, p. 321, n. 1.]

[2] See *supra*, pp. 342–3, n. 1.]

[3] See *supra*, p. 279, n. 2.]

The Individual in International Law—Human Rights and Freedoms—European Convention for Protection of—European Commission of Human Rights—Individual Applications—Rights and Freedoms Guaranteed in Convention—Absence of Guarantee of Certain Standard of Living and Suitable Housing.

Re APPLICATION NO. 159/56 (X. *v.* GERMAN FEDERAL REPUBLIC).

European Commission of Human Rights. September 29, 1956.

(Waldock, President; Eustathiades, Berg, Faber, Beaufort, Dominedo, Süsterhenn, Petren, Janssen-Pevtschin, Sørensen, Crosbie, Jonasson, Akbay, Fuest.)

THE FACTS.—The applicant, a refugee from East Germany now living at B. in the German Federal Republic, complained of his living conditions, and in particular that the municipal authorities had not obtained suitable housing for him. He applied to the Commission for " assistance ".

Held: that the application must be rejected. The European Convention for the Protection of Human Rights and Fundamental Freedoms, 1950, contained no guarantee of a right to satisfactory housing conditions and an adequate standard of living.

The Commission said: " Under the terms of its Article 1[1] and Article 25, paragraph 1,[2] the European Human Rights Convention guarantees only the rights and freedoms set forth in its first Section, and only the alleged violation of one of these rights and freedoms by a Contracting Party can be the object of an application admissible before the Commission. The right to an adequate standard of living and the right to suitable housing, the disregard of which constitutes the subject of the application, are not in principle among the said rights and freedoms.

" The Convention contains no provision corresponding to that of Article 25, paragraph 1, of the Universal Declaration of Human Rights, 1948.[3] It appears, therefore, that the application is

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[[1] Article 1 of the Convention provides as follows:

" The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention."]

[[2] Article 25, para. 1, of the Convention provides:

" (1) The Commission may receive petitions addressed to the Secretary-General of the Council of Europe from any person, non-governmental organisation or group of individuals claiming to be the victim of a violation by one of the High Contracting Parties of the rights set forth in this Convention, provided that the High Contracting Party against which the complaint has been lodged has declared that it recognises the competence of the Commission to receive such petitions. Those of the High Contracting Parties who have made such a declaration undertake not to hinder in any way the effective exercise of this right."]

[[3] Article 25, para. 1, of the Universal Declaration of Human Rights provides as follows:

" 1. Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control."]

incompatible with the provisions of the Convention, and it should accordingly be rejected in pursuance of Article 27, paragraph 2, of the Convention.[1]"

[Report: *Documents et Décisions*, 1955–56–57, p. 202 (in French).]

The Individual in International Law—Human Rights and Freedoms—European Convention for Protection of—European Commission of Human Rights—Individual Applications—Rights and Freedoms Guaranteed in Convention—Right to Exercise a Trade Not Guaranteed—Irrelevance of Protection of Right in Universal Declaration of Human Rights, 1948—Necessity for Exhaustion of Local Remedies—Principle of Non-discrimination.

Re APPLICATION NO. 165/56 (X. *v.* GERMAN FEDERAL REPUBLIC).

European Commission of Human Rights. September 29, 1956.

(Waldock, President; Eustathiades, Berg, Faber, Beaufort, Dominedo, Süsterhenn, Petren, Janssen-Pevtschin, Sørensen, Crosbie, Jonasson, Akbay, Fuest.)

THE FACTS.—The applicant, a refugee from East Germany now living at B. in the German Federal Republic, complained to the town authorities that the Prefect of Police had on January 2, 1956, refused him a licence to operate public transport for which he had applied. The applicant contended that in denying to refugees their professional freedom the Prefect of Police had violated the freedom of the person. The town authorities rejected the appeal on April 6, 1956, and the applicant now appealed to the Commission. He also protested against the persecution which, he alleged, was being suffered by Christians in West Germany, and asked the Commission to " free the population of West Germany from radicalism ".

Held: that the application must be rejected. The right to carry on a trade was not one protected by the European Convention for the Protection of Human Rights and Fundamental Freedoms, 1950. In any event, the applicant had not exhausted the local remedies. There was no evidence of the persecution alleged by the applicant.

The Commission said: " [*On the refusal to issue a licence*] Even assuming that the refusal of the licence in question was inspired by the fact that the applicant was a refugee, it must be borne in mind that Article 14 of the European Convention on Human Rights[2] embodies the principle of non-discrimination only in the enjoyment of the rights and freedoms recognized in the Convention. Under the terms of Article 1[3] and paragraph 1 of Article 25,[4] the Convention guarantees only the rights and freedoms set forth in its first Section, and only the alleged violation of one of those rights and freedoms by a Contracting Party can be the object of an application admissible before the Commission. The right to exercise a trade is not, in principle, among the said rights and freedoms; in fact, the Convention contains no provision corresponding to that of Article 23, paragraph 1, of the Universal Declaration of Human Rights, 1948.[1] It appears, therefore, that the application is incompatible with the provisions of the Convention and it should accordingly be rejected on that ground, in pursuance of Article 27, paragraph 2, of the Convention.[2]

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[1] See *supra*, p. 279, n. 2.]

[2] See *supra*, p. 321, n. 1.]

[3] See *supra*, p. 325, n. 1.]

[4] See *supra*, p. 325, n. 2.]

" Furthermore, under the terms of Article 26 of the Convention,[3] the Commission can only be seised of an application after all domestic remedies have been exhausted, in accordance with the generally recognized rules of international law. It appears from an examination of the file that the applicant did not make use of the right which was available to him to challenge, before the Administrative Tribunal (*Verwaltungsgericht*) of B., the above-mentioned decisions of January 2 and April 6, 1956, a right to which the town authorities had drawn his attention. It is evident, therefore, that the applicant has not satisfied the requirements of Article 26 of the Convention, and the application should accordingly be rejected on this ground also, pursuant to Article 27, paragraph 3, of the Convention,[4] for non-exhaustion of domestic remedies.

" [*On the persecution allegedly inflicted on Christians in West Germany*] An examination of the file does not disclose a *prima facie* violation of any of the rights set forth in the Convention, in particular in Article 9.[5] It appears, therefore, that the application is manifestly ill-founded, and it must accordingly be rejected on this ground also, pursuant to Article 27, paragraph 2, of the Convention.[2] "

[Report: *Documents et Décisions*, 1955–56–57, p. 203 (in French).]

[[1] Article 23, para. 1, of the Universal Declaration provides as follows:
" 1. Everyone has the right to work, to free choice of employment, to just and favourable conditions of work and to protection against unemployment."]

[[2] See *supra*, p. 279, n. 2.]

[[3] Article 26 of the European Convention on Human Rights provides:
" The Commission may only deal with the matter after all the domestic remedies have been exhausted, according to the generally recognised rules of international law, and within a period of six months from the date on which the final decision was taken."]

[[4] See *supra*, p. 280, n. 1.]

[[5] Article 9 of the Convention provides as follows:
" (1) Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.
" (2) Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others."]

The Individual in International Law—Human Rights and Freedoms—European Convention for Protection of—European Commission of Human Rights—Individual Applications—Rights and Freedoms Guaranteed in Convention—Right to Enter a Country Not Guaranteed—Right to Custody of an Infant Not Guaranteed—Acts of Individuals Not Cognizable by Commission—Commission Unable to Hear Allegations of Error in Decisions of National Courts—Allegation of Denial of Justice—Need for Exhaustion of Local Remedies.

Re APPLICATION NO. 172/56 (X. *v.* KINGDOM OF SWEDEN).

European Commission of Human Rights. December 20, 1957.

(Waldock, President; Eustathiades, Berg, Faber, Beaufort, Dominedo, Süsterhenn, Petren, Janssen-Pevtschin, Sørensen, Crosbie, Skarphedinsson, Erim.)

THE FACTS.—The applicant, a former Polish officer, settled in Germany in 1939 and had lived there since that date. In March 1946 he married a Latvian woman of Norwegian descent and there was one child of this marriage, a son, born in January 1947. In the course of 1947 the family decided to emigrate to Sweden and, as they were unable to obtain an immigration permit, they arranged to enter that country clandestinely. In October 1947 the applicant's wife and child succeeded in entering Sweden and subsequently in obtaining a residence permit. The applicant himself was unable to leave with his family because he had to undergo a surgical operation as a result of a motor accident. In May 1948, after his recovery, the applicant applied to the Swedish authorities for permission to immigrate into Sweden to rejoin his family. This request was refused. The applicant subsequently made several further requests for a Swedish entry permit, at first with the object of settling in Sweden and later, in view of the repeated failure of these requests, with the more limited object of seeing his wife and child again. All his requests met with refusals from the Aliens Commission in Stockholm. In 1949, the applicant's wife broke off all relations with her husband, after which he had no direct contact either with her or with his child. The wife then commenced an action in the Swedish courts for a judicial separation, with the intention of suing for a divorce later. Prior to the institution of that action the applicant had, in accordance with Swedish law, received a letter from the Swedish Protestant Minister acting in the proceedings, asking him to meet him on a date in April 1949, when he would try to effect a reconciliation between husband and wife. However, the applicant was unable to go to Sweden because of the attitude of the Swedish immigration authorities, who refused him an entry visa although he had clearly stated the reason why he required to enter the country. The attempt at reconciliation could therefore not take place and the wife proceeded with her action for judicial separation before the Stockholm Court of first instance. In 1951, that Court found that the *de facto* separation of husband and wife since 1947 constituted a cause of "real and profound disagreement" sufficient under Swedish law to justify a decree of judicial separation. It also decided to grant the mother custody of the child on the ground that this was in the child's own interest. The applicant appealed against this decision to the Court of Appeal, but that Court held that there was no ground for reversing the judgment of the Court below. The applicant then in turn brought an action for divorce in the Court of S. in Poland, the court competent under Polish law to deal with this case. The Polish Court granted the applicant a divorce, naming his wife as the guilty party and giving him the custody of the child. Nevertheless, it gave the wife the right to supervise the child's education and training and to maintain personal relations with him. In 1953 the applicant's wife petitioned the Swedish courts for a divorce and asked for the custody of the child. In April 1953, the Court of first instance, finding that the couple had not lived together for a year, converted the judicial separation into a divorce and gave the custody of the child to the mother. The Court held that the divorce decree pronounced by the Polish Court in 1951 was not enforceable in Sweden; for one thing, the applicant's wife was stateless and not Polish, since she had never resided in Poland and now had a firm intention of living in Sweden, where she had obtained a residence permit.

The applicant appealed to the Court of Appeal of Stockholm. He claimed that his wife was Polish from every point of view, the Polish authorities not having deprived her of citizenship. He therefore asked for the annulment of the divorce decree of the (Swedish) Court of first instance and for custody of the child in accordance with the decree of the Polish Court. In 1954, the Court of Appeal gave judgment admitting the applicant's claim as to the validity of the divorce pronounced by the Polish Court and reversed the judgment of the (Swedish) Court of first instance. It decided, however, that it was not bound by the Polish decision concerning custody of the child, but that in the special circumstances of the case it was entitled to apply Swedish law on the question of the custody of the child. It held that in view of his tender age the child should remain in his mother's care. The applicant appealed from this part of the decision to the Supreme Court in Stockholm. In 1954, however, in the interval between the decision of the Court of Appeal and the hearing before the Supreme Court, the applicant's ex-wife married a Swedish national. In 1956, she obtained Swedish nationality. Later in the same year, the applicant submitted a request for a visa so that he could appear before the Supreme Court in Stockholm. It appears from the detailed account prepared by the applicant at the direction of the Commission in the present proceedings, that the facts attending this request for a visa were as follows: first, the applicant received a communication from Counsel appointed by the Court to represent him, concerning the date appointed for the hearing before the Supreme Court. Counsel informed him that the hearing would probably be held towards the end of May 1956, and asked him whether he intended to be present in court in person. On April 20, 1956, the applicant replied by asking his Counsel's opinion on the advisability of his attendance, stating at the same time that he was ready to go to Stockholm at any time, and he requested Counsel to send him, if necessary, a formal summons by the Supreme Court, so that he could take steps to obtain a Swedish entry permit. His Counsel replied on April 27 that after hearing the opinion of the Judge appointed as *Rapporteur* for his case before the Supreme Court, and having regard to the fact that the applicant had not expressed any firm intention to be present in Stockholm in person, he had notified the Court that the hearing could take place in the absence of his client. He also informed the applicant that the hearing had been fixed for May 8 or 9, 1956.

Immediately after the receipt of the above-mentioned letter, on May 2, 1956, the applicant telephoned his Counsel and instructed him to withdraw the authorization, given to the Court without his knowledge, to proceed in his absence, and requested him to approach the Aliens Commission immediately in order to obtain a Swedish entry visa for him. He confirmed these instructions the same day by telegram and letter. On the same day the applicant himself wrote to the Swedish Embassy at Cologne requesting a visa to enable him to appear at the hearing before the Supreme Court, which in the meantime had been fixed for May 9. On May 4, the applicant's Counsel informed him that the Aliens Commission had refused his request for a visa, apparently on the ground that his ex-wife was alleging that he (the applicant) had threatened to kill her. Counsel also stated that had the applicant expressed in April his desire to attend the Supreme Court hearing, the Court would probably have taken steps to ensure that the appropriate authorities granted the necessary visa. In a letter to his Counsel dated May 6, 1956, the applicant protested against the refusal of the Aliens Commission to grant the visa, which was, according to him, based on groundless allegations. The applicant at the same time instructed his Counsel to request a stay of proceedings, in order that he could appear before the Court in person; he considered such a stay of proceedings to be essential to his defence, in view of the unfair methods used by the opposing party. By a telegram dated May 7, 1956, the applicant was informed by his Counsel that no stay of proceedings was possible.

In due course the Supreme Court dismissed the applicant's appeal from the order of the Court of Appeal made in 1954. On the question of the custody of the child the Supreme Court applied the relevant Swedish law. It found that the applicant's ex-wife had acquired Polish nationality only upon her marriage to him, which had been celebrated in Germany; that neither she nor the child had ever lived in Poland; that she had been living in Sweden with her son since 1947; that she had married a Swedish national and had the firm intention of remaining in Sweden. The Court considered that all these circumstances justified an exception to the general rule that the personal status of the parties to a dispute was governed by their nationality.

The applicant now alleged that the refusal of the Aliens Commission in Stockholm to grant him an entry permit prevented him from appearing in person before the Swedish courts and that this refusal constituted a breach of Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, 1950.[1] The Commission ordered the application to be communicated to the Government of Sweden, which was invited to present to the Commission within eight weeks its written observations on the admissibility of the application. The memorial of the Swedish Government was deposited with the Secretariat of the Commission on September 23, 1957.

Held: that the application must be rejected. (i) The matters complained of had occurred, for the most part, before the coming into force of the European Convention for the Protection of Human Rights and Fundamental Freedoms, 1950; (ii) the right to enter a country and the right to the custody of a child are not among the rights protected by the Convention; (iii) the fact that the applicant was deprived of an opportunity to appear personally before the Swedish Court and the fact that the wife was bringing up the child of the marriage in the Roman Catholic faith against the wishes of the applicant were matters for which private individuals and not a State party to the Convention were responsible; (iv) the Commission could not deal with allegations of error on the part of national courts;

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[1] Article 6 of the Convention provides, in part, as follows:

"(1) In the determination of his civil rights and obligations or any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice."

and (v) the applicant had not exhausted the available judicial remedies.

The Commission said: " First, with the exception of one application for an entry permit in May 1956, the facts complained of refer to a period prior to September 3, 1953, the date of the entry into force of the European Convention on Human Rights and Fundamental Freedoms with regard to Sweden. In accordance with the generally recognized rules of international law, the said Convention governs, for each Contracting Party, only facts subsequent to its entry into force in respect of that Party; therefore, the application, so far as it relates to facts complained of in the period prior to September 3, 1953, must be rejected *ratione temporis.*

" Secondly, as regards the refusal of the Aliens Commission to grant an entry permit in May 1956, the applicant alleges, on the one hand, that the fact that he was not permitted to enter Sweden resulted in the final breaking up of his marriage and ultimately in his infant son being estranged from his father, and, on the other hand, that such refusal constituted a breach of Article 6 of the Convention, in that the said request for an entry permit expressly referred to his wish to appear personally before the Supreme Court and he was, in consequence, deprived of the right to a fair hearing guaranteed under Article 6 of the Convention.

" In respect of the applicant's complaint that he was cut off from his wife and child by being denied entry into Sweden, the right to enter a country is not, as such, included among the rights and freedoms set forth in the Convention. Under the terms of Article 1,[1] the Convention guarantees only those rights and freedoms set forth in Section I and, in accordance with Article 25, paragraph 1,[2] only the alleged violation of one of these rights or freedoms by a Contracting Party can be the subject of an application admissible by the Commission. It therefore appears that the application in this regard is incompatible with the provisions of Article 27, paragraph 2, of the Convention.[3]

" In respect of the applicant's complaint that the refusal of the Aliens Commission to grant him an entry permit deprived him of his right to a fair hearing under Article 6 of the Convention,[4] it is not necessary to examine this complaint since it is clear from the facts of the case that a formal request for a personal appearance never reached the Supreme Court and that the application to the Aliens Commission was refused only after the Commission had learned from the Supreme Court that the applicant's personal appearance was not required. An examination of the file, including an examination made by the Commission *ex officio*, shows that the fact that a formal request for a personal appearance never reached the Supreme Court is in fact attributed by the applicant himself to his own lawyer because the latter did not transmit the request to the Supreme Court. It follows that the application, in this respect, in fact concerns the action of a private individual and in no way involves the responsibility of the Swedish Government.

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[1] See *supra*, p. 325, n. 1.]

[2] See *supra*, p. 325, n. 2.]

[3] See *supra*, p. 279, n. 2.]

[4] See *supra*, p 331, n. 1.]

" It results from Article 19 of the Convention[1] that the sole task of the Commission is to ensure the observance of the engagements undertaken by the High Contracting Parties in the Convention. It is, moreover, apparent from Article 25, paragraph 1, of the Convention[2] that the Commission can properly receive an application from a person, non-governmental organisation or group of individuals only if that person, non-governmental organisation or group of individuals claims to be the victim of a violation, by one of the High Contracting Parties which have recognized the right of individual recourse to the Commission, of the rights set forth in the Convention. It is clear that private persons cannot be considered as High Contracting Parties within the meaning of Article 66 of the Convention.[3] It therefore appears that the application, in this respect, does not conform with the provisions of Articles 19, 25 and 66 of the Convention, and should therefore in pursuance of Article 27, paragraph 2, of the Convention[4] be rejected accordingly.

" In so far as the application infers that the Supreme Court of Stockholm in not paying full recognition to the judgment pronounced

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[[1] Article 19 of the Convention provides as follows:

" To ensure the observance of the engagements undertaken by the High Contracting Parties in the present Convention, there shall be set up:

" (1) A European Commission of Human Rights, hereinafter referred to as ' the Commission ';

" (2) A European Court of Human Rights, hereinafter referred to as ' the Court '."]

[[2] Article 25 of the Convention provides as follows:

" (1) The Commission may receive petitions addressed to the Secretary-General of the Council of Europe from any person, non-governmental organisation or group of individuals claiming to be the victim of a violation by one of the High Contracting Parties of the rights set forth in this Convention provided that the High Contracting Party against which the complaint has been lodged has declared that it recognises the competence of the Commission to receive such petitions. Those of the High Contracting Parties who have made such a declaration undertake not to hinder in any way the effective exercise of this right.

" (2) Such declarations may be made for a specific period.

. . . .

" (4) The Commission shall only exercise the powers provided for in this Article when at least six High Contracting Parties are bound by declarations made in accordance with the preceding paragraphs."]

[[3] Article 66, para. 1, of the Convention provides, in part:

" (1) This Convention shall be open to the signature of the Members of the Council of Europe. . . ."]

[[4] See *supra*, p. 279, n. 2.]

in the Polish Court of S., from which the applicant had obtained a decree of divorce and an order awarding him the custody of his infant son, thereby wrongly applied the principles of Private International Law, as understood in Sweden, and thus committed an error of law, it should be noted that the European Commission of Human Rights was not set up as a higher court to hear cases of alleged error of law or fact committed by the domestic courts of the Contracting Parties, but, in accordance with Article 19 of the Convention, to ensure the observance of the engagements undertaken by the Parties in the Convention. Such errors of law or fact concern the Commission, during its examination of the admissibility of an application, only in so far as they appear to have resulted in the violation of the rights and freedoms listed in the Convention. More generally, the Commission is only competent to pronounce on judgments of domestic courts if it appears that such judgments were given in disregard of the rights and freedoms guaranteed by the Convention. An examination of the file in its present state does not disclose any appearance of such disregard; it therefore appears that the application, in this respect, is manifestly ill-founded and should, in pursuance of Article 27, paragraph 2, of the Convention,[1] be rejected accordingly.

" The applicant alleges that the order of the Court of Appeal awarding the custody of his infant son to his ex-wife . . . which was confirmed by the Supreme Court, involves the breach of Articles 8 and 9 of the Convention.[2] It is plain that the right of one particular parent to the custody of an infant as against the other parent is not, as such, included among the rights and freedoms set forth in the Convention, and that the appreciation of the question which parent should be given the custody of an infant is, in principle, governed by the law of the domestic courts and . . . it does not appear in the present case that the Swedish law in the matter in itself violates the Convention. Under the terms of Article 1, the Convention guarantees only those rights and freedoms set forth in Section I and, in accordance with Article 25, paragraph 1,[1] only the alleged violation of one of these rights or freedoms by a Contracting Party can be the subject of an application admissible by the Commission. It therefore appears that the application, in this respect, is incompatible with the provisions of the Convention and should, in pursuance of Article 27, paragraph 2, of the Convention,[2] be rejected accordingly.

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[1] See *supra*, p. 279, n. 2.]

[2] Article 8 of the Convention provides as follows:

" (1) Everyone has the right to respect for his private and family life, his home and his correspondence.

" (2) There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

Article 9 of the Convention reads:

" (1) Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.

" (2) Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others."]

"On the other hand, it should be considered whether the fact that one parent is deprived of the custody of an infant entails not in itself but in its effects a *prima facie* violation, with regard to that parent and the infant in question, of the rights and freedoms guaranteed by the Convention and Protocol.[3] In this respect, the applicant claims that the aforementioned order of the Court of Appeal, as confirmed by the Supreme Court, violates Articles 8 and 9 of the Convention in that it resulted in his infant son being brought up in ignorance of Polish nationality, in his being educated in a way contrary to the teachings of the Roman Catholic Church in which he was baptised, and in his being ignorant of his father's existence.

"Having regard to the allegations put forward by the applicant and after having examined *ex officio* the file in its present state, the Commission is of the opinion that two major questions arise regarding a possible *prima facie* violation of the rights and freedoms guaranteed by the Convention and Protocol as a consequence of the awarding of the custody, of the applicant's infant son to his ex-wife.

"The first question that falls to be decided concerns the possible *prima facie* violation of Article 8 of the Convention in so far as the applicant alleges that, as a result of his not having the custody of his infant son, he did not have an opportunity to have access to his son. In the view of the Commission, the parent who is deprived of the custody of an infant may not be prevented, under Article 8, paragraph 1, from [having] access to that infant unless special circumstances, as defined in paragraph 2 of the same Article, so demand. In this respect, a remedy in the local courts was available to the applicant, since Article 10, Chapter 6, of the Swedish Parents' Law (*Föräldrabalken*) stipulates as follows:

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[1] Article 25 of the Convention provides as follows:

"(1) The Commission may receive petitions addressed to the Secretary-General of the Council of Europe from any person, non-governmental organisation or group of individuals claiming to be the victim of a violation by one of the High Contracting Parties of the rights set forth in this Convention provided that the High Contracting Party against which the complaint has been lodged has declared that it recognises the competence of the Commission to receive such petitions. Those of the High Contracting Parties who have made such a declaration undertake not to hinder in any way the effective exercise of this right.

"(2) Such declarations may be made for a specific period.

. . . .

"(4) The Commission shall only exercise the powers provided for in this Article when at least six High Contracting Parties are bound by declarations made in accordance with the preceding paragraphs."]

[2] See *supra*, p. 279, n. 2.]

[3] Dated March 20, 1952.]

> " 'The father or mother who is deprived of the custody of a child may not be prevented from access to the child unless special circumstances exist against such access; when the parent is not satisfied with what has been decided in this matter by the parent who has the custody, the court shall make a ruling.'

" Under Article 26 of the Convention,[1] the Commission may only deal with a matter after all domestic remedies have been exhausted, according to the generally recognised rules of international law and within a period of six months from the date on which the final decision was taken. The applicant has omitted to pursue the remedy open to him and . . . an examination of the file in its present state does not disclose the existence of any special circumstances which could be held sufficient, according to the generally recognised rules of international law, to excuse the want of appeal to the local courts. It therefore appears that the applicant has not satisfied the conditions laid down in Article 26 of the Convention in regard to the exhaustion of local remedies and the application should, in this respect, in pursuance of Article 27, paragraph 3, of the Convention[2] be rejected accordingly.

" The second question that falls to be decided concerns the possible *prima facie* violation of Article 9 of the Convention[3] and Article 2 of the Protocol[4] in so far as the applicant alleges that his infant son is being brought up in a way contrary to the teachings of the Roman Catholic Church in which he was baptised and in ignorance of his Polish nationality. These allegations are not ascribable to the Swedish Court which made the order as to custody and do not, therefore, involve the responsibility of the Swedish Government, since the alleged facts are to be imputed to the applicant's ex-wife only who, as well as having the custody of the infant, has control of his education. The application, being in this respect directed against a private individual, should be rejected on the grounds already stated above in regard to the complaint under Article 6 of the Convention.[5]

" The applicant further submits that his ex-wife, when the marriage was contracted between her and himself, had made a solemn promise to educate the children to be born out of that marriage in the Roman Catholic religion. When he alleges that his ex-wife did not carry out the obligation to educate the infant in the

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[1] [See *supra*, p. 327, n. 3.]

[2] [See *supra*, p. 280, n. 1.]

[3] [See *supra*, p. 327, n. 5.]

[4] [Article 2 of the Protocol to the Convention provides as follows:
" No person shall be denied the right to education. In the exercise of any functions which it assumes in relation to education and to teaching, the State shall respect the right of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions."]

[5] [See *supra*, pp. 342–3, n. 1.]

Roman Catholic religion [the applicant] in fact relies upon the provisions of the Canon Law. Without underestimating the moral obligation under the Canon Law, Article 9 of the Convention and Article 2 of the Protocol cannot validly be invoked by the applicant because his complaint, in this respect, concerns the action of a private individual and in no way involves the responsibility of the Swedish Government. The application, as being in this respect directed against a private individual, should be rejected on the grounds already stated above in regard to the complaint under Article 6 of the Convention."

[Report: *Documents and Decisions*, 1955–56–57, p. 211 (in English).]

The Individual in International Law—Human Rights and Freedoms—European Convention for Protection of—European Commission of Human Rights—Individual Applications—Rights and Freedoms Guaranteed in Convention—Right to Establish Home in Foreign Territory Not Guaranteed—Principle of Non-Discrimination.

Re APPLICATION NO. 238/56 (MRS. X. *v.* DENMARK).

European Commission of Human Rights. March 7, 1957.

(Waldock, President; Eustathiades, Berg, Faber, Beaufort, Dominedo, Süsterhenn, Petren, Janssen-Pevtschin, Sørensen, Crosbie, Skarphedinsson, Akbay.)

THE FACTS.—On January 14, 1950, the applicant, of Danish nationality, married X., a German national, whom she had known during the war when he belonged to the German forces of occupation in Denmark. As a result of her marriage, the applicant lost her nationality, which, however, she regained in 1951 after making representations to the Danish Ministry of the Interior. Immediately after the marriage she tried to obtain from the Danish authorities a residence permit and a work permit for her husband, but without success. As a consequence, the applicant, in order to continue living with her husband, had to sell her property and leave Denmark for Germany. She stated that she did so against her will and only by reason of the attitude of the Danish authorities towards her husband. Mr. and Mrs. X. extablished their home at B. in the German Federal Republic. Several years later, the applicant and her husband wished to transfer their home to Denmark, because of the state of health of the applicant. To this end, the applicant and her mother once more attempted to secure the grant of a residence permit for Mr. X. On September 10, 1953, the Chief of Police of C. (Denmark), and again in 1954 and 1956 the Danish Ministry of Justice, refused the application. In 1956 the Commissioner of the Danish Parliament, whom the applicant had petitioned, informed her that the Ministry of Justice had told him that it was their "usual practice" not to grant a residence permit to German nationals who did not have sufficiently close ties with Denmark to justify such a measure, and that the marriage of Mr. X. with the applicant could not, of itself, be regarded as having created such a link. The Commissioner considered that the decision of the Ministry of Justice could not be impugned, and informed the applicant that he could not take any further steps on her behalf. The applicant now complained of the attitude of the Danish authorities, which, according to her, constituted a violation of the rights set forth in Article 8, paragraph 1,[1] and Article 12[2] of the European Convention on Human Rights, 1950. She also, in reliance upon the provisions of Article 14 of the Convention,[3] applied for a declaration that the Danish authorities should examine the case of her husband in the same way as that of a foreign woman married to a Dane. She contended, moreover, that the refusal of the Danish authorities showed discrimination based on the nationality of her husband. She asked the Commission to help her to obtain a permit for him to reside in Denmark.

Held: that the application must be rejected. Many of the facts alleged occurred before the coming into force of the Convention; the remainder did not constitute violations of rights protected by the Convention—in particular, the Convention does not guarantee the right of a person to reside in a State which is not his national State.

The Commission said: "As regards the refusal to grant residence and work permits to Mr. X. in 1950, which led to the applicant's leaving Denmark, the facts alleged relate to a period prior to September 3, 1953, the date of the entry into force of the European Convention on Human Rights in respect of Denmark. According to generally recognized principles of international law, the said Convention only governs, for each Contracting Party, facts subsequent to its entry into force in respect of that Party, and the application should accordingly be rejected on this ground as inadmissible *ratione temporis.*

"On the other hand, as regards the facts subsequent to September 3, 1953, an examination of the file does not, in general, disclose a *prima facie* violation of any of the rights and freedoms set forth in the Convention, and in particular of those set forth in Articles 8 and 12, either by themselves or in combination with the principle of non-discrimination embodied in Article 14.

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[1] See *supra*, p. 334, n. 2.]

[2] Article 12 of the Convention provides:

"Men and women of marriageable age have the right to marry and to found a family, according to the national laws governing the exercise of this right."]

[3] Article 14 of the Convention provides as follows:

"The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status."]

" In particular, in so far as the application concerns an alleged violation of the rights set forth in Article 8, paragraph 1, of the Convention, the applicant and her husband have since 1950 had their home in Germany, where it is open to them to continue to live together. An examination of the file does not, in consequence, reveal a *prima facie* violation of the right to respect for their private and family life, nor of the right to respect for their home, as defined in the said Article 8, paragraph 1, of the Convention. It appears, therefore, that the application is in this respect manifestly ill-founded; it should accordingly be rejected on this ground also, pursuant to Article 27, paragraph 2, of the Convention.[1]

" Finally, again as regards the period subsequent to September 3, 1953, the applicant appears to claim for her husband the right to establish his residence on the territory of a State other than his national State. Under the terms of its Article 1[2] and Article 25, paragraph 1,[3] the Convention guarantees only the rights and freedoms set forth in its first Section, and only the alleged violation of one of those rights and freedoms can be the subject of an application admissible before the Commission. The above-mentioned right is not, in principle, among the said rights and freedoms. The principle of non-discrimination embodied in Article 14 of the Convention is only relevant in the enjoyment of rights and freedoms set forth in the Convention. It appears, therefore, that the application is in this respect incompatible with the provisions of Articles 1, 14 and 25 of the Convention, and it should accordingly be rejected on this last ground pursuant to Article 27, paragraph 2, of the Convention."

[Report: *Documents et Décisions*, 1955–56–57, p. 205 (in French).]

The Individual in International Law—Human Rights and Freedoms—European Convention for Protection of—European Commission of Human Rights—Individual Applications—Rights and Freedoms Guaranteed in Convention—Right of Entry to Public Service Not Guaranteed.

Re APPLICATION NO. 273/57 (X. *v.* GERMAN FEDERAL REPUBLIC).

European Commission of Human Rights. August 28, 1957.

(Waldock, President; Eustathiades, Berg, Faber, Beaufort, Dominedo, Süsterhenn, Petren, Janssen-Pevtschin, Sørensen, Crosbie, Skarphedinsson, Erim.)

THE FACTS.—The applicant, a German national of Polish origin now living at B. in the German Federal Republic, was from 1928 to 1939 a civil servant in the district of C. in Silesia. In 1939 the

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[1] See *supra*, p. 279, n. 2.]

[2] See *supra*, p. 325, n. 1.]

[3] See *supra*, p. 325, n. 2.]

German military occupation authorities in Poland relieved him of his functions. In 1942, after a period of unemployment, he obtained a post in a German " reinvestment trust company " at C. which he held, however, only until, after the annexation of Eastern Upper Silesia by the German Reich in 1942, he was compulsorily conscripted into the German army. He served in Upper Silesia and in Norway. In 1944, he was sentenced to two years' imprisonment for a disciplinary offence. During his imprisonment and as a result of severe climatic conditions and the forced labour which he was compelled to do, he contracted osseous tuberculosis. In view of this, the German authorities declared him to be a war invalid. In 1951, the applicant began a series of representations to obtain from the German Federal authorities either reinstatement in the public service or the grant of a pension. He applied in turn to the Minister of the Interior (*Interministerium*) at G., to the Insurance Office (*Versorgungsamt*) of B., to the Pensions Office of G. and to the Mayor of B. All these authorities rejected the applicant's requests, the last on August 6, 1954, on the ground that he was not in the public service on May 8, 1945, as required by the relevant provisions of German law. The applicant complained of the attitude of the above-mentioned authorities and contended that they had misinterpreted the said provisions. He now claimed reinstatement in the public service or compensation or a corresponding pension.

Held: that the application must be rejected. The matters complained of occurred before the entry into force of the European Convention on Human Rights; the applicant had not exhausted the local remedies; and in any event employment in the public service was not one of the rights guaranteed by the Convention.

The Commission said: " The original facts of the case, as well as the first steps taken by the applicant, relate to a period prior to September 3, 1953, the date of the entry into force, in respect of the German Federal Republic, of the Convention for the Protection of Human Rights and Fundamental Freedoms.

"As regards the case in general, under the terms of Article 26 of the Convention,[1] the European Commission of Human Rights can only deal with a matter after the domestic remedies have been exhausted, according to the generally recognized rules of international law and within a period of six months from the date on which the final decision was taken. The applicant has not, however, made use of any judicial remedy that was available to him. Moreover, an examination of the file, as it stands, does not disclose the existence of special circumstances such as to relieve the applicant,

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[[1] Article 26 of the Convention provides as follows:

" The Commission may only deal with the matter after all domestic remedies have been exhausted, according to the generally recognised rules of international law, and within a period of six months from the date on which the final decision was taken."]

according to the generally recognized rules of international law, of the obligation to exhaust the domestic remedies available to him. It appears, therefore, that the applicant has not observed the provisions, cited above, of Article 26 in regard to the exhaustion of local remedies. The application should accordingly be rejected under Article 27, paragraph 3, of the Convention.[1]

"Moreover, under the terms of its first Article,[2] the Convention guaranteed only the rights and freedoms set forth in its first Section, and only the alleged violation of one of these rights and freedoms can, according to Article 25, paragraph 1,[3] be the subject of an application admissible before the Commission. The matter of the public service, which is the subject of the application is, in principle, outside the matters covered by the first Section of the Convention; it appears, therefore, that the application should accordingly be rejected in pursuance of Article 27, paragraph 2, of the Convention."[4]

[Report: *Documents et Décisions*, 1955–56–57, p. 207 (in French).]

The Individual in International Law—Human Rights and Freedoms—European Convention for Protection of—European Commission of Human Rights—Individual Applications—Rights and Freedoms Guaranteed in Convention—Right to Appeal on Facts Not Guaranteed—Failure to Exhaust Local Remedies.

Re APPLICATION NO. 277/57 (X., Y. and Z., represented by B. *v.* GERMAN FEDERAL REPUBLIC).

European Commission of Human Rights. December 20, 1957.

(Waldock, President; Eustathiades, Berg, Faber, Beaufort, Dominedo, Süsterhenn, Petren, Jansson-Pevtschin, Sørensen, Crosbie, Skarphedinsson, Erim.)

THE FACTS.—By a letter dated March 21, 1957, Mr. B., a barrister practising at C. in the German Federal Republic, informed the Secretariat of the Commission that Z. had been arrested on January 22 and X. and Y. on January 23, 1957. He stated that all three persons were in preventive detention in the prison at C., on two charges, *viz.*: (1) having knowingly contravened the decree whereby the Federal Constitutional Court (*Bundesverfassungsgericht*) on August 17, 1956, had ordered the dissolution of the German Communist Party as being unconstitutional, and (2) having formed a Communist "triumvirate". Immediately after their arrest, the applicants submitted an application for conditional release. On January 31, 1957, the *Landgericht* rejected X.'s application, and on February 25, 1957, it rejected the applications of Y. and Z.

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[1] See *supra*, p. 280, n. 1.]

[2] Article 1 of the Convention reads as follows:
"The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention."]

[3] See *supra*, p. 335, n. 1.]

[4] See *supra*, p, 279, n. 2.]

The applicants lodged an appeal from these decisions, which the Court of Appeal of C. rejected on March 7, 1957. Both Courts based their refusal of conditional release on the risk that the men might abscond or destroy the evidence.

The applicants, through their Counsel, formally denied the accusations made against them. They contended, however, that in any case the charge and the arrest, and consequently the detention, were illegal on the ground that the above-mentioned order of the Federal German Constitutional Court violated Articles 1, 5 to 11, and 14 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, 1950.[1] They now requested

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[[1] Articles 1, 5–11 and 14 of the Convention provide as follows:

Article 1

" The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of the Convention."

Article 5

" (1) Everyone has the right to liberty and security of person.

" No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:

" (*a*) the lawful detention of a person after conviction by a competent court;

" (*b*) the lawful arrest or detention of a person for non-compliance with the lawful order of a court or in order to secure the fulfilment of any obligation prescribed by law:

" (*c*) the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so;

" (*d*) the detention of a minor by lawful order for the purpose of educational supervision or his lawful detention for the purpose of bringing him before the competent legal authority;

" (*e*) the lawful detention of persons for the prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholics or drug addicts or vagrants;

" (*f*) the lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition.

" (2) Everyone who is arrested shall be informed promptly, in a language which he understands, of the reasons for his arrest and of any charge against him.

" (3) Everyone arrested or detained in accordance with the provisions of paragraph 1 (*c*) of this Article shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial.

" (4) Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.

" (5) Everyone who has been the victim of arrest or detention in contravention of the provisions of this Article shall have an enforceable right to compensation."

Article 6

" (1) In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.

the Commission to intervene on their behalf and to cause the authorities of the Federal Republic of Germany to order their immediate release. If their liberation could not be obtained by means of a friendly settlement, they asked the Commission to declare that the German Federal Republic had violated the Convention and to refer the matter to the Committee of Ministers of the Council of Europe.

By letters dated November 1 and December 10, 1957, Mr. B. informed the Secretariat that Z. had been sentenced by the *Landgericht* to one year's imprisonment on April 30, 1957. It appears from the text of the judgment that X. and Y were acquitted for lack of evidence. Z., however, was sentenced for failure to deliver

" (2) Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.

" (3) Everyone charged with a criminal offence has the following minimum rights:

" (*a*) to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;

" (*b*) to have adequate time and facilities for the preparation of his defence;

" (*c*) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;

" (*d*) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;

" (*e*) to have the free assistance of an interpreter if he cannot understand or speak the language used in court."

Article 7

" (1) No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed.

" (2) This Article shall not prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognised by civilised nations."

Article 8

" (1) Everyone has the right to respect for his private and family life, his home and his correspondence.

" (2) There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

Article 9

" (1) Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.

" (2) Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others."

Article 10

" (1) Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.

to the authorities a printing press belonging to the German Communist Party and for having harboured an official of that Party. On July 4, 1957, Mr. B. had lodged an appeal (*Revision*) against the decision of the *Landgericht* on the ground that it was contrary to law, to the Constitution and to the European Convention on Human Rights, 1950. The Federal Court of Justice at Karlsruhe rejected the appeal as manifestly ill-founded. Mr. B. now claimed that the legal remedies were *ipso facto* exhausted, and demanded the annulment of the above-mentioned decisions of the *Landgericht* and the Federal Court of Justice. He maintained that " no one can be sentenced to one year's imprisonment for failure to hand over (to the authorities) a printing press belonging to the German Communist Party and for having harboured a former official of that Party ", and that the sentence and order in question infringed Articles 5 to 11 and 14 of the Convention of 1950. He also contended that, under a Law of August 3, 1951, in political cases of this kind there was not, as there was in ordinary cases, a right of appeal on questions of fact from the Courts of first instance.

Held: that the application must be rejected. (i) The applicants had not exhausted all the judicial remedies available to them; (ii) the conviction of Z. did not infringe any of the rights protected by the European Convention on Human Rights; and (iii) the principle that an appeal must lie on questions of fact is not one of those rights.

The Commission said: " The Federal Constitutional Court (*Bundesverfassungsgericht*) decided on August 17, 1956, that the German Communist Party (K.P.D.) was anti-constitutional and that it should be dissolved and prohibited. The German Communist

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" (2) The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary."

Article 11

" (1) Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests.

" (2) No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others. This Article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces, of the police or of the administration of the State."

Article 14

The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status."]

Party, on February 11, 1957, lodged an application with the Commission, requesting the Commission to find that the Government of the Federal Republic of Germany by bringing about the dissolution and abolition of the German Communist Party, had violated its obligations under the Convention. However, the Commission on July 20, 1957, declared the said application to be inadmissible in pursuance of Article 27, paragraph 2, of the Convention,[1] as being incompatible with the provisions thereof.

"With regard to the applicants' complaints made against their arrest and their preventive detention: According to Article 26 of the European Convention for the Protection of Human Rights and Fundamental Freedoms,[2] the Commission may only deal with a matter after all domestic remedies have been exhausted, according to the generally recognised rules of international law and within a period of six months from the date on which the final decision was taken. The applicants did not avail themselves of their right to appeal to the Federal Constitutional Court (*Bundesverfassungsgericht*) against the decision of March 7, of the Court of Appeal of C. Recourse to the Federal Constitutional Court, for matters within the competence of that Court, is a domestic remedy which in principle falls within the scope of the provision contained in Article 26 of the Convention. Moreover, an examination of the file does not disclose the existence of any special circumstances which would have released the applicants, according to the generally recognised rules of international law, from the obligations to exhaust the domestic remedies at their disposal. It therefore appears that the applicants have not satisfied the conditions laid down in Article 26 of the Convention in regard to the exhaustion of local remedies. The application should in this respect, in pursuance of Article 27, paragraph 3, of the Convention[3], accordingly be rejected.

"With regard to the complaint by the applicant Z. concerning his conviction on April 30, 1957, by the tribunal of C.: An examination of the file does not disclose any *prima facie* violation of the rights and freedoms set forth in the Convention, in particular of the Articles invoked by the applicant. It therefore appears that the application is in this respect manifestly ill-founded [and] the application should, in pursuance of Article 27, paragraph 2, of the Convention,[4] accordingly be rejected.

"With regard to the complaint by the applicant Z. that, in political cases such as his own, the decision of the lower Court on questions of fact is final: Under the terms of Article 1, the Convention guarantees only those rights and freedoms set forth in Section I;

[[1] See *supra*, p. 279, n. 2.]
[[2] See *supra*, p. 280, n. 1.]
[[3] See *supra*, p. 280, n. 1.]
[[4] See *supra*, p. 279, n. 2.]

and in accordance with Article 25 [paragraph] (1),[1] only the alleged violation of one of these rights or freedoms by a Contracting Party can be the subject of an application admissible by the Commission.

" The principle that an appeal must lie with regard to the facts to a higher court is not included, in principle, among those rights and freedoms. It therefore appears that the application is in this respect incompatible with the provisions of the Convention; it should, in pursuance of Article 27, paragraph 2, of the Convention, accordingly be rejected."

[Report: *Documents and Decisions*, 1955–56–57, p. 219 (in English).]

The Individual in International Law—Human Rights and Freedoms—European Convention for Protection of—European Commission of Human Rights—Individual Applications—Rights and Freedoms Guaranteed in Convention—Right to a Nationality Not Guaranteed.

Re APPLICATION NO. 288/57 (X. *v.* GERMAN FEDERAL REPUBLIC).

European Commission of Human Rights. August 29, 1957.

(Waldock, President; Eustathiades, Berg, Faber, Beaufort, Dominedo Süsterhenn, Petren, Janssen-Pevtschin, Sørensen, Crosbie, Skarphedinsson, Erim.)

THE FACTS.—In 1933 the applicant abandoned his Luxembourg nationality of origin and adopted German nationality. In 1934, however, a decision of the *Regierungspräsident* of C. in Germany, where he was then living, deprived him of his German nationality because of his " communist and separatist activities ". Since then he had been stateless. In 1944, he was forced to work for the Todt Organization and was interned for six months in a labour camp of that Organization. The applicant applied to the Office of Indemnification (*Regierungsbezirksamt für Wiedergutmachung und verwaltete Vermögen*) of C. for compensation for the loss caused to him by this imprisonment. The Office rejected his request on October 23, 1956. He appealed against this decision to the Tribunal (*Landgericht*) of C., which on December 19, 1956, dismissed his appeal on the ground that the applicant, having been convicted in 1951 of certain serious crimes and sentenced to seven years' imprisonment and loss of civil rights, came within the terms of Article 6, paragraph 1 (3) and (4), of the Federal Restitution Law (*Bundesentschädigungsgesetz*) of September 18, 1953, which provided that persons who had, after May 8, 1945, been sentenced to deprivation of civil rights or more than three years' imprisonment, were excluded from the right to receive compensation. The applicant then applied to the Court of Appeal of B. for legal aid to enable him to appeal further; this was refused on May 16, 1957, on the ground that the appeal had no chance of success. The applicant had also submitted to the Diet (*Landtag*) of the *Land* of F. a petition in which he claimed to be the victim of " a violation of the rights of man ", but without giving any further details. This petition also was rejected.

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[1] See *supra*, p. 335, n. 1.]

The applicant now (1) complained that he had been persecuted by the *Regierungspräsident* of C. between 1946 and 1949, as a result of which he had three times been deprived of his house and his means of subsistence, (2) claimed damages for the wrong done to him by the authorities of the *Land* of F., (3) claimed compensation for loss caused by his internment, and (4) protested against the loss of his German nationality.

Held: that the application must be rejected. Most of the matters complained of occurred before the coming into force of the European Convention for the Protection of Human Rights and Fundamental Freedoms, 1950. As regards the rest, there had been no violation of the rights protected by the Convention; in particular, the Convention did not protect the right to a nationality.

The Commission said: " The original facts of the case, and notably the imprisonment of the applicant, the alleged persecution and the sentence of 1951, relate to a period prior to the entry into force of the Convention for the Protection of Human Rights and Fundamental Freedoms in respect of the German Federal Republic. According to the generally recognized principles of international law, the said Convention governs, for each Contracting Party, only facts subsequent to its entry into force. The application should accordingly be rejected on this ground, as inadmissible *ratione temporis*.

" Moreover, as regards the decisions of the Office of Indemnification of C., of the Tribunal (*Landgericht*) of C., of the Court of Appeal (*Oberlandesgericht*) of B., and of the Diet of the *Land* of F., an examination of the file does not disclose a *prima facie* violation of any of the rights and freedoms set forth in the Convention for the Protection of Human Rights and Fundamental Freedoms, and particularly of the right to the proper administration of justice, under the conditions fixed and within the limits defined in Article 6 of the said Convention.[1] It appears, therefore, that the application is in this respect manifestly ill-founded, and it should accordingly be rejected on this ground in pursuance of Article 27, paragraph 2, of the Convention.[2]

" Finally, in so far as the applicant complains of the loss of his German nationality, under the terms of its Article 1 the Convention guarantees only the rights and freedoms set forth in its first Section, and only the alleged violation of one of these rights and freedoms can, according to Article 25, paragraph 1,[1] be the subject of an application admissible before the Commission. The right to a nationality is not among the said rights and freedoms. It appears, therefore, that the application is in this respect incompatible with the provisions of the Convention, and it should accordingly be rejected on this last ground in pursuance of Article 27, paragraph 2, of the Convention."

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[1] [See *supra*, pp. 342–3, n. 1.]

[2] [See *supra*, p. 279, n. 2.]

[Report: *Documents et Décisions*, 1955–56–57, p. 209 (in French).]

The Individual in International Law—Position of—Human Rights and Freedoms—European Convention for Protection of—Deprivation of Liberty (Article 5)—Internment.

Re APPLICATION NO. 99/55 (X. *v.* GERMAN FEDERAL REPUBLIC).

European Commission of Human Rights. December 17, 1955.

(Waldock, President; Eustathiades, Berg, Faber, Beaufort, Dominedo, Süsterhenn, Petren, Janssen-Pevtschin, Sørensen, Black, Jonasson, Akbay, Fuest.)

THE FACTS.—The applicant was sentenced by a German tribunal, applying Articles 42 (*e*) and 20 (*a*) of the German Penal Code, to internment for an indefinite period. He asked the Commission to examine the compatibility of the said Articles with the provisions of the European Convention for the Protection of Human Rights and Fundamental Freedoms, 1950.

Held: that the application must be rejected, the applicant having been convicted by a competent court.

The Commission said: " Under the terms of Article 19 of the Convention,[2] the European Commission of Human Rights was set up to ' ensure the observance of the engagements ' undertaken by the Contracting Parties. It is therefore incumbent on the Commission, when it receives a petition from a private individual, to find out whether, in the case submitted to it, there is or is not a violation of the Convention. It is true that the applicant confines himself in his case to putting before the Commission the question of the compatibility of the German legislation referred to above with the provisions of the Convention; nevertheless, the Commission considers itself able to regard the application as proceeding, in pursuance of the provisions of Article 25,[3] from a person ' claiming to be the victim of a violation by one of the High Contracting Parties of the rights set forth in this Convention '.

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[1] [See *supra*, p. 335, n. 1.]
[2] [See *supra*, p. 333, n. 1.]
[3] [See *supra*, p. 335, n. 1.]

"Article 5 of the Convention provides that no one shall be deprived of his liberty save in accordance with a procedure prescribed by law, for example, in the case of 'lawful detention of a person after conviction by a competent court' (Article 5, paragraph 1 (*a*)).[1] It appears that those conditions are present in this case. Moreover, an examination of the file does not reveal the existence of the violation of any of the rights set forth in the Convention, including those set forth in Article 5. The application should accordingly be rejected by virtue of Article 27, paragraph 2, of the Convention,[2] as manifestly ill-founded.

[Report: *Documents et Décisions*, 1955–56–57, p. 160 (in French).]

NOTE.—See also *Re Application No.* 100/55 (*X.*, *Y. and Z.* v. *German Federal Republic*), reported *infra*, p. 395, and *Re Application No.* 138/55 (*X.* v. *German Federal Republic*), *infra*, p. 371.

The Individual in International Law—Human Rights and Freedoms—European Convention for Protection of—European Commission of Human Rights—Individual Applications—Exercise of Freedoms Subject to Article 17 of Convention—Protection of Rights Guaranteed by Convention—Communist Party of Germany.

Re APPLICATION NO. 250/57 (COMMUNIST PARTY OF GERMANY *ET AL. v.* GERMAN FEDERAL REPUBLIC).

European Commission of Human Rights. July 20, 1957.

(Waldock, President; Eustathiades, Berg, Faber, Beaufort, Dominedo, Süsterhenn, Petren, Janssen-Pevtschin, Sørensen, Crosbie, Skarphedinsson, Erim.)

THE FACTS.—The applicants asked the Commission to declare that the Government of the German Federal Republic, in causing the dissolution and proscription of the German Communist Party, had violated the obligations assumed by it under the European Convention for the Protection of Human Rights and Fundamental Freedoms, 1950, which entered into force in respect of the Federal Republic on September 3, 1953. On August 17, 1956, the Federal Constitutional Court made an order in the following terms:

"(1) The Communist Party of Germany is anti-constitutional.

"(2) The Communist Party of Germany shall be dissolved.

"(3) The creation of organizations to replace the Communist Party of Germany or the continuation of organizations already existing to replace the Communist Party of Germany, are forbidden.

"(4) The property of the Communist Party of Germany shall be confiscated by the Federal Republic of Germany and used for the public benefit."

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[1] For the full text of Article 5 of the Convention see *supra*, p. 342, n. 1.]

[2] See *supra*, p. 279, n. 2.]

The applicants rested their application on the provisions of Articles 9, 10 and 11 of the Convention.[1]

The Government of the German Federal Republic contended that the dissolution of the Communist Party of Germany by the order of the Federal Constitutional Court had a legal basis compatible with the Convention, namely, Article 21, paragraph 2, of the Fundamental Law of the Federal Republic, which provides:

> " Parties which, in their programme or in the attitude of their members, tend to endanger the free and democratic constitutional order or to eliminate it, or to threaten the existence of the Federal Republic of Germany, are anti-constitutional. The question of their anti-constitutionality is for the determination of the Federal Constitutional Court."

Held: that the application must be rejected. The activities of the German Communist Party had been aimed at the destruction of the rights and freedoms protected by the Convention.

The Commission said: " The rights and freedoms set forth in Articles 9, 10 and 11 of the Convention can, according to paragraph 2 of each of these Articles, be restricted according to law and subject to the conditions laid down in the Convention. An examination of paragraph 2 of each of the Articles 9, 10 and 11 is not necessary in this case, by reason of the existence in the Convention of a more general provision in Article 17, which provides as follows:

> " Nothing in this Convention may be interpreted as implying for any State, group or person, any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms set forth herein or at their limitation to a greater extent than is provided for in the Convention."

" This fundamental provision of the Convention has as its aim the protection of the rights which that Convention sets forth, by the protection of the free functioning of democratic institutions (see Preparatory Work, *Reports of the Consultative Assembly*, 1949, 1st Session, pages 1235, 1237, 1239: ' The purpose is to prevent totalitarian forces from being able to exploit for their own benefit the principles laid down in the Convention, that is, to invoke the freedoms in order to suppress the human rights.'). A similar motive seems to have inspired the German legislature in enacting Article 21 of the Fundamental Law. It is necessary to enquire whether the application in the present case of the provisions of that Article, is in conformity with Article 17 [of the Convention]. It is necessary, therefore, to consider if the applicants have, within the meaning of this last-mentioned provision, engaged in any activity or performed any act aimed at the destruction of any of the rights and freedoms set forth in the Convention or at their limitation to a greater extent than is provided for in the Convention.

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[1] For the text of these Articles see *supra*, pp. 343–4, n.]

The petition, which was also in the names of two of the members of the Managing Committee of the Party, was communicated by the Commission to the German Federal Republic with a request for that Government's observations. These when received were transmitted to the applicants, who submitted their counter-observations thereon.

" It is agreed: (1) that ' the Communist Party has as its aim the establishment in society of a Communist social system by means of the proletarian revolution and the dictatorship of the proletariat ' (declaration of the Communist Party of Germany reproduced in the judgment of the Federal Constitutional Court;[1] (2) that the Communist Party of Germany continues to state these as its principles.[2]

" Even assuming that its present activities were directed towards the gaining of power solely by the constitutional means open to it under the Fundamental Law of the Federal Republic of Germany, it would in no way follow that it had renounced its traditional aims; on the contrary, the above-mentioned declaration reaffirms the faith of the Communist Party of Germany in these aims. The pursuit of these ultimate aims involves, in the words of the applicants themselves, passing through the stages foreseen by fundamental Communist doctrine and, essentially, the dictatorship of the proletariat. Recourse to dictatorship for the creation of a régime is incompatible with the Convention since it involves the destruction of many of the rights and freedoms protected by the Human Rights Convention. The organization and functioning of the Communist Party of Germany constitute, in this case, an activity within the meaning of Article 17.

" It follows from the above that the application of the Communist Party of Germany can find no basis in any provision of the Convention, in particular in Articles 9, 10 and 11. It should accordingly be rejected as inadmissible in pursuance of Article 27, paragraph 2, of the Convention,[3] as incompatible with the provisions of the Convention."

[Report: *Documents et Décisions*, 1955–56–57, p. 222 (in French).]

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[1] See *Entscheidungen des Bundesverfassungsgerichts*, Vol. 5, 1956, p. 163.]

[2] *Loc. cit.*, pp. 191, 193–195.

[[3] See *supra*, p. 279, n. 2.]

The Individual in International Law—Human Rights and Freedoms—European Convention for Protection of—European Commission of Human Rights—Individual Applications—Admissibility of—Manifest Lack of Foundation—Virtual Appeal from Alleged Errors of Municipal Courts.

Re APPLICATION NO. 94/55 (X. *v.* GERMAN FEDERAL REPUBLIC).

European Commission of Human Rights. May 29, 1956.

(Waldock, President; Eustathiades, Berg, Faber, Beaufort, Dominedo, Süsterhenn, Petren, Janssen-Pevtschin, Sørensen, Crosbie, Jonasson, Akbay, Fuest.)

THE FACTS.—The applicant claimed to have been employed from 1929 to 1932 as a primary school teacher, and from 1932 to 1939 as a secondary school teacher in various State schools. In 1939 he was required to resign on account of his anti-Nazi attitude. He then found a post in a private school, but in 1941 he was compelled to leave his new post for the same reasons. After the war, he was engaged by the Mayor of B. as a teacher in a secondary school in that town, but this engagement was revoked a few days later " by order of the higher authorities ". The applicant attributed this decision to the arbitrary intervention of the *Oberpräsident* of the *Land* of C., which intervention was an abuse of his powers. He claimed to have suffered damage to the amount of RM2,995.93 or DM299.59, that is, the amount of salary which he had lost up to September 1, 1946, the date on which he resumed his post as a teacher. The applicant had sought to recover this amount by legal proceedings, but his claim was successively rejected by the Tribunal (*Landgericht*) of B., by the Court of Appeal of F., and by the Federal Court of Cassation (*Bundesgerichtshof*) of Karlsruhe, on the ground that the facts alleged did not constitute an abuse of power by the *Oberpräsident* of the *Land* of C. The applicant now claimed that these decisions were a violation of his fundamental rights, in particular of his right to equitable social security and of his right to work.

The applicant also complained that the administration of the *Land* of C. had, in a decision given on September 5, 1949, unjustly fixed October 1, 1948, as the date on which he resumed his employment as a teacher, for the purpose of calculating the amount of his pension as a secondary school teacher, without taking into account the time he had spent before that as a primary school teacher, that is, from February 21, 1929, to August 31, 1946. The applicant's appeal against that decision was rejected by the Regional Administrative Tribunal (*Landesverwaltungsgericht*) of D. on May 25, 1951. He appealed against this judgment to the higher Administrative Tribunal (*Oberverwaltungsgericht*) of the *Land* of C. which, on January 27, 1955, confirmed the major part of the judgment of 1951.

On the advice of Counsel, the applicant did not appeal against this last judgment to the Federal Administrative Court (*Bundesverwaltungsgericht*) of Berlin, which had in the past consistently declared its incompetence to deal with cases like that of the applicant. The applicant now asked the Commission to give "a first decision".

Held: that the application must be rejected. Many of the matters complained of occurred before the coming into force of the European Convention for the Protection of Human Rights and Fundamental Freedoms, 1950. The remainder did not constitute a violation of any right protected by the Convention. In any event, the Commission was not a court of appeal from decisions of municipal courts.

The Commission said: "The facts of which the applicant complains relate to a period prior to the entry into force of the Convention in respect of the German Federal Republic (September 3, 1953). The Convention only governs matters occurring subsequently to its entry into force in respect of the Contracting Party concerned and the application should accordingly be rejected on this ground as inadmissible *ratione temporis*.

"As regards the legal proceedings and actions instituted by the applicant after the date of the entry into force of the Convention in respect of the German Federal Republic, an examination of the file does not disclose a *prima facie* violation of any of the rights recognized in the Convention, and in particular of the right to the proper administration of justice, under the conditions and within the limits provided in Article 6 of the Convention.[1] It should be noted that the European Commission of Human Rights was not set up to deal with or put right, as a higher court of appeal, alleged errors of law or fact committed by the municipal tribunals of Contracting Parties, when their decisions are given wholly within their jurisdiction, but rather, according to Article 13,[2] to ensure the observance of the engagements undertaken by the parties in the Convention. The competence of the Commission can extend only to those cases in which the decisions of municipal courts have been given in disregard of fundamental rights protected by the Convention, which is not the case here. The same applies to the inability of the applicant to assert his alleged right before the Administrative Court of Berlin as the court of third instance, since the exercise of such a right is subject to the rules of procedure laid down by municipal law. The application should accordingly be rejected on these last two grounds, in pursuance of Article 27, paragraph 2, of the Convention,[1] as manifestly ill-founded."

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[1] Article 6 of the Convention provides, in part:
"(1) In the determination of his civil rights and obligations . . ., everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law . . ."]

[2] Article 13 of the Convention provides as follows:
"Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity."]

[Report: *Documents et Décisions*, 1955–56–57, p. 249 (in French).]

The Individual in International Law—Human Rights and Freedoms—European Convention for Protection of—European Commission of Human Rights—Individual Applications—Admissibility of—Manifest Lack of Foundation—Virtual Appeal from Alleged Errors of Municipal Courts.

Re APPLICATION NO. 125/55 (X. *v.* SWEDEN).

European Commission of Human Rights. September 29, 1956.

(Waldock, President; Eustathiades, Berg, Faber, Beaufort, Dominedo, Süsterhenn, Petren, Janssen-Pevtschin, Sørensen, Crosbie, Jonasson, Akbay, Fuest.)

THE FACTS.—In 1954, the applicant brought an action in the Tribunal of first instance (*Radhusrätt*) of B., Sweden, against C. and D., sheriffs attached to the Tribunal of B., for having " violated his home and caused annoyance to him " during the course of a distraint on his property ordered by the Court in respect of unpaid costs awarded against the applicant in earlier proceedings. The action was dismissed, as was an appeal in 1955 to the Court of Appeal (*Svea Hovrätt*) of B. and a further appeal in the same year to the Swedish Supreme Court (*Högsta Domstol*). The applicant now contended that the distraint had been illegal and in violation of Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, 1950.[2] He also contended that the various decisions of the Courts set out above were erroneous, since they were based on paragraphs 59 and 60 of the Swedish Law of Distraint, whereas certain other provisions of the Swedish Penal Code[3] were applicable in his case.

Held: that the application must be rejected.

The Commission said: "An examination of the file does not disclose, in general, a violation of any of the rights recognized in the European Human Rights Convention, in particular in Articles 6[4] and 8[2]. It should be particularly noted, as regards judicial decisions which are challenged, that the European Commission of Human Rights was not set up to deal, as a court of appeal, with alleged errors of law or fact on the part of the municipal courts of Contracting Parties, when the decisions given are wholly within their jurisdiction, but rather, according to Article 19 of the Convention,[1] to ensure the observance of the engagements undertaken by the Parties in the Convention. The competence of the Commission to pronounce upon the decisions of the said courts can only cover cases where it would appear possible that such decisions have been given in disregard of rights and freedoms guaranteed by the Convention; an examination of the file does not disclose the appearance of any such violation. It appears, therefore, that the application is manifestly ill-founded and it should accordingly be rejected in pursuance of Article 27, paragraph 2, of the Convention.[2]"

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[1] See *supra*, p. 279, n. 2.]

[2] See *supra*, p. 343, n.]

[3] Chapter 20, para. 6 (2); Chapter 75, para. 26; Chapter 11, para, 11; and Chapter 25, para. 4.]

[4] See *supra*, pp. 342–3, n. 1.]

[Report: *Documents et Décisions*, 1955–56–57, p. 251 (in French).]

The Individual in International Law—Human Rights and Freedoms—European Convention for Protection of—Protocol to Convention—European Commission of Human Rights—Individual Applications—Manifest Lack of Foundation—Abuse of Right of Petition—No Details Given.

Re APPLICATION NO. 150/56 (X. *v.* GERMAN FEDERAL REPUBLIC).

European Commission of Human Rights. September 29, 1956.

(Waldock, President; Eustathiades, Berg, Faber, Beaufort, Dominedo, Süsterhenn, Petren, Janssen-Pevtschin, Sørensen, Crosbie, Jonasson, Akbay, Fuest.)

THE FACTS.—The applicant, who was a refugee from East Germany, complained in a general way of the insufficiency of the indemnity for war damage which had been paid to him under the Federal German Law concerning the Apportionment of the Expenses of the War (*Lastenausgleichgesetz*). The applicant did not complete and return the form of application sent to him by the Secretariat on January 27, 1956, together with an acknowledgement of receipt, nor did he send any explanatory letter instead of the form. The notice of receipt, signed by the applicant on January 30, 1956, was in the file.

Held: that the application must be rejected.

The Commission said: "The applicant has not furnished sufficient details nor produced anything to support his allegations, in spite of an express request made to him to do so. Moreover, an examination of the file, as it stands, does not disclose a violation of any of the rights set forth in the Convention. It appears, therefore, that the application is manifestly ill-founded; it should consequently be rejected in accordance with Article 27, paragraph 2, of the Convention.[3]

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[1] See *supra*, p. 333, n. 1.]

[2] See *supra*, p. 279, n. 2.]

[3] See *supra*, p. 279, n. 2.]

" In so far as the grounds of the application could fall within the field of application of the first Article of the Protocol to the Convention,[1] it must be observed that the Protocol, under the terms of its Article 6,[2] only binds Signatories who have ratified it. The Federal Republic of Germany has not yet ratified the Protocol, and the application should accordingly be rejected on this ground also, as brought against a State not bound by the Protocol."

[Report: *Documents et Décisions*, 1955–56–57, p. 181 (in French).]

NOTE.—See also the following decisions of the Commission, reported in the present volume: *Re Application No.* 254/57, *supra*, p. 284; *Re Application No.* 99/55, *supra*, p. 348; *Re Application No.* 250/57, *supra*, p. 349; *Re Application No.* 33/55, *infra*, p. 572; *Re Application No.* 89/55, *infra*, p. 363; *Re Application No.* 100/55, *infra*, p. 395; *Re Application No.* 104/55, *infra*, p. 365; *Re Application No.* 167/56, *infra*, p. 372; *Re Application No.* 180/56, *infra*, p. 374; *Re Application No.* 188/56, *infra*, p. 404; *Re Application No.* 217/56, *infra*, p. 376; *Re Application No.* 268/57, *infra*, p. 378; *Re Application No.* 323/57, *infra*, p. 380.

The Individual in International Law—Human Rights and Freedoms—European Convention for Protection of—European Commission of Human Rights—Individual Applications—Manifest Lack of Foundation—*Ex Officio* Examination by Commission.

Re APPLICATION NO. 261/57 (X. *v.* GERMAN FEDERAL REPUBLIC).

European Commission of Human Rights. December 16, 1957.

(Waldock, President; Eustathiades, Berg, Faber, Beaufort, Dominedo, Süsterhenn, Petren, Janssen-Pevtschin, Sørensen, Crosbie, Skarphedinsson, Erim.)

THE FACTS.—The applicant, a German national, had in 1955 submitted to the Commission an application (No. 135/55[3]) which was, on May 31, 1956, rejected as manifestly ill-founded. In that application the applicant had complained: (a) that on June 18, 1955, he had been convicted by a German court and sentenced as an habitual criminal to a term of imprisonment for homosexuality; (b) that his appeal against conviction had been rejected and the cross-appeal of the Public Prosecutor allowed, with the result that his sentence had been increased; (c) that his conviction had been due to irregularities and, in particular, to perjury; and (d) that he had received insufficient payment for work done by him during his imprisonment.

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[1] [Article 1 of the Protocol of 1952 provides as follows:

" Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.

" The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties."]

[2] [Article 6 of the Protocol reads, in part, as follows:

" This Protocol shall be open for signature by the Members of the Council of Europe, who are the signatories of the Convention; it shall be ratified at the same time as or after the ratification of the Convention. It shall enter into force after the deposit of ten instruments of ratification. As regards any signatory ratifying subsequently, the Protocol shall enter into force at the date of the deposit of its instrument of ratification. . . ."]

[3] Not reported.

In the present application, whilst repeating the complaints listed above, the applicant alleged that the conviction referred to was essentially motivated by his Polish origin and by his anti-fascist political views. He asserted, moreover, that the general prohibition of homosexuality in Germany was an infringement of human rights, seeing, on the one hand, that the same sexual behaviour was not punished in other countries and, on the other hand, that, even in Germany, homosexuality between women was not punished. The applicant complained also of the rejection by the competent Court, on an unspecified date, of his request for a rehearing.

The applicant did not produce any documents relating directly to his application. He did, however, send to the Commission on November 1, 1957, after several requests from the Secretariat, some press-cuttings and a copy of the judgment of the Federal Constitutional Court of May 10, 1957. That judgment declared that the suppression of homosexuality by the German penal law, and the limitation of this measure to homosexuality between men, were not incompatible with the fundamental law (*Grundgesetz*). The applicant claimed that the proceedings which resulted in that judgment should be considered as a " test case " in regard to his own case. He contended that the judgment, by which the Federal Constitutional Court had definitively settled the law on the matter, relieved him of the obligation to exhaust the local remedies available to him in Germany.

Held: that the application must be rejected. So far as it merely repeated the previous application, it must be dismissed for that reason. The two new grounds alleged did not disclose a *prima facie* violation of the European Convention for the Protection of Human Rights and Fundamental Freedoms, 1950, since discrimination between the sexes was in certain circumstances permissible. In any event, the applicant had not exhausted the judicial remedies available to him.

The Commission said:

" In so far as the application concerns the applicant's conviction for homosexuality.—According to Article 27, paragraph 1 (*b*), of the

Convention,[1] the Commission cannot deal with any application submitted under Article 25[2] which is substantially the same as a matter which has already been examined by the Commission if it contains no relevant new information. The present application is not distinguishable from Application No. 135/55, as regards the matter indicated above, except as to the two further grounds invoked by the applicant; these grounds are not, however, such as to alter the juridical fact on which the right invoked is based.

" On the other hand, under the terms of Article 19 of the Convention, the Commission was set up 'to ensure the observance of the engagements' undertaken by the High Contracting Parties; it is therefore incumbent on the Commission, when it receives an application from any person, to ascertain whether there is or is not in the case submitted to it a *prima facie* violation of the Convention. The Commission proceeds *ex officio* to this examination so as to determine whether the subject-matter of the application falls, in essence, within the scope of the Convention, without the applicant's having to invoke a specific Article of the Convention on which he relies. In the present case, the Commission did in fact state, in its decision of May 31, 1956, that an examination, even *ex officio*, of the file did not disclose 'any *prima facie* violation by the German Courts of one of the rights recognized in the Convention,' including therefore Articles 8[3] and 14,[4] on which the two new grounds invoked by the applicant appear to depend. The fact remains that the Commission stated, in its decision of December 17, 1955, on the admissibility of Application No. 104/55,[5] that the Convention allows a High Contracting Party to make homosexuality punishable by law, since the right to respect for private and family life may, in a democratic society, be the object of interference in accordance with the law of that Party for the protection of health or morals. In the same decision, as well as in that given on the same day concerning the admissibility of Application No. 54/55,[6] the Commission further stated that Article 14 of the Convention,[7] concerning discrimination on the ground of sex, does not exclude the possibility of a High Contracting Party making a distinction between the sexes in measures which it takes for the protection of health or

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[[1] Article 27, para. 1 (*b*), of the Convention provides:

" (1) The Commission shall not deal with any petition submitted under Article 25 which . . . (*b*) is substantially the same as a matter which has already been examined by the Commission or has already been submitted to another procedure of international investigation or settlement and if it contains no relevant new information."]

[[2] See *supra*, p. 335, n. 1.]

[[3] See *supra*, p. 343, n.]

[[4] See *supra*, p. 344, n.]

[[5] *Re Application No.* 104/55 (*X.* v. *German Federal Republic*): *Documents et Décisions*, 1955–56–57, p. 228 (reported *infra*, p. 365, in this volume).]

[[6] Not reported.]

[[7] See *supra*, p. 344, n.]

morals in conformity with Article 8, paragraph 2, of the Convention.[1] The new grounds invoked by the applicant are thus incompatible with the practice of the Commission before the date of the rejection of Application No. 135/55 and confirmed since then.

" It follows from the above that the present application is substantially the same as Application No. 135/55 and that it contains no relevant new information. It should accordingly be rejected on this ground in pursuance of Article 27, paragraph 1 (*b*), of the Convention.

" In so far as the application is concerned with the request by the applicant for a rehearing of his trial.—On the one hand, an examination of the file, as it stands, does not disclose a *prima facie* violation of any of the rights and freedoms recognized in the European Convention for the Protection of Human Rights and Fundamental Freedoms, and in particular of the right to the proper administration of justice under the conditions fixed and within the limits defined by Article 6 of the said Convention.[2] It should particularly be noted as regards the judicial decisions challenged by the applicant that the European Human Rights Commission was not set up as a court of appeal, to deal with alleged errors of law or fact committed by the domestic courts of Contracting Parties when their decisions are given wholly within their jurisdiction, but rather, according to Article 19 of the Convention, to ensure the observance of the engagements undertaken by the Parties in the Convention. Errors of law or fact which national tribunals may have committed thus concern the Commission, at the stage of examining the admissibility of applications, only in so far as they seem to involve a violation of one of the rights and freedoms exhaustively enumerated in the Convention. More generally, the Commission has competence to pronounce upon the decisions of domestic courts only when it appears possible that the decisions have been given in disregard of rights and freedoms guaranteed by the Convention. An examination of the file does not disclose the appearance of any such violation. It appears, therefore, that this part of the application is manifestly ill-founded, and it should accordingly be rejected on this ground, in pursuance of Article 27, paragraph 2, of the Convention.[3]

" On the other hand, under the terms of Article 26 of the Convention,[4] the Commission may only deal with a matter after all domestic remedies have been exhausted, according to the generally recognized rules of international law, and within a period of six months from the date on which the final decision was taken. The applicant did not make use of the judicial remedies available to him to appeal against the decision rejecting his request for a rehearing, in particular before the Federal Constitutional Court (*Bundesverfassungsgericht*), asserting, at least, the grounds for complaint which he could have put forward if necessary, in respect of various procedural abuses of which he claimed to be the victim. In addition, an examination of the file does not disclose the existence of special circumstances such as to relieve the applicant, according to the generally recognized rules of international law, from the obligation of exhausting the domestic remedies available to him. It appears, therefore, that the applicant has not satisfied the provisions cited above of Article 26 of the Convention concerning the exhaustion of domestic remedies; this part of the application should therefore be rejected on this ground also, in pursuance of Article 27, paragraph 3,[1] of the Convention."

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[1] See *supra*, p. 343, n.]
[2] See *supra*, pp. 342–3, n. 1.]
[3] See *supra*, p. 279, n. 2.]
[4] See *supra*, p. 340, n. 1.]

[Report: *Documents et Décisions*, 1955–56–57, p. 255 (in French).]

The Individual in International Law—Human Rights and Freedoms—European Convention for Protection of—European Commission of Human Rights—Individual Applications—Admissibility of—Manifest Lack of Foundation—Virtual Appeal from Alleged Errors of Municipal Courts.

Re APPLICATION NO. 285/57 (MRS. X. *v.* GERMAN FEDERAL REPUBLIC).

European Commission of Human Rights. August 29, 1957.

(Waldock, President; Eustathiades, Berg, Faber, Beaufort, Dominedo, Süsterhenn, Petren, Janssen-Pevtschin, Sørensen, Crosbie, Skarphedinsson, Erim.)

THE FACTS.—The applicant, a German national, had previously, on April 19, 1956, submitted to the Commission an application, registered under file No. 171/56[2], in which she complained that the *Regierungspräsident* of B. and the Tribunal (*Landgericht*) of the same town had refused—the former on November 23, 1954, and the latter on an unspecified date—to award her compensation for the damage caused to her by her confinement in a lunatic asylum between 1940 and 1945 which, she alleged, had been based on political reasons. Her claims were dismissed as the result of findings that the reason for her confinement in the asylum had been her mental condition. On September 28, 1956, the Commission rejected the first application as inadmissible *ratione temporis*, since the facts alleged related to a period prior to September 3, 1953 (the date of the entry into force of the European Convention for the Protection of Human Rights and Fundamental Freedoms, 1950) and, in addition, as being manifestly ill-founded and incompatible with the provisions of the Convention.

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[1] [See *supra*, p. 280, n. 1.]

[2] Not reported.

In her present application, the applicant repeated the complaints which she had made previously. It appeared also, from fresh documents in her file, that she had been convicted on July 6, 1956, by the Magistrates (*Schöffengericht*) of C. to six months' imprisonment for theft, and that on November 9, 1956, she had been ordered by the local Tribunal (*Amtsgericht*) of C. to make restitution of a part of the stolen property. She now protested her innocence of the charges and stated that the property in question had been handed over to her, as a gift or in the alternative as wages, by the person for whom she was working at the time as a servant. She claimed payment of the wages to which she considered herself entitled.

Held: that the application must be rejected. So far as it merely repeated the previous application, it must be dismissed for that reason; for the rest, the applicant had not exhausted the local judicial remedies available to her, and the Commission could not act as a court of appeal from the judgments of municipal courts.

The Commission said: " In so far as the application reproduces the complaints set forth in Application No. 171/56.—According to Article 27, paragraph 1 (*b*), of the Convention for the Protection of Human Rights and Fundamental Freedoms,[1] the Commission shall not deal with an application submitted under Article 25[2] which is substantially the same as a matter which has already been examined by the Commission and if it contains no relevant new information. It appears that the present application is substantially the same as Application No. 171/56 and that it contains no relevant new information. Accordingly, it should be rejected on this ground, in pursuance of the aforementioned provisions of Article 27, paragraph 1 (*b*), of the Convention.

" In so far as the application differs from Application No. 171/56.—On the one hand, under the terms of Article 26 of the Convention,[3] the Commission can only deal with a matter after all domestic remedies have been exhausted according to the generally recognized rules of international law and within a period of six months from the date on which the final decision was taken. The applicant has not lodged an appeal against the two judgments which she challenges, although she had the opportunity to do so. In addition, an examination of the file, as it stands, does not disclose the existence of special circumstances such as would relieve the applicant, according to the generally recognized rules of international law, from the obligation to exhaust the domestic remedies available to her. It appears, therefore, that the applicant has not satisfied the abovementioned provisions of Article 26 of the Convention concerning the exhaustion of domestic remedies, and the application should accordingly be rejected on this ground, in pursuance of Article 27, paragraph 3, of the Convention.[1]

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[1] See *supra*, p. 358, n. 1.]

[2] See *supra*, p. 333, n. 2.]

[3] See *supra*, p. 340, n. 1.]

" On the other hand, an examination of the file, as it stands, does not disclose, in general, a *prima facie* violation of any of the rights and freedoms recognized in the Convention for the Protection of Human Rights and Fundamental Freedoms, and in particular of the right to the proper administration of justice, under the conditions fixed and within the limits defined in Article 6 of the said Convention.[2]

" It should especially be noted that, as regards the two judgments which the applicant challenges, the European Commission of Human Rights was not set up to deal, as a higher court of appeal, with alleged errors of law or fact committed by municipal courts of the Contracting Parties, when their decisions are given wholly within their jurisdiction, but, according to Article 19 of the Convention, to ensure the observance of the engagements undertaken by the Parties in the Convention. Errors of fact or law which tribunals may have committed do not concern the Commission, at the stage of considering the admissibility of applications, except in so far as they may appear to have involved the violation of one of the rights and freedoms exhaustively listed in the Convention. In more general terms, the Commission has competence to pronounce upon the decisions of the said courts only when it would appear possible that the decisions have been given in disregard of rights and freedoms guaranteed by the Convention, and an examination of the file does not disclose the appearance of any such violation. It appears, therefore, that the application is manifestly ill-founded, and it should accordingly be rejected on this ground also, in pursuance of Article 27, paragraph 2, of the Convention.[3] "

[Report: *Documents et Décisions*, 1955–56–57, p. 252 (in French).]

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[1] [See *supra*, p. 280, n. 1.]
[2] [See *supra*, pp. 342–3, n. 1.]
[3] [See *supra*, p. 279, n. 1.]

The Individual in International Law—Human Rights and Freedoms—European Convention for Protection of—European Commission of Human Rights—Individual Applications—No *prima facie* Violation of Convention—Right to Legal Aid (Article 6 (3) (*c*)) —Civil Action—Arrest by Mistake.

Re APPLICATION No. 89/55 (X. *v.* GERMAN FEDERAL REPUBLIC).

European Commission of Human Rights. December 16, 1955.

(Waldock, President; Eustathiades, Berg, Faber, Beaufort, Dominedo, Süsterhenn, Petren, Janssen-Pevtschin, Sørensen, Black, Jonasson, Akbay, Fuest.)

THE FACTS.—The applicant complained that on March 6, 1954, two policemen entered his apartment in his absence and induced his landlady to state that he had left without leaving an address. As a result, he was refused entry to his lodgings. He then sought legal aid to recover damages from the police for the wrong alleged to have been done to him. The police, rejecting the allegations brought against them, stated that they had received orders to withdraw the applicant's passport, as he was liable to prosecution for complicity in procuring an abortion. In fact, the applicant was convicted for this offence on June 2, 1954, and sentenced to six months' imprisonment. Relying on this conviction, the Tribunal (*Landgericht*) of B. and subsequently the Court (*Oberlandesgericht*) of B., on June 5 and 23, 1954, respectively, refused legal aid. On July 1, 1954, the applicant applied to the Court again, asking for remission of the case to the competent Tribunal. On July 3, 1954, the Court replied that all remedies had been exhausted. The applicant then wrote to the Minister of Justice of the *Land* of C. The Minister sent the letter to the President of the Court of B., who informed the applicant on August 12, 1954, that he had no jurisdiction to examine or reverse decisions taken concerning legal aid. The applicant then wrote to the Constitutional Court of the *Land* of C., the President of which notified him that any further requests on his part for the grant of legal aid were doomed to failure. On March 25, 1955, the Court itself dismissed an appeal by the applicant concerning legal aid, on the ground, *inter alia*, that the action for damages contemplated by the applicant had no chance of success. The applicant also addressed a complaint to the International Court of Justice.

The applicant was also sentenced, on April 14, 1955, to a fine of DM 5 or one day's imprisonment for riding a bicycle on a pedestrian crossing, thus seriously endangering the safety of pedestrians. He served his sentence in prison on February 11/12, 1954. On March 23, 1954, he was again arrested. On March 28, 1954, he claimed DM 500 compensation for this arrest and for injury caused to his health, which was already bad, and for the loss of his bicycle. The prosecutor of the Tribunal (*Landgericht*) of B. on October 1, 1954, explained to the applicant that the competent Magistrate had been in error in issuing a further order for the arrest of the applicant, the order for release from prison not having reached him. The applicant was arrested on March 25 at 7.15 a.m., and was released as soon as the mistake was discovered, that is, on the same morning. The Minister of Justice of the *Land* of C. refused to take disciplinary measures against the Magistrate in question, and stated that an action for damages could only be brought in the ordinary civil courts. Subsequently, the Federal Minister of Justice, in reply to a letter from the applicant, informed him that only the provincial administration of Justice (*Landesjustizverwaltung*) was competent to control the courts and the prosecutors of a province (*Land*). On February 22, 1955, the Tribunal (*Landgericht*) of B. rejected the applicant's request for legal aid, on the ground that there was no relation of cause and effect between the applicant's arrest and his loss of employment, his illness and the loss of his bicycle and, consequently, the applicant's action did not have sufficient chance of success. The Court (*Oberlandesgericht*) of B. on April 7, 1955, confirmed this decision. Previously, the Clerk of the Federal Constitutional Court, to which the applicant had appealed, informed him that his allegations of breach of the German Basic Law were without foundation. In 1955, the applicant applied to the Federal Constitutional Court, to the International Court of Justice and to the Council of Europe, claiming on this occasion DM 1669.90 compensation for breach of the Universal Declaration of Human Rights, 1948.

Held: that the application must be rejected. There had been no violation of the rights protected by the European Convention for the Protection of Human Rights and Fundamental Freedoms, 1950, in respect either of the refusal of legal aid or of the applicant's imprisonment.

The Commission said:

" *On the refusal of legal aid.*—The applicant made his request for legal aid in connection with litigation of a civil character. Article 6, paragraph 3 (*c*), of the Convention[1] only applies to persons charged with a criminal offence; even so, that provision does not guarantee the right to free judicial procedure but only to the free assistance of counsel when the interests of justice so require. In general, an examination of the file does not, in this respect, disclose a *prima facie* violation of any of the rights set forth in the Convention, in particular, of Article 6; the application should accordingly be rejected on this ground in pursuance of Article 27, paragraph 2, of the Convention,[2] as manifestly ill-founded.

" *On the deprivation of liberty.*—An examination of the file does not, in this respect, disclose a violation on the part of the Federal

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[1 See *supra*, p. 343, n.]

[2 See *supra*, p. 279, n. 2.]

Republic of any of the rights set forth in the Convention. The application should accordingly be rejected on this ground in pursuance of Article 27, paragraph 2, of the Convention, as manifestly ill-founded."

[Report: *Documents et Décisions*, 1955–56–57, p. 226 (in French).]

NOTE.—See also the following decisions of the Commission, reported in the present volume: *Re Application No.* 86/55, *supra*, p. 320; *Re Application No.* 92/55, *supra*, p. 321; *Re Application No.* 94/55, *supra*, p. 352; *Re Application No.* 95/55, *supra*, p. 323; *Re Application No.* 125/55, *supra*, p. 354; *Re Application No.* 165/56, *supra*, p. 326; *Re Application No.* 172/56, *supra*, p. 328; *Re Application No.* 238/56, *supra*, p. 337; *Re Application No.* 261/57; *supra*, p. 356; *Re Application No.* 285/57, *supra*, p. 360; *Re Application No.* 288/57, *supra*, p. 346; and *Re Application No.* 155/56, *infra*, p. 398; *Re Application No.* 169/56, *infra*, p. 388; *Re Application No.* 202/56, *infra*, p. 391; *Re Application No.* 254/57, *infra*, p. 284; *Re Application No.* 256/57, *infra*, p. 413; *Re Application No.* 265/57, *infra*, p. 393; *Re Application No.* 277/57, *infra*, p. 341.

The Individual in International Law—Human Rights and Freedoms—European Convention for Protection of—European Commission of Human Rights—Individual Applications—No *prima facie* Violation of Convention—Right to Respect for Private and Family Life (Article 8)—Principle of Non-Discrimination on Ground of Sex (Article 14)—Homosexuality.

Re APPLICATION NO. 104/55 (X. *v.* GERMAN FEDERAL REPUBLIC).

European Commission of Human Rights. December 17, 1955.

(Waldock, President; Eustathiades, Berg, Faber, Beaufort, Dominedo, Süsterhenn, Petren, Janssen-Pevtschin, Sørensen, Black, Jonasson, Akbay, Fuest.)

THE FACTS.—The applicant, who was at the time of petitioning the Commission in prison at B. in the German Federal Republic, was sentenced on September 23, 1954, by the *Landgericht* of G. to fifteen months' imprisonment for offences involving homosexuality (Articles 175 and 175*a* of the German Penal Code). He claimed that his sentence violated Articles 2, 8, 14, 17 and 18 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, 1950.[1] He alleged in particular that the punishment of the crimes in question under the Articles of the German Penal Code

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[1] Articles 2, 8, 14, 17 and 18 of the Convention provide as follows:

Article 2

"(1) Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.

"(2) Deprivation of life shall not be regarded as inflicted in contravention of this Article when it results from the use of force which is no more than absolutely necessary:

"(*a*) in defence of any person from unlawful violence;

mentioned above constituted a violation of the Convention not only in principle, in so far as it attacked respect for private life (Article 8), but also in its scope, as it was limited to males and thus violated the principle of non-discrimination on the ground of sex (Articles 8 and 14 read together).

Held: that the application must be rejected. Making homosexuality, and between males only, an offence, did not violate any of the rights protected by the Convention.

The Commission said: " The Convention permits a High Contracting Party to make, by its legislation, homosexuality a criminal offence, seeing that the right to respect for private and family life may in a democratic society be the object of interference, in accordance with the law, by that Party, for the protection of health or morals (Article 8, paragraph 2, of the Convention.) Moreover, Article 14 of the Convention, regarding discrimination on the ground of sex, does not exclude the possibility of a High Contracting Party's discriminating between the sexes in the measures which it takes in regard to homosexuality for the protection of health and morals in conformity with Article 8, paragraph 2, of the Convention.

"Although other grounds can be mentioned which would lead to the same conclusion, it follows sufficiently from the foregoing that the above-mentioned provisions of German law do not contravene the provisions of the Convention. The application should accordingly be rejected as inadmissible, in pursuance of Article 27, paragraph 2, of the Convention,[1] as manifestly ill-founded."

[Report: *Documents et Décisions*, 1955–56–57, p. 228 (in French).]

" (*b*) in order to effect a lawful arrest or to prevent the escape of a person lawfully detained;

" (*c*) in action lawfully taken for the purpose of quelling a riot or insurrection."

Article 8

" (1) Everyone has the right to respect for his private and family life, his home and his correspondence.

" (2) There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

Article 14

" The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status."

Article 17

" Nothing in this Convention may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms set forth herein or at their limitation to a greater extent than is provided for in the Convention."

Article 18

" The restrictions permitted under this Convention to the said rights and freedoms shall not be applied for any purpose other than those for which they have been prescribed."

[[1] See *supra*, p. 279, n. 2.]

The Individual in International Law—Human Rights and Freedoms—European Convention for Protection of—European Commission of Human Rights—Individual Applications—No *prima facie* Violation of Convention—Right to Hearing Within a Reasonable Time (Article 6)—Subject to Diligence of Party Concerned.

Re APPLICATION NO. 107/55 (X. *v.* BELGIUM).

European Commission of Human Rights. May 29, 1956.

(Waldock, President; Eustathiades, Berg, Faber, Beaufort, Dominedo, Süsterhenn, Petren, Janssen-Pevtschin, Sørensen, Crosbie, Jonasson, Akbay, Fuest.)

THE FACTS.—The applicant was a German national by birth who had become Belgian by marriage. She stated that in February 1949 she had commenced divorce proceedings in the Tribunal (*Landgericht*) of B., in the German Federal Republic, against her husband, with whom she had not been living since 1944. The Tribunal held that it lacked jurisdiction. In 1953, she commenced other proceedings in the *Rechtbank* (Tribunal) of C., in Belgium. At the first hearing, she appeared alone; at the second hearing both she and her husband appeared. No decision was made in the course of the hearing, and since then there had been no further steps in the proceedings. The applicant now complained that her case had been pending for more than seven years, and asked the Commission to help her to obtain a divorce, or at least to tell her what she should do. She stated that she had written to her Counsel on several occasions, without receiving any reply from him.

Held: that the application must be rejected. The applicant had not shown any violation of a right protected by the European Convention for the Protection of Human Rights and Fundamental Freedoms, 1950.

The Commission said: "Article 6 of the Convention[1] provides that everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal. Nevertheless, the exercise of this right is subject to the exercise of all necessary diligence on the part of the party concerned.

" In the present case, it does not appear from an examination of the file that the tribunals, in the exercise of their judicial power, have refused to hear the applicant's case within a reasonable time; it appears, on the contrary, that the applicant blames her Counsel for the delay, a fact which is only alleged but which, even if it proved true, could not in any event be considered as a violation by the Contracting Party of the rights set forth in Article 6 of the Convention. An examination of the file does not, therefore, disclose any *prima facie* violation of the rights set forth in the Convention.

[[1] See *supra*, pp. 342–3, n. 1.]

The application should accordingly be rejected in pursuance of Article 27, paragraph 2, of the Convention,[1] as manifestly ill-founded."

[Report: *Documents et Décisions*, 1955-56-57, p. 229 (in French).]

The Individual in International Law—Human Rights and Freedoms—European Convention for Protection of—European Commission of Human Rights—Individual Applications—No *prima facie* Violation of Convention—Right to Choice of Legal Assistance (Article 6 (3) (*c*))—Not Protected in Legal Aid Case.

Re Application No. 127/55 (X. *v.* German Federal Republic).

European Commission of Human Rights. May 30, 1956.

(Waldock, President: Eustathiades, Berg, Faber, Beaufort, Dominedo, Süsterhenn, Petren, Janssen-Pevtschin, Sørensen, Crosbie, Jonasson, Akbay, Fuest.)

The Facts.—The applicant claimed that on November 26, 1954, he had been accused by the Prosecutor to the Tribunal (*Landgericht*) of B., in Germany, of active participation in an organization working against the constitutional order of the Federal Republic of Germany. He complained that the Tribunal designated as counsel for him not his own counsel, Mr. C., as he had requested on March 10, 1955, and on several occasions since then, but another counsel, against his express wishes. On November 1, 1955, the Court of Appeal (*Oberlandesgericht*) of B., confirmed the designation of counsel by the Tribunal. The applicant claimed that these decisions constituted a violation of Article 6, paragraph 3 (*c*), of the European Convention for the Protection of Human Rights and Fundamental Freedoms.[2] He stated, however, that the *Landgericht* of B. had been recognized as having jurisdiction to hear political cases by a special Law of August 30, 1951 (Article 74 (*a*) of the *Gerichtsverfassungsgesetz*). He contended that that Law violated the Convention of 1950.

Held: that the application must be rejected. No violation of any right protected by the Convention had been shown.

The Commission said: "As regards the alleged violation of Article 6, paragraph 3 (*c*), of the Convention, this provision allows everyone charged with a criminal offence 'to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require.' It follows from these words that the Convention lays down the right to a free choice of legal assistance only when the person charged with a criminal offence has

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[[1] See *supra*, p. 279, n. 2.]

[2] See *supra*, p. 343, n.

insufficient means to pay for legal assistance. When this is not the case, the right of the person charged is limited to free legal assistance when the interests of justice so require. It appears that this right has been respected in this case. In general, an examination of the file discloses no *prima facie* violation of any of the rights set forth in the Convention, in particular of Article 6; and the application should accordingly be rejected on this ground in pursuance of Article 27, paragraph 2, of the Convention,[1] as manifestly ill-founded.

" In so far as the application concerns the special jurisdiction conferred on the Tribunal of B. by the German Law of August 30, 1951, an examination of the file does not disclose a *prima facie* violation of any of the rights set forth in the Convention, in particular in Article 6; the application should accordingly be rejected on this ground also, in pursuance of Article 27, paragraph 2, of the Convention, as manifestly ill-founded."

[Report: *Documents et Décisions*, 1955–56–57, p. 230 (in French).]

The Individual in International Law—Human Rights and Freedoms—European Convention for Protection of—European Commission of Human Rights—Individual Applications—No *prima facie* Violation of Convention—Right to Freedom of Expression (Article 10)—Freedom to Practise as a Lawyer Not Protected—Right to Legal Aid (Article 6)—Civil Action.

Re APPLICATION NO. 134/55 (X. *v.* GERMAN FEDERAL REPUBLIC).

European Commission of Human Rights. May 31, 1956.

(Waldock, President; Eustathiades, Berg, Faber, Beaufort, Dominedo, Süsterhenn, Petren, Janssen-Pevtschin, Sørensen, Crosbie, Jonasson, Akbay, Fuest.)

THE FACTS.—The applicant claimed that on June 15, 1952, the Tribunal (*Landgericht*) of B. had awarded him a suspended sentence of one year's imprisonment for certain acts committed by him on March 5, 1933, when he was taking part in a Nazi attack on members of the German Communist Party. The judgment was based on Law No. 10 of the Allied Control Council in Germany (Law concerning Crimes against Humanity). In 1954, the applicant was fined DM 180 for illegally practising as a lawyer. As a result of this second sentence, the suspension of the first sentence was annulled, and he was detained in prison from May 2, 1955, to November 30, 1955. The applicant claimed that his detention constituted in several respects a violation of the European Convention for the Protection of Human Rights and Fundamental Freedoms, 1950. In the first place, he contended, the members of the Tribunal which convicted him on June 15, 1952, did not take the oath in conformity with the German law then in force. The Tribunal of B. therefore did not have jurisdiction and, consequently, the detention of the applicant, carried out in 1955 in pursuance of this first judgment, was neither " lawful " nor " in accordance with a procedure prescribed by law " within the meaning of Article 5 of the Convention.[1] On the other hand, the facts on which the conviction of the applicant was based had already on May 22, 1933, been the subject of criminal proceedings before the Tribunal of C., which had acquitted him completely. The reopening of the case in 1952, without the prior annulment of the judgment of 1933, violated the principle " *non bis in idem* " and thus Article 5 of the Convention. Furthermore, the conviction in 1954 for illegally practising as a lawyer was, according to the applicant, incompatible with the provisions of Article 10 of the Convention:[2] under the terms of these provisions, the applicant had the right to practise as a lawyer. His imprisonment in 1955 was, therefore contrary to the Convention. The applicant claimed that he had exhausted all domestic remedies in respect of his detention in 1955, and asked the Commission for full reinstatement. He also complained that the German authorities wrongly refused him legal aid which he had requested in order to take proceedings against the German Federal Republic, as legal successor to the German *Reich*, for compensation for the wrong allegedly done to him when he had been unlawfully detained for three months in a concentration camp in 1934.

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[1] See *supra*, p. 279, n. 2.]

Held: that the application must be rejected. The conviction in 1952 had taken place before the entry into force of the Convention. None of the other facts alleged constituted a violation of rights protected by the Convention.

The Commission said: " On the sentence pronounced on June 13, 1952.—The facts alleged relate to a period prior to the entry into force of the Convention in respect of the Federal Republic of Germany (September 3, 1953). The Convention only governs facts subsequent to its entry into force in respect of the Contracting Party concerned, and the application should accordingly be rejected on this ground as inadmissible *ratione temporis*.

" On the conviction and sentence of the applicant in 1954 for illegally practising as a lawyer.—It does not appear from an examination of the file that the proceedings which resulted in the conviction of the applicant for illegally practising as a lawyer were in violation of the provisions of Article 6 of the Convention.[3] Article 10 of the Convention, which was invoked by the applicant, guarantees to every person the right to freedom of expression, including freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. It cannot be deduced from this Article—or from any other in the Convention—that practising as a lawyer is free and that it cannot be subjected to restrictions imposed in the public interest.

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[1] See *supra*, p. 342, n. 1.

[2] See *supra*, pp. 343–4, n.

[[3] See *supra*, pp. 342–3, n. 1.]

"On the detention of the applicant in 1955.—The detention of the applicant took place after conviction by a tribunal having jurisdiction.

"On the refusal of legal aid.—Under the terms of Article 6, paragraph 3 (*c*), of the Convention, everyone charged with a criminal offence is entitled in particular

> 'to defend himself in person or through legal assistance of his own choosing, or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require'.

The right to free legal assistance is only recognized in favour of a person 'charged with a criminal offence', on condition that that person has not sufficient means to pay for legal assistance and in so far as the interests of justice require the legal assistance to be given. Apart from the case provided for in Article 6 of the Convention, the benefit of legal aid is not set forth in the Convention as a right which any person may invoke and the refusal of which by the competent authority would in itself constitute a violation of the Convention. In the present case, it was refused to the applicant in connection with a civil action which he intended to bring.

"In general, an examination of the file does not disclose, in these three respects, a *prima facie* violation of any of the rights recognized in the Convention, particularly in Articles 5, 6 and 10; the application should accordingly be rejected in pursuance of Article 27, paragraph 2, of the Convention,[1] as manifestly ill-founded."

[Report: *Documents et Décisions*, 1955–56–57, p. 232 (in French).]

The Individual in International Law—Human Rights and Freedoms—European Convention for Protection of—European Commission of Human Rights—Individual Applications—No *prima facie* Violation of Convention—Right to Liberty and Security of Person (Article 5)—Imprisonment for Indefinite Period.

Re APPLICATION NO. 138/55 (X. *v.* GERMAN FEDERAL REPUBLIC).

European Commission of Human Rights. May 31, 1956.

(Waldock, President; Eustathiades, Berg, Faber, Beaufort, Dominedo, Süsterhenn, Petren, Janssen-Pevtschin, Sørensen, Crosbie, Jonasson, Akbay, Fuest.)

THE FACTS.—The applicant complained that he was being kept in prison at B. in Germany, although he had served the period of imprisonment to which he was sentenced in 1950 for theft. It appeared from his letter and from the note attached to it by the Prison authorities of B. that, since January 5, 1954, the applicant was held under Articles 20 (*a*) and 42 (2) of the German Penal Code (detention for an indefinite period—*Sicherungsverwahrung*) as a dangerous habitual criminal ("*gefährlicher Gewohnheitsverbrecher*".) It appeared that the applicant was convicted three times between 1945 and 1950, as well as in 1937, also for theft.

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[1] See *supra*, p. 279, n. 2.]

Held: that the application must be rejected. The applicant was lawfully detained after conviction by a competent court.

The Commission said: "Under the terms of Article 5 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, 1950,[1] no one shall be deprived of his liberty, save in the cases there listed, in accordance with a procedure prescribed by law, in particular 'the lawful detention of a person after conviction by a competent court'. It appears that those conditions are present in this case. Furthermore, an examination of the file does not disclose a *prima facie* violation of any of the rights set forth in the Convention, in particular in Articles 5 and 6,[2] and the application should accordingly be rejected on this ground, in pursuance of Article 27, paragraph 2, of this Convention,[3] as manifestly ill-founded."

[Report: *Documents et Décisions*, 1955–56–57, p. 234 (in French).]

The Individual in International Law—Human Rights and Freedoms—European Convention for Protection of—European Commission of Human Rights—Individual Applications—No *prima facie* Violation of Convention—Right to Respect for Private and Family Life (Article 8)—Principle of Non-Discrimination on Ground of Sex (Article 14)—Homosexuality.

Re APPLICATION NO. 167/56 (X. *v.* GERMAN FEDERAL REPUBLIC).

European Commission of Human Rights. September 28, 1956.

(Waldock, President; Eustathiades, Berg, Faber, Beaufort, Dominedo, Süsterhenn, Petren, Janssen-Pevtschin, Sørensen, Crosbie, Jonasson, Akbay, Fuest.)

THE FACTS.—The applicant was sentenced on November 3, 1954, by the *Jugendschöffengericht* (Tribunal for the protection of children) of B. in the German Federal Republic to eight months' imprisonment for homosexuality, under Article 175 of the German Penal Code. On appeal by the applicant, the judgment was confirmed by the Tribunal (*Landgericht Grosse Strafkammer Jugendkammer*) of B. on September 9, 1955, and, on further appeal, by the Court (*Oberlandesgericht*) of C. on January 11, 1956. The applicant now contended that the decision of January 11, 1956, should be quashed as contrary to "international principles of human rights", as well as to the European Convention for the Protection of Human Rights and Fundamental Freedoms, 1950, in particular Articles 8 and 14,[1] in so far as it violated the right to respect for private life and the principle of non-discrimination on the ground of sex. He asked for the quashing of the decision and DM 10,000 compensation for the wrong done to him by it. The applicant had instituted proceedings before the Federal Constitutional Court (*Bundesverfassungsgericht*), which had not yet given judgment. He considered that he could nevertheless petition the Commission without awaiting the decision of the Federal Constitutional Court, on the ground that a case similar to his own had been pending for three years before the Court, without judgment being given. He also cited in this respect the decisions of the Permanent Court of International Justice in the matter of the exhaustion of domestic remedies, and in particular the Judgment in the case of the *Panevezys-Saldutiskis Railway*.[2] He asked the Commission to consider his application as falling within the provisions of Article 26 of the Convention.[3]

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[1] See *supra*, p. 342, n. 1.]
[2] See *supra*, pp. 342–3, n. 1.]
[3] See *supra*, p. 279, n. 2.]

Held: that the application must be rejected. There had been no violation of any of the rights protected by the Convention. The Commission gave no ruling on the question of exhaustion of local remedies.

The Commission said: "Examination of the file does not disclose, in a general manner, a *prima facie* violation of any of the rights set forth in the Convention. In particular, the Convention permits a High Contracting Party to make homosexuality a criminal offence, by legislation, since the right to respect for private and family life may, in a democratic society, be the object of interference by a Party in accordance with the law, for the protection of health and morals (Article 8, paragraph 2, of the Convention[4]).

"Moreover, Article 14 of the Convention,[5] which forbids any discrimination on the ground of sex, does not exclude the possibility of a High Contracting Party discriminating between the sexes in the measures which it takes in regard to homosexuality for the protection of health and morals in conformity with Article 8, paragraph 2, of the Convention.

"Although other grounds could be adduced which lead to the same conclusion, it follows sufficiently from the foregoing that the above-mentioned provisions of German law do not contravene the provisions of the Convention. It appears, therefore, that the application is manifestly ill-founded and it should accordingly be rejected in pursuance of Article 27, paragraph 2, of the Convention.[1]

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[1] See *supra*, p. 366, n.

[2] *P.C.I.J.*, Series A/B, No. 76; *Annual Digest*, 1938–1940, Case No. 103.

[3] See *supra*, p. 340, n. 1.]

[[4] See *supra*, p. 366, n.]

[[5] See *supra*, p. 366, n.]

" The Commission considers it unnecessary, in the circumstances, to examine whether the applicant has or has not satisfied the provisions of Article 26 of the Convention[2] regarding the exhaustion of domestic remedies."

[Report: *Documents et Décisions*, 1955–56–57, p. 235 (in French).]

The Individual in International Law—Human Rights and Freedoms—European Convention for Protection of—European Commission of Human Rights—Individual Applications—No *prima facie* Violation of Convention—Right to Legal Aid (Article 6)—Civil Action.

Re Application No. 180/56 (Mrs. X. *v.* German Federal Republic).

European Commission of Human Rights. September 29, 1956.

(Waldock, President; Eustathiades, Berg, Faber, Beaufort, Dominedo, Süsterhenn, Petren, Janssen-Pevtschin, Sørensen, Crosbie, Jonasson, Akbay, Fuest.)

The Facts.—The applicant complained that in 1938 she had been compulsorily sterilised under an order of the *Erbgesundheitsgericht* of B. in Germany, as a sufferer from schizophrenia. In fact, she had never suffered from that illness. She claimed that the real reason for the proceedings before that Court, which had been commenced by the Gestapo, was that that organization wished to prevent her from disclosing a crime committed by one of its members. After the war, the applicant made an application to the Tribunal (*Landgericht*) of C. for legal aid in order to institute proceedings against the *Land* of D. for the payment of compensation. Her application was rejected on November 23, 1954, on the ground that the action contemplated had no chance of success. On appeal, the Court of Appeal (*Oberlandesgericht*) of C. confirmed that decision on February 8, 1956. The applicant now asked the Commission to grant her legal aid to enable her to take proceedings against those responsible for her sterilisation and obtain reparation for the injury she had suffered.

Held: that the application must be rejected. (i) The sterilisation of the applicant took place before the entry into force of the European Convention for the Protection of Human Rights and

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[1] See *supra*, p. 279, n. 2.]

[2] See *supra*, p. 340, n. 1.]

Fundamental Freedoms, 1950; and (ii) the provision in the Convention concerning legal aid (Article 6[1]) operated only in favour of persons charged with a criminal offence.

The Commission said: " As regards the sterilisation of the applicant in 1938, the facts alleged relate to a period prior to September 3, 1953, the date of the entry into force of the European Convention on Human Rights in respect of the Federal Republic of Germany. According to the generally recognized principles of international law, the Convention only governs, for each Contracting Party, facts subsequent to its entry into force in respect of that Party; the application should accordingly be rejected on this ground as inadmissible *ratione temporis.*

" In so far as the application concerns proceedings taken by the applicant after September 3, 1953, an examination of the file does not disclose, in general, a *prima facie* violation of any of the rights set forth in the Convention, particularly in Article 6; it appears, therefore, that the application is manifestly ill-founded. It should accordingly be rejected on this ground also, in pursuance of Article 27, paragraph 2, of the Convention.[2]

" As regards the requests for legal aid, under the terms of Article 6, paragraph 3 (*c*), of the Convention everyone charged with a criminal offence has the right, in particular, ' to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require '. The right to free legal assistance is thus only protected in favour of persons ' charged with a criminal offence ', provided that the person has not sufficient means to pay for legal assistance of his own choosing and in so far as the interests of justice so require. Apart from the case provided for in Article 6 of the Convention, the benefit of legal aid is not set forth in the Convention as a right which every person can invoke and the refusal of which by the competent authority would of itself constitute a violation of the Convention. In the present case, legal aid was refused in connection with a civil action which the applicant intended to bring. It appears, therefore, that the application is incompatible with the provisions of the Convention, and it should accordingly be rejected on this last ground also, in pursuance of Article 27, paragraph 3, of the Convention."[3]

[Report: *Documents et Décisions*, 1955–56–57, p. 236 (in French).]

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[1] See *supra*, pp. 342–3, n. 1.

[[2] See *supra*, 279, n. 2.]

[[3] See *supra*, p. 280, n. 1.]

The Individual in International Law—Human Rights and Freedoms—European Convention for Protection of—European Commission of Human Rights—Individual Applications—No *prima facie* Violation of Convention—Right to Proper Administration of Justice (Article 6)—"Legality of Crimes" and Penalties (Article 7).

Re APPLICATION NO. 217/56 (X. *v.* GERMAN FEDERAL REPUBLIC).

European Commission of Human Rights. July 20, 1957.

(Waldock, President; Eustathiades, Berg, Faber, Beaufort, Dominedo, Süsterhenn, Petren, Janssen-Pevtschin, Sørensen, Crosbie, Skarphedinsson, Erim.)

THE FACTS.—The applicant, a barrister practising at B. in the German Federal Republic, complained that a sentence had been passed on him which he considered to be contrary to German law and to the European Convention for the Protection of Human Rights and Fundamental Freedoms, signed at Rome in 1950. It appeared from the file that in 1955 the applicant had been a member of the committee of a students' association which used to hold evening meetings devoted to the playing of jazz music. These meetings had caused disturbance and annoyance to neighbours, and the police had several times asked the applicant to take steps to prevent such disturbance. On November 8, 1955, the applicant appeared before a Justice of the Peace (*Friedensgericht*) charged with having, as a member of the committee of the association, failed to prevent the disturbance. He was found guilty and fined DM 10. On December 21, 1955, on appeal by the applicant, the *Friedensgericht* of B. confirmed the decision of first instance. This Tribunal found, *inter alia*, that the association had as its principal object the organization of meetings devoted to the playing of jazz, in the course of which alcohol was consumed; that it had entrusted each of the three members of its committee in turn with the task of supervising these meetings and of ensuring that they were conducted in good order and peacefully; that the applicant owed a duty to take any steps which might become necessary to prevent disturbances; and that he had failed signally in this task, thus causing a nocturnal disturbance for which he had to bear the responsibility. The applicant then appealed to the Federal Constitutional Court (*Bundesverfassungsgericht*), which rejected the appeal as manifestly ill-founded. He now maintained that his conviction had been improper under German law, which attributes criminal responsibility to the members of the committee of an association only in certain cases strictly defined by law, of which the present was not one. He alleged, as a consequence, the violation of the principle *nulla poena sine lege*, embodied in Article 7 of the Convention.[1]

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[1] See *supra*, p. 343, n.

Held: that the application must be rejected. None of the rights protected by the Convention had been infringed.

The Commission said: " An examination of the file does not disclose a *prima facie* violation of any of the rights and freedoms set forth in the European Convention on Human Rights, and in particular the right to a proper administration of justice, under the conditions set out and within the limits defined in Article 6 of the Convention.[1]

" The applicant seems to be complaining of having been convicted of an offence committed by another, but it appears from an examination of the file that he was in fact convicted for a fault of his own, namely, having failed, as a member of the committee of the association in question and being aware of the noisy character of the meeting which he had organized and supervised, to take the steps necessary in preventing a disturbance from occurring. It is therefore unnecessary in this case to enquire whether the Convention embodies the principle of the personality of penal sanctions, which the applicant would appear to be invoking.

" Finally, in so far as the applicant objects to the judgments given as having infringed the principle *nulla poena sine lege*, it does not appear that the German Courts which dealt with the case have applied the provisions of the German Penal Code in a manner incompatible with the principle of the ' legality of crimes ' and penalties or with its corollary, the principle of the restrictive interpretation of penal laws, embodied in Article 7 of the Convention.

" It follows, therefore, that the application is in its entirety manifestly ill-founded, and it should accordingly be rejected in pursuance of Article 27, paragraph 2, of the Convention.[2] "

[Report: *Documents et Décisions*, 1955–56–57, p. 238 (in French).]

[[1] See *supra*, pp. 342–3, n. 1.]
[[2] See *supra*, p. 279, n. 2.]

The Individual in International Law—Human Rights and Freedoms—European Convention for Protection of—European Commission of Human Rights—Individual Applications—No *prima facie* Violation of Convention—Principle of "Legality of Crimes" and Non-retroactivity of Penalties (Article 7 (1))—Crimes under International Law—Collaboration With the Enemy.

Re APPLICATION NO. 268/57 (X. *v.* BELGIUM).

European Commission of Human Rights. July 20, 1957.

(Waldock, President; Eustathiades, Berg, Faber, Beaufort, Dominedo, Süsterhenn, Petren, Janssen-Pevtschin, Sørensen, Crosbie, Skarphedinsson, Erim.)

THE FACTS.—The applicant, a Belgian national domiciled at B. in Belgium, complained that since September 1944 he had not been paid the pension which he had received until that time for a disability incurred during service in the army before the war. The pension had ceased as a result of his being convicted in 1945, by a tribunal which he did not identify, of collaboration with the enemy. He stated that, having been sentenced to forced labour for life and to the loss of his civil and political rights, he secured the reduction of the first of these punishments to twenty-five years' forced labour. He was released on December 29, 1955. In 1947, whilst still in prison, the applicant had asked for the payment of his pension to be recommenced. In reply, the Belgian Finance Ministry informed him that it had decided to suspend all payments in cases of this kind until a final legal determination was made in regard to them. In response to a second petition, submitted in 1951, the Belgian Ministry of Pensions told the applicant that he had lost his right to a pension by virtue of Article 3 of the Law of August 10, 1948. The applicant stated that in 1957 he submitted to the Belgian Ministry of Justice a petition asking that the legal duration of his punishment and, correspondingly, of the loss of his civil and political rights, be reduced to the number of years which he had in fact spent in prison; he hoped that this would allow him to enjoy once again his pension rights. In a letter to the Commission dated July 5, 1957, he stated that he had received no reply to his request. The applicant alleged that the above-mentioned Law of August 10, 1948, contravened, in that it had retroactive effect, the provisions of Article 7, paragraph 1, of the European Convention for the Protection of Human Rights and Fundamental Freedoms, 1950.[1] He claimed the payment of his pension with arrears.

Held: that the application must be rejected. Most of the facts complained of occurred before the coming into force of the Convention. In any event, the provisions of the Convention which prohibited retroactive penal legislation did not apply to laws for the punishment of, *e.g.*, collaboration with the enemy.

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[1] See *supra*, p. 343, n.

The Commission said: " Most of the facts in the case relate to a date prior to June 14, 1955, the date of the entry into force of the above-mentioned Convention in respect of Belgium. According to generally recognized principles of international law, the said Convention only governs, for each Contracting Party, facts subsequent to its entry into force in respect of that Party. The application should accordingly be rejected, on this ground, as inadmissible *ratione temporis.*

" Moreover, an examination of the file does not disclose, in general, a *prima facie* violation of the rights and freedoms protected by the Convention. In particular, as regards the alleged violation of the principle of the ' legality of crimes ' and penalties and of its corollary, the principle of non-retroactivity of penal laws as embodied in Article 7 of the Convention, it must be noted that, having regard to the terms of paragraph 2, this Article does not prevent the trial and punishment of a person guilty of an act or omission which, at the time when it was committed, was criminal according to the general principles of law recognized by civilized nations. It appears from the preparatory work of the Convention that paragraph 2 of Article 7 is intended to indicate that that Article does not affect laws which, in the entirely exceptional circumstances arising out of the Second World War, were passed to punish war crimes and acts of treachery and collaboration with the enemy, and is not intended to condemn such laws on juridical or moral grounds. It follows from the above that the application is manifestly ill-founded and it should accordingly be rejected in pursuance of Article 27, paragraph 2, of the Convention.[1] "

[Report: *Documents et Décisions*, 1955–56–57, p. 239 (in French).]

[1 See *supra*, p. 279, n. 2.]

The Individual in International Law—Human Rights and Freedoms—European Convention for Protection of—European Commission of Human Rights—Individual Applications—No *prima facie* Violation of Convention—Fines Not Prohibited (Article 1 of Protocol to Convention)—Right to Proper Administration of Justice (Article 6 of Convention)—Alleged Lack of Impartiality.

Re APPLICATION NO. 323/57 (X. *v.* KINGDOM OF DENMARK).

European Commission of Human Rights. December 19, 1957.

(Waldock, President; Eustathiades, Berg, Faber, Beaufort, Dominedo, Süsterhenn, Petren, Janssen-Pevtschin, Sørensen, Crosbie, Skarphedinsson, Erim.)

THE FACTS.—In 1947, the applicant, a Danish national, was convicted by the Tribunal of B. in Denmark of collaboration with the enemy and sentenced to twelve years' imprisonment and confiscation of two-thirds of his property, under Article 4 of the Law of June 1, 1943, amending the Penal Code. He appealed to the High Court which, by a decision of April 8, 1948, reduced the term of imprisonment to eight years and the confiscation to that of a sum of 70,000 Kroner. He appealed against this decision to the Supreme Court of Denmark (*Høfesteret*). The Supreme Court confirmed the sentence of imprisonment and ordered the confiscation of one-half of the applicant's property. In 1952 the applicant addressed a written application to the Danish Commission of Appeal (*Ankenaevn*) to obtain the re-opening of the "Preliminary Investigation" (*Genoptagelse*). In 1954, the Commission of Appeal rejected the application by a majority of two against one. In 1957, the applicant lodged another application, before the Special Court of Appeal (*Den Saertige Klageret*), for the re-opening of the "Preliminary Investigation". The Special Court rejected the application. The applicant now contended that the following provisions were violated in the course of the proceedings:

A. Article 1 *of the Protocol to the European Convention on Human Rights*.[1]—The applicant maintained that the reservation contained in the second paragraph of this Article did not justify the sentence by which he was deprived of one-half of his property. In support of his contentions he put forward the following arguments:

(i) Although the Supreme Court could not have been aware of the paragraph in question—the Protocol not having been signed at the date of the judgment—it would be correct to say that it would now be a violation of the obligations imposed by the Protocol (which had been duly ratified by Denmark) if the sentence of seizure of his property were carried out.

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[1] Article 1 of the Protocol of March 20, 1952, provides as follows:

"Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.

"The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties."

(ii) It was a principle of Danish law that, if the Penal Code in force at the date of final judgment differed from the provisions in force at the time of the commission of the offence, the punishment should be determined in accordance with the more recent legislation if that legislation did not provide a penalty more severe than under the previous law. The applicant contended that the European Convention for the Protection of Human Rights and Fundamental Freedoms, 1950, and the Protocol thereto should be treated as incorporated into Danish law—the former since September 3, 1953, the latter since May 18, 1954—in accordance with the general principles of international law. Thus, it would be impossible, according to him, to carry out after the entry into force of the Protocol a sentence pronounced before that date which imposed a penalty prohibited thereafter by the Protocol.

(iii) Under the terms of Article 64 of the Danish Constitution, judges were bound, in the exercise of their functions, to conform exclusively to the law, which included all treaties ratified by Denmark. The Commission of Appeal and the Special Court of Appeal, being courts of law, were bound to ensure that their decisions did not violate a right protected by the Convention or by the Protocol. The applicant claimed that the Special Court of Appeal, having been informed that the case might be taken before the European Commission of Human Rights, had been invited to examine to what extent the provisions of the Convention and the Protocol would influence their decision.

(iv) The applicant drew attention to the fundamental conflict which existed, as he contended, between Article 23 of the Danish Constitution of 1953 and Article 1 of the Protocol. Article 23 of the Danish Constitution reads as follows:

> "Property is inviolable. No person can be required to give up his property, except in the public interest. Expropriation can only take place in pursuance of a Law and for full and complete compensation."

The applicant stated that, even if the constitutional provision was absolute in its terms, in fact—as decisions of courts have proved on many occasions—inroads could be made on private property, although it was in principle inviolable, without compensation—for example, duties, other public taxes, fines, restrictions under agricultural and housing legislation, joint ownership clauses, etc. In his contention, Article 1 of the Protocol conflicted with the provisions of the Constitution in that it enumerated in express terms the cases in which it was permissible to restrict the right of every person to respect for his property. The first paragraph of Article 1 provides that no one shall be deprived of his possessions except in the public interest and then subject to certain conditions. The second paragraph of the Article states specifically that the principle of respect for property shall not in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes and other contributions or penalties. It must be assumed, according to the general principles of interpretation, that the limitations imposed by this Article were the only limitations to be considered. The applicant stated that his arguments were supported by Article 64 of the Convention.[1] Indeed, the fact that the Signatory Powers were able to make reservations at the time of signature of the Protocol, showed that the provisions of Article 1 of the Protocol were to be regarded as restrictive. The applicant concluded that the fact that the seizure of property was not mentioned seemed to imply that such a measure was incompatible with the right to respect for property which is guaranteed by the first paragraph of Article 1 of the Protocol.

B. Article 6, *paragraph* 2, *of the Convention.*[2]—During the three years for which the trial lasted, numerous false statements tending to suggest that the applicant was guilty of a number of grave crimes, which he denied having committed, were communicated to the press. On this matter, the applicant gave the following particulars:

(i) In 1945, the Public Prosecutor stated to the press that it was established that in 1944 the applicant had incited Quisling to obtain from Hitler permission for the formation of a government in Denmark; the applicant was, however, acquitted on this count by the High Court in 1948.

(ii) Also in 1945, the "*politiadvokat*" (a police official charged with the preliminary investigation of cases and their presentation in the courts) told the press that the applicant had sought to overthrow the Danish Government with the help of Germany.

(iii) In 1946, the "*politiadvokat*", who had gone to Norway to examine certain documents, stated at a press conference that definite proof had been found showing that Quisling had consulted Hitler on the plan to form a government in Denmark and that the guilt of the applicant was fully established.

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[1] Article 64 of the Convention provides as follows:

"(1) Any State may, when signing this Convention or when depositing its instrument of ratification, make a reservation in respect of any particular provision of the Convention to the extent that any law then in force in its territory is not in conformity with the provision. Reservations of a general character shall not be permitted under this Article.

"(2) Any reservation made under this Article shall contain a brief statement of the law concerned."

[2] For the text of Article 6, para. 2, of the Convention see *supra*, p. 343, n.

(iv) In 1946, the Minister of Justice informed the Lower House of the charges brought against the applicant. He at that time issued a public notice of the penalties which the applicant deserved to suffer.

(v) The applicant stated that the press campaign, which originated directly or indirectly with the Public Prosecutor, was aimed at influencing the opinion and the attitude of those who had to give evidence and of those who would have to give judgment, so that the possibility of a fair judgment was excluded.

(vi) The applicant claimed that for the purposes of Article 6, paragraph 2, it was not necessary to examine whether the misleading statements had brought about his conviction or contributed to it.

(vii) The applicant wrote several times in 1946 and 1947 to the Ministry of Justice to protest against the wrongs mentioned above. Apart from an acknowledgment, in 1946, of his first letter, he received no reply until 1952. He alleged, moreover, that his complaints had not been investigated, which the decision of the Special Court mentioned above seemed to confirm. According to the applicant, the fact that the Ministry of Justice took no account of the complaints lodged by him prevented his case from being given a fair trial.

It appeared, on the other hand, from documents in the file that the Commission of Appeal and the Special Court of Appeal, to which the applicant had submitted his complaints concerning the facts set out above (in (i)–(iv)), recognized that certain rules of procedure had been contravened but that, by reason of the time which had elapsed, the decisions of the tribunals concerned could not have been affected by it.

C. *Article* 6, *paragraph* 3 (*d*), *of the Convention.*[1]—In this regard the applicant claimed that a decision of the High Court refused to authorize him to summon certain witnesses. By a letter addressed to the High Court in 1947, he asked for a number of Danish and German people to be called as witnesses, giving grounds for his request. The Court rejected the request and remitted it to the Parliamentary Commission, which did not make any enquiry into the matter.

D. *Article* 6, *paragraph* 1, *of the Convention.*[2]—The applicant claimed that the Commission of Appeal and the Special Court of Appeal were not impartial courts, because their composition infringed the legal requirements for ensuring the impartiality of judges. In this regard, the applicant put forward, in substance, the following facts:

(i) As regards the Special Court of Appeal: in 1956, the applicant lodged by letter a Complaint in the Special Court of Appeal, objecting to its President, who had already taken part in the hearing of the case by the Supreme Court. In 1957, the Special Court sustained the objection of the applicant and decided that the Judge in question should not take part either in the trial or in the decision as to the re-opening of the preliminary investigation. According to the applicant, however, this Judge had already presided over the Special Court for two years, and had therefore been in a position to have a considerable influence on the conduct of the trial; he therefore contended that the entire investigation should have been started again after a complete change in the composition of the Court.

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[1] See *supra*, p. 343, n.

[2] See *supra*, p. 342, n. 1.

(ii) As regards the Commission of Appeal: the applicant alleged that the President of the Commission had publicly spoken of him in offensive terms and had a personal interest in not allowing the investigation to be re-opened. He considered that, in these circumstances, this Judge should not have been permitted to take part in the trial. A petition to that effect was rejected by the Minister of Justice.

(iii) The applicant maintained in addition that the two Courts referred to above ignored the provisions of Article 6 of the Convention on " the right to a fair hearing ", which, in his view, was an integral part of Danish law.

E. Article 5, *paragraph* 3, *and Article* 6, *paragraph* 1, *of the Convention.*[1]—In this regard, the applicant alleged that, for reasons connected with the violation of the principles of justice by the authorities, his trial was prolonged for twelve years and that he was detained without justification for four years. In this respect he put forward the following contentions:—

(i) The case lasted from 1945, when he was arrested, until 1957, when the decision of the Special Court of Appeal was given. The applicant maintained that responsibility for this delay could not be imputed to him, for the following reasons : (*a*) the delay resulted from the considerable number of charges against him, which were subsequently shown to be without foundation; (*b*) it appeared from the statements made by the Minister of Justice to the Lower House that the trial was postponed because the Public Prosecutor hoped to get hold of certain essential evidence, which was finally shown to be non-existent.

(ii) The applicant considered that under the terms of Article 5, paragraph 3, he ought at least to have been set free during the proceedings. In fact, he was held in prison from his arrest in 1945 until the order of the Supreme Court made in 1949.

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[1] See *supra*, p. 342, n. 1.

The applicant, relying on Article 28 (*b*)[1] and Article 13[2] of the Convention, asked the Commission to give a ruling which would effectively re-establish him in his rights, and to include the following terms: (i) the sentence ordering the confiscation of his property to be quashed; (ii) the Danish authorities to return to the applicant the sum of 94,925.08 Krøners which he had already paid under the law regulating the payment of interest on confiscated property; (iii) the applicant to be compensated for losses resulting from the violation of the Convention, in particular: fees for defence counsel (extremely high owing to the length of the proceedings), and other expenses, 590,511.38 Krøners; and costs and expenses of the trial, 50,000 Krøners; and (iv) eventually, insertion in the Danish press of a legal notice retracting the defamation and calumnies uttered against the applicant.

The applicant contended that the question whether the alleged violations occurred, in whole or in part, before or after the entry into force of the Convention (September 3, 1953) or of the Protocol (May 18, 1954) in respect of Denmark, was irrelevant since, in his view, the case formed one complete whole. He asserted, moreover, that, during the continuance of the effects of the violations, the provisions of the Convention and the Protocol repectively should be applied to any violation of those instruments, even though the violation itself was committed before the entry into force of the instruments.

Held: that the application must be rejected. Much of what was alleged took place before the Convention came into force; Article 1 of the Protocol did not forbid the normal imposition of pecuniary penalties; and the various Courts concerned had not contravened any of the provisions of the Convention or the Protocol.

The Commission said: "As regards the alleged violation of Article 1 of the Protocol (*cf.* point *A* above), in the opinion of the Commission it is clear from the text itself and from the preparatory work that that provision has not affected the system of pecuniary penalties as practised by civilized States, a matter which otherwise, considering its importance, would certainly have been the subject of some regulation in the Protocol, which is not the case. The fact that Article 1 of the Protocol has not affected the said system is also shown by the statement that none of the signatory States had made a reservation as regards pecuniary penalties, which were and are provided for by the laws of all the Contracting Parties and of civilized States in general. Supposing the contrary to be the case, the conclusion would be inevitable that the Contracting Parties had, without any discussion and without any reservation, sanctioned what would amount to a juridical revolution, namely, a different interpretation of the first Article of the Protocol, which governs and can only govern the cases which are there expressly indicated.

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[1] Article 28 of the Convention provides as follows:

" In the event of the Commission accepting a petition referred to it:

" (*a*) it shall, with a view to ascertaining the facts, undertake together with the representatives of the parties an examination of the petition and, if need be, an investigation, for the effective conduct of which the States concerned shall furnish all necessary facilities, after an exchange of views with the Commission;

" (*b*) it shall place itself at the disposal of the parties concerned with a view to securing a friendly settlement of the matter on the basis of respect for Human Rights as defined in this Convention."

[2] Article 13 of the Convention provides as follows:

" Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity."

" In consequence, the complaints made by the applicant in this matter cannot depend on the provisions of Article 1 of the Protocol; in this respect the application is therefore manifestly ill-founded and should accordingly be rejected on this ground, in pursuance of Article 27, paragraph 2, of the Convention.[1]

" It should be noted, in any case, that the judicial decisions ordering the confiscation of a part of the property of the applicant relate to a period prior to May 18, 1954, the date of the entry into force of the Protocol in respect of Denmark. According to the generally recognized principles of international law, the said Protocol governs, for each Contracting Party, only facts subsequent to its entry into force in respect of that Party. This part of the application should therefore be rejected on this ground also, as inadmissible *ratione temporis*.

"As regards the alleged violation of Article 6, paragraph 2, of the Convention (*cf.* point *B* above), the errors to which objection has been taken occurred between 1946 and 1949 and thus relate to a period prior to September 3, 1953, the date of the entry into force of the Convention in respect of Denmark. According to the generally recognized principles of international law, the Convention governs, for each Contracting Party, only facts subsequent to its entry into force in respect of that Party. This part of the application should accordingly be rejected on this ground, as inadmissible *ratione temporis*.

" It is true that the applicant objects also, under this head, to the decisions of the two special Courts to which he had submitted a request for revision, and these decisions were given subsequently to the entry into force of the Convention in respect of Denmark. It must be noted, however, that, far from ignoring the principle of Article 6, paragraph 2, of the Convention, the said decisions embody it by implication. It follows that, on this point, the application is manifestly ill-founded, and it should accordingly be rejected on this ground in pursuance of Article 27, paragraph 2, of the Convention.

"As regards the alleged violation of Article 6, paragraph 3 (*d*), of the Convention (*cf.* point *C* above), the facts in question relate to a period prior to September 3, 1953. It follows that this part of the application should accordingly be rejected as inadmissible *ratione temporis*.

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[1] [See *supra*, p. 279, n. 2.]

"As regards the alleged violation of Article 6, paragraph 1, of the Convention (*cf.* point *D* above), it should be noted that all the grounds put forward by the applicant in his application to the '*Ankenaevn*' were presented by him once more, and indeed in an amplified form, before the Special Court of Appeals. Therefore, the complaint concerning the non-acceptance of his objection to the Judge in question, even if it has some appearance of foundation, is in fact irrelevant, since the case was completely re-examined by the Court finally seised of it, in whose deliberations the said Judge did not take part. On this particular point, therefore, it appears that the application is manifestly ill-founded. It should accordingly be rejected on this ground, in pursuance of Article 27, paragraph 2, of the Convention.

" On the other hand, as regards the procedings before the Special Court of Appeal, an examination of the file does not disclose a *prima facie* violation of any of the rights and freedoms set forth in the Convention, particularly in Article 6. It appears, therefore, that this part of the application is manifestly ill-founded and it should accordingly be rejected on this ground also in pursuance of Article 27, paragraph 2, of the Convention.

"As regards the alleged violation of Article 5, paragraph 3, and Article 6, paragraph 1, of the Convention (*cf.* point *E* above), the proceedings to which exception has been taken took place between 1946 and 1949 and therefore relate to a period prior to September 3, 1953, the date of the entry into force of the Convention in respect of Denmark. According to the generally recognized principles of international law, the Convention governs, for each Contracting Party, only facts subsequent to its entry into force in respect of that Party. This part of the application should accordingly be rejected, as inadmissible *ratione temporis*."

[Report: *Documents et Décisions*, 1955–56–57, p. 241 (in French).]

NOTE.—See also *Re Application No.* 89/55 (*X.* v. *German Federal Republic*), *supra*, p. 363; *Re Application No.* 134/55 (*X.* v. *German Federal Republic*), *supra*, p. 369; *Re Application No.* 180/56 (*Mrs. X.* v. *German Federal Republic*), *infra*, p. 374; *Re Application No.* 265/57 (*X.* v. *German Federal Republic*), *infra*, p. 393.

The Individual in International Law—Human Rights and Freedoms—European Convention for Protection of—European Commission of Human Rights—Individual Applications—Abuse of Right of Petition—Failure to Provide Any Details.

Re APPLICATION NO. 26/55 (X. *v.* GERMAN FEDERAL REPUBLIC).

European Commission of Human Rights. December 16, 1955.

(Waldock, President; Eustathiades, Berg, Faber, Beaufort, Dominedo, Süsterhenn, Petren, Janssen-Pevtschin, Sørensen, Black, Jonasson, Akbay, Fuest.)

THE FACTS.—The applicant, in an application dated July 23, 1955, claimed that the authorities of the *Land* of Hesse in the Federal Republic of Germany had violated to his detriment the rights set forth in Articles 2, 3, 5, 7, 13 and 17 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, 1950,[1] and Article 1 of the Protocol thereto,[2] but he did not set out the grounds or reasons which had led him to apply to the Commission. In spite of a letter which the Secretariat, at the request of the Commission, addressed to him on October 7, 1955, the applicant did not see fit to furnish any information at all on the matter.

Held: that the application must be rejected as being an abuse of the Convention.

The Commission said: " It follows [from the facts as stated above] that the application should be rejected as an abuse of the right of petition, pursuant to Article 27, paragraph 2, of the Convention.[3]"

[Report: *Documents et Décisions*, 1955–56–57, p. 194 (in French).]

The Individual in International Law—Human Rights and Freedoms—European Convention for Protection of—European Commission of Human Rights—Individual Applications—Abuse of Right of Petition—Proper Administration of Justice—No *Prima Facie* Violation.

Re APPLICATION NO. 169/56 (X. *v.* GERMAN FEDERAL REPUBLIC).

European Commission of Human Rights. September 28, 1956.

(Waldock, President; Eustathiades, Berg, Faber, Beaufort, Dominedo, Süsterhenn, Petren, Janssen-Pevtschin, Sørensen, Crosbie, Jonasson, Akbay, Fuest.)

THE FACTS.—The applicant complained that he had been wrongfully sentenced on October 14, 1950, by the Tribunal (*Landgericht*) of B. in the German Federal Republic, to four years' solitary confinement for a series of crimes and misdemeanours of which he stated that he was not guilty. He complained in particular that the Tribunal had convicted him on the basis of the lying deposition of a witness. He appealed against his conviction, but his appeal was rejected by the Federal Court of Justice (*Bundesgerichtshof*) as manifestly ill-founded. A request for a rehearing of the trial was also rejected, on January 4, 1952, by a judgment of the Tribunal (*Landgericht*) of B., which was confirmed on January 19, 1952, by the Court of Appeal (*Oberlandesgericht*) of C. An appeal on a point of constitutional law lodged by the applicant against his conviction was rejected later in the same year, by the Federal Constitutional Court (*Bundesverfassungsgericht*). The applicant also complained that the Public Prosecutor refused to open a criminal investigation against the witness whose deposition had been relied upon in the original prosecution. Not only was nothing done in answer to his numerous requests, but he was prosecuted for slanderous accusation and sentenced on November 11, 1953, by the Magistrates of the Cantonal Tribunal of D. to one year's solitary confinement, a sentence which, on appeal, was altered by the Tribunal of first instance (*Landericht*) of C. to one year's imprisonment. A second request for the opening of a criminal investigation was also refused, on April 24, 1956. The applicant now asked the Commission to annul the convictions and sentences of October 14, 1950, and November 11, 1953, respectively, and to award him compensation for the damage he had suffered, which he estimated at DM 660,000.

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[1] For the text of these Articles see, variously, *supra*, pp. 366–7, n. 1; p. 282, n. 1; pp. 342–3, n. 1; p. 385, n. 2; and p. 366, n.

[2] See *supra*, p. 380, n. 1.

[[3] See *supra*, p. 279, n. 2.]

Held: that the application must be rejected.

The Commission said: An examination of the file does not disclose in general a *prima facie* violation of any of the rights set forth in the European Convention for the Protection of Human Rights and Fundamental Freedoms, 1950, and in particular of the right to the proper administration of justice, under the conditions set out and within the limits prescribed in Article 6 of the Convention.[1] The numerous proceedings instituted and claims made by the applicant show that, on the contrary, he has been able to defend himself properly, as guaranteed by the Convention.

"It appears, therefore, that the application is manifestly an abuse of the right of petition, and should accordingly be rejected in pursuance of Article 27, paragraph 2, of the Convention.[2]"

[Report: *Documents et Décisions*, 1955–56–57, p. 195 (in French.)]

[[1] See *supra*, pp. 342–3, n. 1.]
[[2] See *supra*, p. 279, n. 2.]

The Individual in International Law—Human Rights and Freedoms—European Convention for Protection of—European Commission of Human Rights—Individual Applications—Abuse of Right of Petition—Flagrant Injustice—Failure to Return Application Form—No Details Given.

Re APPLICATION NO. 244/57 (X. *v.* GERMAN FEDERAL REPUBLIC).

European Commission of Human Rights. July 16, 1957.

(Waldock, President; Eustathiades, Berg, Faber, Beaufort, Dominedo, Süsterhenn, Petren, Janssen-Pevtschin, Sørensen, Crosbie, Skarphedinsson, Erim.)

THE FACTS.—The application consisted of one short letter from the applicant, dated January 2, 1957. In this letter the applicant made a complaint, in extremely vague terms, " against the Tribunal of B." for " flagrant injustice ". He asked that the " necessary papers " should be sent to him for completion by him. On January 9, 1957, the Secretariat of the Commission sent to him the usual application form, drawing his attention in a covering letter to the fact that he had two months in which to return the form duly completed or, alternatively, to send to the Secretariat some other writing to the same effect. The notice of receipt of the letter, signed by the applicant, was in the file, but the applicant did not reply to the letter of January 9. On May 13, 1957, the Secretariat wrote to him again, repeating the earlier letter, and the notice of receipt of this second letter was also in the file, but once more the applicant took no further step.

Held: that the application must be rejected. The applicant's neglect to pursue his claim amounted to an abuse of the right of petition.

The Commission said: " Under Article 25 of the Convention for the Protection of Human Rights and Fundamental Freedoms,[1] the Commission may, subject to certain conditions, receive petitions from any person, non-governmental organization or group of individuals. Neither that Article nor any other Article of the Convention lays down any special requirements as to the form or method of presentation of individual applications, apart from requiring that the applications be addressed to the Secretary-General of the Council of Europe (Article 25) and that they be not anonymous (Article 27 (1) (*a*)). Articles 40, 41 and 42 of the Rules of Procedure of the Commission contain, however, various complementary provisions on this matter, and to enable applicants to comply more easily with these provisions the Commission, at its third session, further approved the sending to applicants of an application form. It has also

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[1 See *supra*, p. 335, n. 1.]

considered it necessary for the good conduct of its work to allow applicants a period of two months from the receipt of the form in which to return the form duly completed or, in the alternative, to send to the Secretariat a letter containing the same information. Failure to comply with all these directions, liberal and applied with leniency as they are, can sometimes show disregard of one of the rules of admissibility provided in the Convention, notably when it reveals in the applicant a persistent lack of diligence amounting to an abuse of the right of petition, within the meaning of Article 27, paragraph 2, of the Convention.[1] It emerges clearly from the facts of the case that, the applicant having set in motion the machinery of protection provided by the Convention, he has nevertheless failed to provide the Commission with the elementary details absolutely indispensable for the examination of his case, although the Secretariat has asked him for them on two occasions. In addition, he has not invoked any circumstance which would justify or excuse his silence, and the Commission has no reason in this case to assume the existence of such a circumstance. He has thus committed a manifest and categorical abuse of his right of petition, and the application should accordingly be rejected in pursuance of Article 27, paragraph 2, of the Convention."

[Report: *Documents et Décisions*, 1955–56–57, p. 196 (in French.)]

The Individual in International Law—Human Rights and Freedoms—European Convention for Protection of—European Commission of Human Rights—Individual Applications—"Applications Substantially the Same" (Article 27 (1) (b) of Convention) —" No Relevant New Information "—*Res judicata* Distinguished.

Re APPLICATION NO. 202/56 (X. *v.* BELGIUM).

European Commission of Human Rights. September 28, 1956.

(Waldock, President; Eustathiades, Berg, Faber, Beaufort, Dominedo, Süsterhenn, Petren, Janssen-Pevtschin, Sørensen, Crosbie, Jonansson, Akbay.)

THE FACTS.—In his first application, lodged on September 29, 1955, and registered under file No. 95/55, X. complained of discrimination against him on the part of the Belgian authorities when he applied for a post in the civil service. He also complained that his appeal to the Belgian *Conseil d'Etat* had been rejected as being out of time and that the Belgian authorities had infringed Article 21, paragraph 2, of the Universal Declaration of Human Rights, 1948, which provided that everyone had the right of equal access to public service. By its decision of December 16, 1955, the Commission rejected that application.[1] In this second application, lodged on July 18, 1956, the applicant, complaining of the same facts, stated that he now based his application not on Article 21, paragraph 2, of the Universal Declaration, but on Articles 6 and 13 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, 1950. In the first place, he maintained that no Belgian court was or could be competent to give judgment on the substance of his case, and that any such judgment would constitute a violation of the right set forth in Article 13 of the Convention.[2] Secondly, he invoked the provisions of Article 6, paragraph 1, of the Convention, which provided that

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[1] See *supra*, p. 279, n. 2.]

> " In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. . . ."

He reaffirmed the " perennial " character of his case and contended that his application could not be rejected as inadmissible *ratione temporis*.

Held: that the application must be rejected, as being substantially the same as the former application.

The Commission said: " Under the terms of Article 27, paragraph 1, of the Convention:—

> " ' The Commission shall not deal with any petition submitted under Article 25 which
>
> (*a*) is anonymous, or
>
> (*b*) is substantially the same as a matter which has already been examined by the Commission or has already been submitted to another procedure of international investigation or settlement and if it contains no relevant information.'

It follows, in particular, from the above-mentioned Article 27, paragraph 1, which refers only to individual applications, that the Commission cannot deal with an application if it is ' substantially the same ' as another ' which has already been examined by the Commission ' and if the second application ' contains no relevant new information '.

" Having regard to the domain in which it performs its task and its functions, the Commission considers that in safeguarding human rights it ought not to follow strict rules which would have the effect of attributing to its decisions the character of *res judicata*, as is done before Common Law tribunals when there is identity of object, parties and cause of action.

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[1] For the full facts and the text of the previous decision, *Re Application No.* 95/55 (*X.* v. *Belgium*), see *supra*, p. 323.

[2] For the text of Article 13 of the Convention see *supra*, p. 385, n. 2.

"The question whether in a given case the ground for rejection provided by paragraph 1 of Article 27 (cited above) exists can only be decided from an examination of the application to ascertain whether or not the paragraph applies in that case. The present application is substantially the same as that previously examined, and the new legal arguments advanced by the applicant are unable to alter the juridical fact which underlies the right invoked and which has reference to a period prior to the entry into force of the Convention in respect of Belgium.

"On the other hand, under the terms of Article 19 of the Convention[1] the Commission was set up "to ensure the observance of the engagements" undertaken by the Contracting Parties. It is incumbent on the Commission, therefore, when it receives a petition from an individual, to find out whether there is or is not a violation of the Convention in the case submitted to it. The Commission carries out this task by looking to see whether the object of the complaint falls essentially within the scope of the Convention, without insisting on the applicant's indicating expressly the Article of the Convention upon which he relies. In the present case, the Commission actually held, in its decision of December 16, 1955, cited above, that 'in general, an examination of the file discloses no *prima facie* violation of any of the rights set forth in the Convention, including Articles 6 and 13'. The idea of a violation of Article 13 of the Convention had thus been rejected by implication, and that of a violation of Article 6 in express terms. The application should accordingly be declared inadmissible under Article 27, paragraph 1(*b*), of the Convention."

[Report: *Documents et Décisions*, 1955–56–57, p. 190 (in French).]

NOTE.—See also *Re Application No.* 261/57, reported *supra*, p. 356; *Re Application No.* 277/57, *supra*, p. 341; and *Re Application No.* 285/57, *supra*, p. 360.

The Individual in International Law—Human Rights and Freedoms—European Convention for Protection of—European Commission of Human Rights—Individual Applications—Application Sunstantially the Same as Another Previously Considered—"No New Relevant Information"—Refusal of Legal Aid in Civil Case Not Within Convention.

Re APPLICATION NO. 265/57 (X. v. GERMAN FEDERAL REPUBLIC).

(Waldock, President; Eustathiades, Berg, Faber, Beaufort, Dominedo, Süsterhenn, Petren, Janssen-Pevtschin, Sørensen, Crosbie, Skarphedinsson, Erim.)

THE FACTS.—By two previous applications, registered under files No. 49/55 and 136/55, X. complained to the Commission, in substance, that in consequence of irregularities in procedure which he alleged had been committed by various German tribunals, his house, situated at B., had been sold by public auction on May 24, 1955, and that, despite recourse had on numerous occasions to judicial organs of the German Federal Republic, he had not succeeded in having this compulsory sale annulled. On September 23, 1955, and May 31, 1956, respectively, the Commission rejected the two above-mentioned applications, the first for non-exhaustion of domestic remedies, the second as manifestly ill-founded.[1] In his new application, lodged on February 25, 1957, as well as in several subsequent letters, the applicant repeated the complaints which he had previously put forward. He further complained of the irregularity attaching to the judgments and orders given in his case by the Tribunal of first instance (*Landgericht*) of C. on December 7, 1956, by the Tribunal of first instance (*Landgericht*) of D. on December 13, 1956, by the Court of Appeal (*Oberlandesgericht*) of F. on January 10 and May 7, 1957, and by the Federal Constitutional Court (*Bundesverfassungsgericht*) on a date not given. He objected, in particular, that in the first three of these decisions he was refused legal aid for which he had applied in order again to attempt to invalidate the forced sale above mentioned. The applicant claimed also that, in 1956 and 1957, he addressed numerous letters of protest to different parliamentary and governmental authorities, but that his letters were in the majority of cases unanswered. The applicant asked for the restitution of his house or suitable compensation together with damages for the whole of the loss which he claimed to have suffered in the matter.

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[1] See *supra*, p. 333, n. 1.]

Held: that the application must be rejected as being substantially the same as the former applications. In any event the applicant was not entitled under the European Convention for the Protection of Human Rights and Fundamental Freedoms, 1950, to legal aid in civil proceedings.

The Commission said: " Under the terms of Article 27, paragraph 1(*b*), of the Convention,[2] the Commission cannot deal with any application lodged in pursuance of Article 25 when it is substantially the same as an application previously examined by the Commission and if it contains no new relevant information. In so far as it reproduces the complaints already set forth in applications No. 49/55 and 136/55, the present application is substantially the same as those and contains no new relevant information. The application should accordingly be rejected on this ground pursuant to Article 27, paragraph 1(*b*), of the Convention.

" In so far as the application differs from applications No. 49/55 and 136/55, an examination of the file as it stands does not disclose a *prima facie* violation of any of the rights and freedoms set forth in the European Convention on Human Rights, and notably the right to a proper administration of justice, under the conditions set out and within the limits defined in Article 6 of the Convention.[1] It appears, therefore, that the application is manifestly ill-founded, and it should accordingly be rejected also on this ground, pursuant to Article 27, paragraph 2, of the Convention.[2]

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[1] These decisions are not reported.

[[2] See *supra*, p. 358, n. 1.]

" As regards the requests for legal aid formulated in vain by the applicant, under the terms of Article 6, paragraph 3(*c*), of the Convention[3] everyone charged with a criminal offence has the right " to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require ". The right of free legal assistance is thus recognized in favour only of a person " charged with a criminal offence ", on condition that the person so charged has not the means to pay for legal assistance of his own choosing and when the interests of justice so require. Apart from the case provided for in the afore-mentioned Article 6, the right to legal aid is not set forth in the Convention as a right to which every person is entitled and the refusal of which by the competent authority would constitute of itself a violation of the Convention. In the present case it was refused in connection with civil proceedings which the applicant intended to bring. It appears, therefore, that the application is in this respect incompatible with the provisions of the Convention and it should accordingly be rejected on this ground also, pursuant to Article 27, paragraph 2, of the Convention."

[Report: *Documents et Décisions*, 1955–56–57, p. 192 (in French).]

The Individual in International Law—Position of—Human Rights and Freedoms—European Convention for Protection of—European Commission of Human Rights—Individual Applications—Personal Nature of Applications—Meaning of " Victim " in Article 25 of Convention—Rights of Relatives or Third Parties—Requirement of Personal Interest—Application Under Articles 5 and 6 of Convention.

Re APPLICATION NO. 100/55 (X., Y. and Z. *v.* GERMAN FEDERAL REPUBLIC).

European Commission of Human Rights. May 31, 1956.

(Waldock, President; Eustathiades, Berg, Faber, Beaufort, Dominedo, Süsterhenn, Petren, Janssen-Pevtschin, Sørensen, Crosbie, Jonasson, Akbay, Fuest.)

THE FACTS.—The applicants complained on October 9, 1955, that B., their brother and brother-in-law, was kept in prison for two years after the completion of his prison sentence, under Articles 20(*a*) and 42(*e*) of the German Penal Code (which provided for detention for an indefinite period). They asked the Commission to examine the case.

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[1] See *supra*, pp. 342–3, n. 1.]
[2] See *supra*, p. 279, n. 2.]
[3] See *supra*, p. 343, n.]

Held: that the application must be rejected. B. had been detained after conviction by a competent court.

The Commission said: "Under Article 25 of the Convention,[1] the Commission can only receive a petition from an individual if the petitioner claims that he himself was the victim of a violation by one of the High Contracting Parties of one of the rights set forth in the Convention. In the present case, the applicants complain that their brother and brother-in-law was the victim of an alleged violation of one of those rights. Although they do not show that B. duly authorized them to act in his name, it would be possible nevertheless to allow that when a violation of the Convention has been committed, a near relative of the victim or any other third party would be able on his own initiative to apply to the Commission, in so far as the violation injured him or in so far as he had a valid personal interest in putting an end to that violation. In any event, B. lodged his own application on November 20, 1955 (No. 138/55[2]), in which he complains of the same facts.

"Under the terms of Article 5 of the Convention,[3] no one shall be deprived of his liberty except in the cases there enumerated and in accordance with a procedure prescribed by law, notably when it is '(*a*) the lawful detention of a person after conviction by a competent court'. It appears that these factors are present in this case. Furthermore, an examination of the file does not disclose a violation of one of the rights set forth in the Convention, in particular in Articles 5 and 6.[4] The application should accordingly be rejected on this ground under Article 27, paragraph 2, of the Convention,[5] as manifestly ill-founded."

[Report: *Documents et Décisions*, 1955–56–57, p. 162 (in French).]

[[1] See *supra*, p. 333, n. 2.]

[[2] *Re Application No.* 138/55 (*X.* v. *German Federal Republic*), reported *supra*, p. 371.]

[[3] See *supra*, p. 342, n. 1.]

[[4] See *supra*, pp. 342–3, n. 1.]

[[5] See *supra*, p. 279, n. 1.]

The Individual in International Law—Human Rights and Freedoms—European Convention for Protection of—European Commission of Human Rights—Individual Applications—Personal Nature of Application—Meaning of "Victim" in Article 25 of Convention—Application by Third Party—Victim Not in Position to Assert Rights—Evidence of Authority to Make Application.

Re APPLICATION NO. 113/55 (X. *v.* GERMAN FEDERAL REPUBLIC).

European Commission of Human Rights. May 30, 1956.

(Waldock, President; Eustathiades, Berg, Faber, Beaufort, Dominedo, Süsterhenn, Petren, Janssen-Pevtschin, Sørensen, Crosbie, Jonasson, Akbay, Fuest.)

THE FACTS.—The applicant claimed damages and interest amounting to the sum of DM 34,800 in the name of his three married sisters (born in Hungary), who had been ill-treated by the National Socialists. He stated that he had submitted the case to the Office of Indemnification (*Entschädigungsamt*) and to the Federal President (*Bundespräsident*) without obtaining the damages asked for. The Secretariat of the Commission wrote to the applicant on November 4, 1955, asking him to furnish documents establishing that he was authorized to act in the name of his three sisters, but no reply was received to that letter. On January 27, 1956, the Secretariat wrote to him again, and the applicant replied, on March 20, 1956, that he was not able for "personal reasons" to send the required authorization.

Held: that the application must be rejected. The applicant had not shown that he was duly authorized by his sisters to lodge this petition.

The Commission said: "Under the terms of Article 25 of the Convention,[1] the Commission cannot receive a petition from an individual unless the petitioner claims to be the 'victim' of a violation by one of the High Contracting Parties of the rights set forth in the Convention. Granted that, in the case of a violation of the Convention, the Commission can be petitioned by a close relative of the victim or even by another third party in so far as the alleged violation caused injury to them or in so far as they have a valid personal interest in putting an end to that violation or, again, when the victim himself is not in a position to act so as to assert his rights, it is sufficient to state that, in the present case, the applicant seeks monetary compensation for the alleged injury suffered by his sisters on the ground of their ill-treatment by the Nazis. The applicant, although invited to do so, has not proved that he has been duly authorized by his sisters to act in their name, as is required, moreover, by Article 40 of the Rules of Procedure of the Commission. The

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[[1] See *supra*, p. 333, n. 2.]

application should accordingly be declared inadmissible under Article 27, paragraph 2, of the Convention,[1] for failure to conform with Article 25 of the said Convention."

[Report: *Documents et Décisions*, 1955–56–57, p. 161 (in French).]

The Individual in International Law—Human Rights and Freedoms—European Convention for Protection of—European Commission of Human Rights—Individual Applications—Personal Nature of Application—Meaning of " Victim " in Article 25 of Convention—Rights of Relatives and Third Parties—Insufficiency of Particulars.

Re APPLICATION NO. 155/56 (E.X. *v.* GERMAN FEDERAL REPUBLIC).

European Commission of Human Rights. September 29, 1956.

(Waldock, President; Eustathiades, Berg, Faber, Beaufort, Dominedo, Süsterhenn, Petren, Janssen-Pevtschin, Sørensen, Crosbie, Jonasson, Akbay, Fuest.)

THE FACTS.—The applicant complained that her son, F.X., then in prison at B., was not receiving the medical care which the state of his health demanded, and that the stomach complaint from which he was suffering had considerably worsened. She did not, however, respond to a letter from the Commission asking for details and for supporting evidence.

Held: that the application must be rejected for insufficiency of particulars.

The Commission said: " Under the terms of Article 25, paragraph 1, of the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950,[2] the Commission cannot receive a petition from an individual unless the petitioner claims that he himself is the victim of a violation by one of the High Contracting Parties of the rights set forth in the Convention. Although the applicant does not show that her son has duly authorized her to act in his name, nevertheless it can be admitted that in the case of an alleged violation of the Convention a close relative of the victim or even another third party can of his own initiative petition the Commission, in so far as the said violation causes him harm or in so far as he may have a valid personal interest in having an end put to the violation or, again, when the victim himself is not able to act on his own behalf. The applicant has not, however, provided sufficient details nor produced anything to support her allegations, in spite of the express request for her to do so made to her, in the name of the Commission, by a letter of February 7, 1956, of which she acknowledged receipt. An examination of the file as it stands does not disclose a *prima facie* violation of any of the rights set forth in the Convention. It appears, therefore, that the application is manifestly ill-founded and it should accordingly be rejected in pursuance of Article 27, paragraph 2, of the Convention."[1]

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[1] See *supra*, p. 279, n. 2.]

[2] See *supra*, p. 333, n. 2.]

[Report: *Documents et Décisions*, 1955–56–57, p. 163 (in French).]

The Individual in International Law—Position of—Human Rights and Freedoms—European Convention for Protection of—European Commission of Human Rights—Individual Applications—Personal Nature of Applications—Effect of Death of Applicant—Meaning of "Victim" in Article 25 of Convention—Rights of Indirect Victims—Position of Heirs or Personal Representatives—Inadmissibility of Application by Legatee of Chattels.

Re APPLICATION NO. 282/57 (X. *v.* GERMAN FEDERAL REPUBLIC).

European Commission of Human Rights. December 16, 1956.

(Waldock, President; Eustathiades, Berg, Faber, Beaufort, Dominedo, Süsterhenn, Petren, Janssen-Pevtschin, Sørensen, Crosbie, Jonasson, Akbay, Fuest.)

THE FACTS.—On September 9, 1949, the applicant, a German national, concluded before a notary a contract with a Saar firm for the formation of a limited liability company having as its object the publication of books and other works. In 1951, following upon certain difficulties within the company, the applicant commenced before the Tribunal of first instance of B. a civil action against his co-directors. In March 1952, in order to pursue the proceedings instituted by him, the applicant sought a grant of legal aid. This was refused by the Eighth Civil Chamber of the Tribunal of first instance of B. The applicant then formulated a second request, which was not heard. In 1953, on application to the President of the Tribunal, he succeeded in obtaining the grant of legal aid. On July 6, 1954, the Tribunal of first instance of B. gave partial judgment granting certain of the applicant's claims. On appeal by his co-directors, the Court of Appeal of B. on January 9, 1957, reversed this judgment. For the purpose of appealing against the order of January 9, 1957, the applicant filed a request for legal aid. This was rejected by the Second Civil Chamber of the Federal Court of Justice, on the grounds that the appeal had no chance of success and that the value of the subject-matter of the litigation was not sufficiently great. The applicant then applied, without success, to the President of the said Court for legal aid to be granted to him. On June 25, 1957, after having lodged his present application before the Commission, the applicant laid a complaint against the three Judges responsible for the above-mentioned order of January 9, 1957, against the three

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[1 See *supra*, p. 279, n. 2.]

counsel on the opposing side, and against the Judge who, as President of the Eighth Civil Chamber of the Civil Court of first instance of B., had refused legal aid in 1952. On August 13, 1957, the applicant informed the Secretariat of the Commission that the Public Prosecutor had not yet dealt with his complaint. It emerged, however, from a document in the file that, subsequently, the applicant was the object of a counter-accusation on the part of the four Judges and the three counsel mentioned above, alleging slander by him.

On October 19, 1957, a Miss C. informed the Secretariat that the applicant had died and that she intended, as his heiress, to continue the proceedings commenced by him before the Commission. In a letter of October 20, 1957, the Secretariat replied to Miss C. that it 'would inform the Commission of her intention' but that 'nevertheless, without prejudicing the decision that the Commission will finally take in this case, and in particular the question of whether she is effectively entitled to continue the proceedings commenced by the applicant, it would seem to it to be necessary and useful for her to furnish a certificate attesting to her status as heiress.' On November 4, 1957, Miss C. sent to the Secretariat a document dated November 10, 1956, from which it appeared that she could not be regarded as the heiress of the applicant, but only that he had transferred to her the title to all the chattels in his apartment, in recognition of services rendered.

Held: (*a*) that as regards X.'s original application, in view of the decease of the applicant the case must be struck out; and (*b*) that the request of Miss C. to pursue the application must be rejected, she not having sufficient interest or status therefor.

The Commission said: "The applicant complained of the arbitrary attitude of the Judges who made the order of the Court of Appeal of B.; on the other hand, he criticized the extreme slowness with which the proceedings against his co-directors had progressed over five years. As regards the original application of X., the decease of the applicant has, subject to what follows, extinguished the claim; it is proper, therefore, to strike the case from the record.

"In so far as Miss C. seeks to pursue the application on her own behalf, it should be noted that under the terms of Article 25, paragraph 1, of the European Convention for the Protection of Human Rights and Fundamental Freedoms,[1] the Commission can only receive a petition from an individual if the petitioner claims that he himself is the victim of a violation by one of the High Contracting Parties of rights set forth in the Convention. The question thus arises as to whether Miss C. can legitimately 'claim to be a victim of a violation' by the German Federal Republic of the rights which the applicant invoked. By 'victim', Article 25 of the Convention means to refer not only to the direct victim or victims of the alleged violation

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[1 See *supra*, p. 333, n. 2.]

—in this case X.— but also to any other indirect victim to whom this violation has caused detriment or who has a valid personal interest in having an end put to the violation. It is clear that Miss C. fulfils none of these conditions; in fact, she is not the heiress of X. but simply a person entitled by special title and then, apparently, only for value received. Furthermore, the rights that X. asserted against his co-directors are not included among those transferred by him to Miss C. It is true, on the other hand, that the personal representative of the victim of an alleged violation, or even another person when the victim is unable to act for himself, can present an application in the name of the said victim. An examination of the file reveals, however, that Miss C. does not possess in this case any of these qualifications. It appears, therefore, that Miss C. cannot, having neither a special interest nor the necessary status, submit the present application to the Commission. The application does not meet the conditions of Article 25 of the Convention; it is therefore incompatible with the provisions of the Convention; and it should accordingly be rejected on this ground in pursuance of Article 27, paragraph 2, of the Convention.[1]"

[Report: *Documents et Décisions*, 1955–56–57, p. 164 (in French).]

The Individual in International Law—Human Rights and Freedoms—European Convention for Protection of—European Commission of Human Rights—Individual Applications—Application Against State Not Member of Council of Europe and Not Having Signed or Ratified Convention—Application Against Institution for Which Member States Not Answerable.

Re APPLICATION NO. 182/56 (X. *v.* GERMAN FEDERAL REPUBLIC).

European Commission of Human Rights. March 8, 1957.

(Waldock, President; Eustathiades, Berg, Faber, Beaufort, Dominedo, Süsterhenn, Petren, Janssen-Pevtschin, Sørensen, Crosbie, Skarphedinsson, Akbay.)

THE FACTS.—In 1938, the applicant, who resided in the town of B. in Germany, bought for the sum of RM 60,000 a building in that town from C., who was then in England where he had been living since 1934. In 1948, C. presented to the Office for Restitution a request for restitution of the building, under Law No. 59 of the Military Government of the American Zone of Occupation in Germany, alleging that he had been compelled to sell the building in 1938 because he was a Jew and solely as a consequence of the exceptional measures to which the Jews were subjected under the National-Socialist régime. Pursuant to this request, restitution of the building in question was ordered on October 5, 1950, by the Chamber of

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[1] See *supra*, p. 279, n. 2.

Restitutions (*Wiedergutmachungskammer*) of the Tribunal (*Landgericht*) of B. The applicant's appeal against this decision was rejected by the Chamber of Restitutions of the Court of Appeal (*Oberlandesgericht*) of B. on April 12, 1951, and, finally, by the United States Court of Restitution Appeals of the Allied High Commission for Germany of D., in 1952. Subsequently to the signature, but before the entry into force, of the Paris Agreements of October 23, 1954, concluded between the German Federal Republic on the one part and France, the United Kingdom and the United States of America on the other, the applicant lodged a request for a review of the restitution proceedings, but in 1954 this request also was rejected by the United States Court of Restitution Appeals of D. The applicant now claimed that the restitution without compensation of the building to C., as former owner, ordered by a tribunal which in his contention was neither independent nor impartial, constituted a violation of the European Convention for the Protection of Human Rights and Fundamental Freedoms, 1950, in particular of Articles 6 and 7.[1] He contended, in particular, that he had made the purchase in 1938 in proper form and that the price which he had paid was in excess of the real value of the building. Furthermore, he had not known that C. was a Jew. He maintained, in addition, that since the entry into force of the Paris Agreements, by which the Federal Republic of Germany had undertaken the obligation of applying Allied legislation concerning the restitution of the property of victims of Nazi oppression, the Government of that country was entirely responsible for an " expropriation without compensation " carried out in pursuance of Military Government Law No. 59. In consequence, the applicant claimed from the German Federal Republic the payment of reparation amounting to RM 119,200, plus DM 23,108 for the loss which he had suffered as a result of the restitution of the building.

Held: that the application must be rejected. The Court of Restitution Appeals was a court of a State which was not a party to the European Convention on Human Rights.

The Commission said: " The application relates to decisions given in 1952 and 1954 by the United States Court of Restitution Appeals of D. That Court, however, although until May 5, 1955 (the date of the entry into force of the Paris Agreements of October 23, 1954) it exercised jurisdiction over the territory of the German Federal Republic, was set up by Law No. 59 of the United States Military Government in Germany. It was composed exclusively of Judges of American nationality who, under Law No. 21 of the United States High Commission for Germany,[2] were remunerated by the Government of the United States and were subject to the administrative and disciplinary authority of that Government. The Court gave its decisions in the name of the Allied High Commission and not 'in the name of the people' as provided in German legislation for all German courts (*e.g.*, Article 311 of the Code of Civil Procedure; Article 268 of the Code of Penal Procedure; and Article 25, paragraph 4, of the Law concerning the Federal Constitutional Court). The decisions of the Court were definitive and, as such, not subject to the German Federal Court of Cassation or the Federal Constitutional Court.

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[1] See *supra*, pp. 342–3, n. 1.

[2] *Cf. Official Journal of the Allied High Commission*, p. 929.

"It appears sufficiently from the foregoing that the United States Court of Restitution Appeals of D. was outside the judicial system of the German Federal Republic and derived entirely at first from the authority of the Military Government and subsequently from the United States High Commission in Germany; it was within the framework of the occupation régime, which only came to an end on May 5, 1955. Consequently, the decisions of that Court which are now challenged, and which took effect as *res judicata* before May 5, 1955, originate in fact not from the jurisdiction of the German Federal Republic, within the meaning of Article 1 of the Convention,[1] but from that of the United States. Furthermore, under the terms of Article 25, paragraph 1, of the Convention,[2] only the Contracting Parties can be the object of an application before the Commission. It follows, moreover, from Article 66, paragraph 1, of the Convention[3] that the Convention only binds Members of the Council of Europe who have signed and ratified it—the United States of America satisfies none of these conditions, and therefore does not possess the character of a party to the Convention. The application should accordingly be rejected in pursuance of Article 27, paragraph 2, of the Convention.[4]"

[Report: *Documents et Décisions*, 1955–56–57, p. 167 (in French).]

NOTE.—See also *Re Application No.* 172/56 (*X.* v. *Sweden*), reported *supra*, p. 328; *Re Application No.* 33/55 (*X.* v. *Sweden*), *infra*, p. 572; and *Re Application No.* 88/55 (*X.* v. *German Federal Republic*), *infra*, p. 548.

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[1] See *supra*, p. 325, n. 1.]

[2] See *supra*, p. 333, n. 2.]

[3] See *supra*, p. 342, n. 1.]

[4] See *supra*, p. 279, n. 2.]

The Individual in International Law—Human Rights and Freedoms—European Convention for Protection of—European Commission of Human Rights—Individual Applications—Application against Member State of Council of Europe Having Signed But Not Ratified Convention and Protocol—Proper Administration of Justice—Hindrance by Municipal Authorities of Recourse to Commission.

Re APPLICATION NO. 188/56 (X. *v.* GERMAN FEDERAL REPUBLIC).

European Commission of Human Rights. December 17, 1957.

(Waldock, President; Eustathiades, Berg, Faber, Beaufort, Dominedo, Süsterhenn, Petren, Janssen-Pevtschin, Sørensen, Crosbie, Skarphedinsson, Erim.)

THE FACTS.—The applicant, a German national, stated that he had served a sentence of preventive detention from December 31, 1946, to July 28, 1947, on conviction by the Austrian courts for fraud, breach of trust and defamation. He claimed to have lost through the default of the Austrian judicial authorities (a) his house, which was compulsorily sold by public auction, and (b) a sum of 23,200 schillings which had been taken by third parties from his bank account. He further stated that he was subsequently expelled from Austrian territory and that he settled in Germany in November 1948. Since taking up residence in the territory of the German Federal Republic the applicant became involved in a series of civil and criminal proceedings. It appears from the documents in the file that on July 4, 1955, the Tribunal of first instance (*Landgericht*) of B. in the German Federal Republic sentenced the applicant to four years and two months' imprisonment, to a fine of RM 130, and to the loss of civil rights for three years, for a number of crimes. The applicant lodged an appeal against this judgment, which was rejected by the Federal Court of Justice (*Bundesgerichtshof*) in 1955. Before pronouncing final judgment on July 4, 1955, the Tribunal seems to have separated from the main proceedings certain unspecified questions concerning which it had given a "partial judgment" (*Teilurteil*) at the beginning of 1955. On May 27, 1955, the applicant requested a review of this judgment, but the Tribunal of first instance of B. found against him on December 21, 1956. Against this decision the applicant lodged an appeal (*Beschwerde*) which was also rejected, by the Court of Appeal of C., on February 26, 1957. The applicant had also, in January 1955, lodged an appeal against a judgment given on November 4, 1954, by the Tribunal of first instance of B. However, the documents in the Commission's file did not show whether this judgment was the same as that mentioned above, or a different judgment. The Federal Court of Justice quashed the judgment appealed against on certain points and remitted the case to the Court of first instance for a new examination. In 1955, the applicant appealed against this order to the Federal Constitutional Court (*Bundesverfassungsgericht*), but his appeal was rejected as manifestly ill-founded. In 1957, the applicant lodged an appeal before the Federal Constitutional Court against his conviction of July 4, 1955, and against the rejection of his request for a rehearing. The Federal Constitutional Court rejected that appeal. In two letters written prior to that decision, the President of the First Chamber of the Constitutional Court had explained to the applicant: (a) with regard to his appeal against conviction, that he had not initiated it within the period of one month allowed by the relevant legislation; (b) with regard to his request for a rehearing, that his file did not show that any fundamental right had been infringed; and (c) as to the allegedly excessive length of his imprisonment, that he had not made use of all the remedies available to him.

The applicant also claimed that he had been convicted on a date subsequent to July 4, 1955, by the Magistrates' Court (*Schoffengericht*) of B. for insulting the bench.

The applicant alleged that various Articles of the European Convention for the Protection of Human Rights and Fundamental Freedoms, 1950, had been infringed.[1] He complained, in particular: (a) that the above-mentioned Tribunals had not taken into consideration certain evidence produced by him; (b) that the preliminary investigation of his case had been carried out in a partial and arbitrary manner; (c) that on June 11, 1953, certain police officers seized 1,400 documents at his home and that he was not furnished by the Tribunal of first instance of B. with a detailed inventory of the documents, as provided by the rules of penal procedure then in force; (d) that, despite numerous requests by the applicant, the Public Prosecutor had brought his case before the Tribunal of first instance of B. instead of that of D.; and (e) that a letter from the applicant which the judicial authorities considered libellous, had been retained by them.

It appeared that these allegations had been the grounds of an appeal on a point of constitutional law by the applicant in 1954, but that the Federal Constitutional Court had rejected this appeal on a date prior to November 30, 1955. As regards the above-mentioned judgment of July 4, 1955, the applicant attacked, amongst other things, the impartiality of the Judges.

The applicant formulated the grounds of his application as follows: In so far as his application was directed against Austria, the applicant asked for (1) compensation corresponding to the damage suffered by him as a result of his preventive detention;

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[1] The Articles cited by the applicant were Article 3 (see *supra*, p. 282, n. 1), Article 5, paras. 1 and 3, Article 6, paras. 1, 3 (*a*), (*b*) and (*d*), Article 8, para. 1, Article 10, para. 1 (see *supra*, pp. 342–3, n. 1), and Article 25, para. 1 (see *supra*, p. 333, n. 2).

(2) repayment of the sum of 23,000 schillings mentioned above. In so far as his application was directed against the German Federal Republic, the applicant asked that the criminal proceedings be reviewed, and also claimed compensation, the amount of which he would determine at a later date. Finally, the applicant asked to be heard by the Commission. Between November 3, 1956, and August 6, 1957, the authorities of the prison in which the applicant was serving his sentence held up the correspondence between the applicant and the Secretariat of the Commission. As a result of representations made by the Secretariat to the Government of the German Federal Republic, the Federal Minister of Justice addressed to the judicial and prison authorities of the Republic a circular dated May 31, 1957, ordering the competent authorities to " ensure that detained persons are not impeded in the exercise of their right of recourse to the Commission ". On July 3, 1957, the German Government officially communicated this circular to the Commission. As a result of this measure, the applicant was able to correspond normally and freely with the Commission.

Held: that the application must be rejected. No complaint lay against Austria because that State had signed but not ratified the Convention. Of the complaints against Germany, some of the facts had occurred before the entry into force of the Convention; the applicant had not exhausted the local remedies available to him; some of the claims were manifestly ill-founded and some were lodged out of time with the Commission.

The Commission said: " As regards that part of the application which is directed against Austria, it follows from Article 25, paragraph 1, of the Convention[1] that only the Contracting Parties to the said Convention which have recognized the right of individual recourse to the Commission can be the object of an application admissible before the Commission; it follows, on the other hand, from Article 66 of the Convention[2] that only States Members of the Council of Europe who have duly signed and ratified the Convention have the character of Contracting Parties. Austria, although a Member of the Council and a signatory of the Convention, has not yet ratified it nor, *a fortiori*, accepted the jurisdiction provided for in Article 25. It appears, therefore, that the application does not, in this respect, accord with the provisions of Articles 25 and 66 referred to above and consequently it is incompatible with the provisions of the Convention. It should accordingly be rejected on this ground in accordance with Article 27, paragraph 2, of the Convention,[3] as being directed against a State not bound by the Convention.

[[1] See *supra*, p. 333, n. 2.]
[[2] See *supra*, p. 333, n. 3.]
[[3] See *supra*, p. 279, n. 2.]

" As regards that part of the application which is directed against the German Federal Republic.—(a) Certain facts in the case appear to relate to a period prior to September 3, 1953, the date of the entry into force of the Convention in respect of the Federal Republic of Germany. In this regard, it should be noted that, according to generally recognized principles of international law, the said Convention only governs, for each Contracting Party, facts subsequent to its entry into force in respect of that Party. The application should accordingly be rejected on this ground as inadmissible *ratione temporis*.

" (b) As regards the sentence pronounced on July 4, 1955, by the Tribunal of first instance of B., it should be noted that, under the terms of Article 26 of the Convention,[1] the Commission may not deal with a matter until the domestic remedies have been exhausted, according to the generally recognized principles of international law. The applicant omitted to apply to the Federal Constitutional Court within the time-limit provided by the legislation in force. Moreover, an examination of the file, as it stands, does not diclose the existence of special circumstances in this case such as to relieve the applicant, according to generally recognized principles of international law, from the obligation to exhaust within the given time-limit the remedies available to him. It appears, therefore, that the applicant has not observed the aforementioned provisions of Article 26 in the matter of the exhaustion of domestic remedies, and the application should accordingly, on this ground also, be rejected in accordance with Article 27, paragraph 3, of the Convention.[2]

" (c) As to the decisions on the question of the request for revision presented by the applicant, an examination of the file does not disclose a violation of any of the rights and freedoms set forth in the Convention, in particular the right to a proper administration of justice, under the conditions laid down and within the limits defined in Article 6 of the said Convention.[3] It appears, therefore, that the application is in this respect manifestly ill-founded and it should accordingly be rejected on this ground in accordance with Article 27, paragraph 2, of the Convention.

" (d) As regards the allegations which were the grounds of the appeal on a point of constitutional law lodged by the applicant in 1954—an appeal which seems to have been rejected on a date prior to November 30, 1955—it is necessary to note that the applicant did not observe the time-limit provided for in Article 6 of the Convention. The application should accordingly be rejected on this ground also, in accordance with Article 27, paragraph 3, of the Convention.

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[1] See *supra*, p. 340, n. 1.]

[2] See *supra*, p. 280, n. 1.]

[3] See *supra*, pp. 342–3, n. 1.]

" (e) As to the conviction of the applicant by the Magistrates' Court of B., reference must again be made to the terms, already cited, of Article 26 of the Convention. The applicant does not show that he exercised the remedies available to him against the decision of the Magistrates. An examination of the file does not disclose in this case the existence of special circumstances such as to relieve the applicant, according to generally recognized principles of international law, from the obligation to exhaust the domestic remedies available to him. It appears, therefore, that the applicant has not observed the provisions (cited above) of Article 26 of the Convention concerning the exhaustion of domestic remedies, and the application should accordingly be rejected on this ground also, in accordance with Article 27, paragraph 3, of the Convention.

" (f) Finally, as regards the obstacles put by the prison authorities of F. in the way of correspondence between the applicant and the Secretariat of the Commission, it must be noted that even if, at the beginning of the proceedings, the applicant was effectively prevented from corresponding normally and freely with the Commission, it appears from the file that it was otherwise as from August 1957. It follows that the grounds for complaint which could have been maintained in this respect against the respondent party have now no substance."

[Report: *Documents et Décisions*, 1955–56–57, p. 174 (in French).]

The Individual in International Law—Human Rights and Freedoms—European Convention for Protection of—European Commission of Human Rights—Individual Applications—Application Against the Saar—Effect of Integration of the Saar into German Federal Republic—Procedure of Working Group Under Rule 45 of Rules of Procedure of Commission.

Re APPLICATION NO. 245/57 (THE W. ASSOCIATION, BY X., Y. AND Z.,[1] *v.* GERMAN FEDERAL REPUBLIC AND THE TERRITORY OF THE SAAR[2]).

European Commission of Human Rights. December 20, 1957.

(Waldock, President; Eustathiades, Berg, Faber, Beaufort, Dominedo, Süsterhenn, Petren, Janssen-Pevtschin, Sørensen, Crosbie, Skarphedinsson, Erim.)

THE FACTS.—After the evacuation of the civilian population from the territory of the Saar in 1939, 31 houses at B. were demolished under an urban development plan. These demolitions took place, in some instances, in the absence of the owners of the houses, some of whom subsequently complained that certain of the contents of their houses had been destroyed or damaged. The owners of the houses in question formed themselves into the W. Association for the protection and joint enforcement of their rights. In a test case before the Civil Chamber of the Tribunal of first instance (*Landgericht*) of C., Z., one of the applicants, sued the town of B. for the loss which he had suffered in consequence of the demolition. In 1953, the Tribunal dismissed the applicant's case, stating that he had not provided sufficient evidence of the responsibility of the town of B. for the demolition of his house and the destruction of his moveable property. In 1954, the applicant in question appealed against this judgment to the Court of Appeal (*Oberlandesgericht*) of C. In 1956, the Third Civil Chamber of that Court rejected the appeal, basing its decision on the same grounds as the Tribunal of first instance. In addition, it pointed out that the demolition had been carried out under the authority of the Governmental Office for Reconstruction (*Staatliches Wiederaufbauamt*), which was under the Governor-General of the Reich (*Reichsstatthalter*) for the Saar. In the meantime, the applicants had also applied to the Government of the Saar for compensation. In a letter dated in 1955, the Government replied, *inter alia*, that " the Saar was not able to recognize an obligation to pay damages ", that " the measures in question were those of the former Reich " and that " the Saar could not be regarded as successor to the Reich."

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[1] Suing in their own name and on behalf of the Association, of which they were respectively first President, second President and first Secretary.

[2] Before the political integration of the Saar into the German Federal Republic on January 1, 1957, it had, as an Associate Member of the Council of Europe, signed and ratified the European Convention for the Protection of Human Rights and Fundamental Freedoms, 1950, and the Protocol to 1952 thereto, but without recognizing the right of individual recourse to the Commission. The Commission was

In their application to the Commission, the applicants stated that they had so far received no compensation. They alleged also that certain governmental circles had successfully brought influence to bear on the two Courts referred to above, in order to secure judgments favourable to the interests of the Government of the Saar. They claimed, in addition, that appeal to a further court was not at that time possible in the Saar and that the two judgments in question should accordingly be regarded as final.

The applicants complained principally of the arbitrary attitude adopted towards them by the competent judicial organs, which had not taken into consideration any of the evidence produced by the applicant who took part in the proceedings mentioned above. They also complained of the refusal of both the Government of the Saar and the Town of B. to compensate them for the losses caused by the destruction of their property. The applicants claimed full

therefore not competent to receive applications against the Saar. After January 1, 1957, a number of applications against the German Federal Republic were addressed to the Commission in respect of actions or decisions taken by the Saar authorities before that date, *viz.*, the present application, No. 245/57; *Application* No. 256/57, reported *infra*, p. 413, and two unreported applications, No. 255/57 and 286/57. This raised the question whether or not the Federal Republic had taken over the obligations assumed by the Saar by virtue of the Convention and Protocol. The Commission took no decision on this point as it was in any event obliged to declare the applications in question inadmissible on other grounds.

reparation for the damage suffered by the members of the W. Association as the result of the "arbitrary" demolition of their property. They asked in particular that the European Commission of Human Rights should intervene in their behalf with the Government of the Saar and the Government of the German Federal Republic.

A working group was appointed by the Commission to carry out the duties laid down in Rule 45 of its Rules of Procedure.[1] The group examined the application at its meeting of May 17, 1957, and decided, before submitting a report to the Commission, to instruct the Secretariat to find out from the applicants whether, following the integration of the Saar into the Federal Republic of Germany, they were now able to lodge claims with the Federal authorities. The Secretariat accordingly wrote to the applicants on May 22, 1957, and asked them "whether, as a result of the political integration of the Saar into the Federal Republic of Germany, they were not now able to present their claims to the competent authorities of the German Federal Republic and, ultimately, to the courts . . . seeing that, in order to hold the Federal Republic of Germany responsible for an alleged violation of the Convention, it would appear that, under the terms of Article 26 [of the European Convention for the Protection of Human Rights and Fundamental Freedoms, 1950[2]], they would have to have exhausted domestic remedies. . . ." In their reply dated May 28, 1957, the applicants stated that (1) the order of the Court of Appeal of C. made in 1956 was final; (2) the facts giving rise to the application occurred when the Saar was still independent; (3) the principal ground of the application was concerned with the arbitrary attitude of the courts of the Saar, which had not taken into consideration any of the evidence put forward by the applicants; (4) after the return of the Saar to Germany at the beginning of 1957, the Federal Republic of Germany undertook the obligations previously accepted by the Saar under the European Convention on Human Rights and the Protocol thereto.

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[1] Rule 45 of the Commission's Rules of Procedure provided (before its amendment on September 20, 1955):

"1. Any application submitted according to Article 25 of the Convention shall be referred by the President of the Commission to the three members mentioned in Rule 34, who shall make a preliminary examination as to its admissibility. The three members shall then submit to the Commission a report on such preliminary examination.

"2. If the three members unanimously report that the application appears to be admissible, the President of the Commission shall through the Secretary-General of the Council of Europe give notice of such application to the High Contracting Party against which the claim is made and shall invite it to submit to the Commission its observations in writing on the admissibility of such application.

"3. If the three members do not unanimously report that the application appears to be admissible, the Commission shall consider the application and may

"(*a*) either, declare at once that the application is inadmissible,

"(*b*) or, through the Secretary-General of the Council of Europe give notice of such application to the High Contracting Party against which the claim is made and invite it to submit to the Commission its observations in writing on the admissibility of such application."

Rule 34 provides as follows:

"1. The Commission shall, as circumstances require, appoint one or more groups, each consisting of three of its members, to carry out the duties laid down in Rule 45. Two substitute members shall also be appointed for each group.

"2. Such members and substitute members shall be appointed by the Commission in plenary session.

"3. The work of a group shall be presided over by the senior member of such group according to the order of precedence laid down in Rule 3."

[[2] See *supra*, p. 280, n. 1.]

The working group made its report, and after considering it the Commission decided on July 19, 1957, "(a) to adjourn the examination of the admissibility of the application; (b) to instruct the Secretariat to send to the Government of the German Federal Republic a statement of the facts, setting out the substance of the allegations made by the applicants, and asking that Government to provide the Commission in due course with information as to whether there are now available to the applicants any remedies before the courts of the Federal Republic for enforcement of their alleged rights and, if so, what those remedies are." At the same time, the Commission stressed that "this communication to the Federal Government is not made in application of Article 45, paragraph 3 (*b*), of the Rules of Procedure, but simply constitutes a request for information to enable the Commission to come to a decision, with a full understanding of the position, concerning the admissibility of the application." On July 25, 1957, the Head of the Secretariat wrote accordingly to the Permanent Representative of the Federal Republic of Germany at the Council of Europe, who, on October 16, 1957, sent to the Secretariat the following "observations":

"The individual application was lodged on December 15, 1956, 'against the Federal Republic of Germany . . . (against the Saar, which was integrated into the Federal Republic of Germany on January 1, 1957)'. At that time the lodging of an individual application against the Saar was not admissible, as the Saar was not yet within the field of application of the declaration made by the Federal Republic in conformity with the first sentence of the first paragraph of Article 25 of the Convention on Human Rights.[1] An individual application against the *Federal Republic* was also inadmissible at that date, seeing that prior to January 1, 1957, the applicants were not subject to the authority of the Federal Republic, at least as regards the effective exercise of political power in the Saar (*cf.* Article 27, paragraph 2,[2] and Article 1[3] of the European Convention on Human Rights, and Article 97 of the Treaty between the French Republic and the Federal Republic

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[1 See *supra*, p. 279, n. 2.]
[2 See *supra*, p. 279, n. 2.]
[3 See *supra*, p. 325, n. 1.]

of Germany on the Settlement of the Question of the Saar.[1] There are also other objections to the admissibility of the individual application. In so far as the application is directed at the fact that the Government of the Saar and the Town of B. refused to compensate the applicants for losses sustained by them as the result of the demolition of property belonging to them, and that the Courts did not accept evidence provided by the applicants when they gave judgment on the claims in question, an individual application would not have been admissible even if it had been lodged after January 1, 1957. The refusal to pay compensation and the proceedings before the Courts took place at a date when the Saar was not subject to the effective authority of the Federal Republic and when, as a result, the Convention on Human Rights did not impose responsibility on the Federal Republic. For this reason, it does not seem necessary to examine here the question whether the individual application lodged on December 15, 1956, was made within the six months' period, as laid down in Article 26 of the Convention,[2] from the date of the judgment of the Court of Appeal of C. in 1956. But as the applicants wish to obtain by their individual application compensation from the Federal Republic—as can be concluded from the last paragraph of their application—the admissibility of the application would depend on the prior exhaustion of domestic remedies, as provided in Article 26 of the Convention, seeing that another claim is involved and that the Saar is not the opposing party. As, in fact, the possibilities of instituting an action for damages against the Federal Republic are not exhausted (*cf.* Article 19, paragraph 4, of the Basic Law [of the Federal Republic]), the individual application should be rejected as inadmissible, in conformity with Article 26 and Article 27, paragraph 3,[3] of the Convention."

Held: that the application must be rejected. The applicants had not exhausted the local remedies available to them.

The Commission said: "All the facts in this case relate to a period prior to January 1, 1957, the date of the integration of the Saar into the Federal Republic of Germany, and some of the facts are even attributable to the Government of the Third Reich. The questions which would therefore arise are: (a) to what extent the Saar succeeded to the obligations of the Third Reich relating to that territory; and (b) whether the Federal Republic of Germany has succeeded to the obligations assumed by the Saar by virtue of the Convention and the Protocol annexed thereto.

"An examination of these questions is, however, unnecesssary in this case. Under the terms of Article 26 of the European Convention for the Protection of Human Rights and Fundamental Freedoms the Commission cannot deal with any matter until the domestic remedies have been exhausted, according to generally recognized rules of international law and within a period of six months from the date on which the final decision was taken. There are still available to the applicants remedies under Article 19, paragraph 4, of the Basic Law (*Grundgesetz*) of the State by which they can present claims against the Federal Republic of Germany. In addition, an examination of the file does not disclose the existence of special circumstances such as would relieve the applicants, according to generally recognized rules of international law, from the obligation to make use of the said remedies. It appears, therefore, that the applicants have not satisfied the provisions of Article 26 of the Convention as regards the exhaustion of domestic remedies and the application should, accordingly, be rejected, in any case, in pursuance of Article 27, paragaraph 3, of the Convention.[1] "

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[1] *Federal Official Journal*, 1956, II, pp. 1587 *et seq.*, 1593, 1638.

[[2] See *supra*, p. 280, n. 1.]

[[3] See *supra*, p. 280, n. 1.]

[Report: *Documents et Décisions*, 1955–56–57, p. 183 (in French).]

The Individual in International Law—Human Rights and Freedoms—European Convention for Protection of—European Commission of Human Rights—Individual Applications—Applications Against Private Persons—Application against the Saar—Effect of Integration of the Saar into German Federal Republic—Responsibility for Tortious Acts of Saar Officials.

Re APPLICATION NO. 256/57 (MRS. X. *v.* GERMAN FEDERAL REPUBLIC).

European Commission of Human Rights. July 20, 1953.

(Waldock, President; Eustathiades, Berg, Faber, Beaufort, Dominedo, Süsterhenn, Petren, Janssen-Pevtschin, Sørensen, Crosbie, Skarphedinsson, Erim.)

THE FACTS.—The applicant complained, *inter alia*, of having been threatened by various persons. It appeared from the numerous documents in the file that in 1949 minutes of compromise of proceedings had been drawn up in the Tribunal of first instance (*Landgericht*) of B. putting an end to one of the actions which the applicant had commenced against her former husband. The main effect of the document was that of making the applicant renounce participation in the business of her former husband. Subsequently, the applicant tried to contest before the *Landgericht* of B. the regularity of the proceedings. For this purpose she sought legal aid, which, however, was refused by the Court. The applicant appealed against this decision to the Court of Appeal (*Oberlandesgericht*) of B., which twice in 1950 rejected her appeal. The applicant had also, in 1949, complained to the President of the Order of Advocates of the Saar against her own advocate who, according to her, had compelled her to accept the agreement made in 1949. The President of the Order of Advocates referred the matter to the Attorney-General of the Saar, who in 1950 decided that the matter must be regarded as closed. The applicant made some ten other representations to various authorities, but without success.

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[1] See *supra*, p. 280, n. 1.]

Held: that the application must be rejected. The facts complained of relating to the compromise occurred before the European Convention for the Protection of Human Rights and Fundamental Freedoms, 1950, came into force. The subsequent proceedings did not disclose any *prima facie* breach of the Convention. In any event, no claim lay under the Convention against a private person.

The Commission said: " The applicant appears to complain in particular of her advocate and of her husband; the latter, according to her, had wronged her and persecuted her. She also protests that the various judicial and administrative authorities did not protect her interests sufficiently, and she claims compensation for the loss suffered by her since the compromise mentioned above and asks to be enabled to take part again in the business of her former husband.

" As regards the compromise of 1949 and the proceedings instituted by the applicant against her advocate in 1949 and 1950, the facts alleged relate to a period prior to September 3, 1953, the date of the entry into force of the Convention in respect of the Federal Republic of Germany—the date which, since January 1, 1957, would also be relevant as regards the Saar, where the Federal Republic of Germany is to be considered as responsible for violations of the Convention by the authorities of the Saar which come to light later but which were committed before January 1, 1957. According to generally recognized rules of international law, the Convention governs for each Contracting Party only facts subsequent to its entry into force in respect of that Contracting Party. The application should accordingly be rejected on this ground, as inadmissible *ratione temporis*.

" As regards the other judicial and administrative proceedings relied upon by the applicant, an examination of the file as it stands does not disclose a *prima facie* violation of any of the rights and freedoms set forth in the European Convention on Human Rights, in particular, of the right to the proper administration of justice, under the conditions set out and within the limits defined in Article 6 of the Convention.[1] It appears, therefore, that the application is manifestly ill-founded and it should accordingly be rejected on this ground also, in pursuance of Article 27, paragraph 2, of the Convention.[2]

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[1] [See *supra*, pp. 342–3, n. 1.]
[2] [See *supra*, p. 279, n. 2.]

"Finally, in so far as the application is in reality directed against private individuals, it should be noted that under the terms of Article 19 of the Convention[1] the Commission has as its sole task that of ensuring the observance of the engagements undertaken by the High Contracting Parties to the Convention. It follows, moreover, from Article 25, paragraph 1, of the Convention[2] that the Commission cannot validly receive a petition from a private person, non-governmental organization or group of individuals unless that person, organization or group claims to be the victim of a violation of the rights set forth in the Convention committed by one of the High Contracting Parties, and not by a private individual. It appears, therefore, that the application is in this respect incompatible with the provisions of Articles 19 and 25 of the Convention and it should accordingly be rejected on this ground also, in pursuance of Article 27, paragraph 2, of the Convention."

[Report: *Documents et Décisions*, 1955–56–57, p. 188 (in French).]

The Individual in International Law—Human Rights and Freedoms—European Convention for Protection of—European Commission of Human Rights—Individual Applications—Application Against State Not Member of Council of Europe and Not Having Signed or Ratified Convention.

Re APPLICATION NO. 262/57 (X. *v.* GERMAN FEDERAL REPUBLIC).

European Commission of Human Rights. August 28, 1957.

(Waldock, President; Eustathiades, Berg, Faber, Beaufort, Dominedo, Süsterhenn, Petren, Sørensen, Janssen-Pevtschin, Crosbie, Skarphedinsson, Erim.)

THE FACTS.—The applicant, a German national who since 1947 had been domiciled in Bavaria, was seriously wounded in battle in the First World War. After that war, a medical commission assessed his disability at 70 per cent. He stated that between the two wars, he lived in Czechoslovak territory and that the Czech authorities did not pay him his disability pension because of his pro-German sympathies. After the Second World War, the applicant asked the authorities of the German Federal Republic to pay him the pension to which he considered himself entitled, but his request was refused. His disability was now 100 per cent. as a result of various injuries which he had sustained in the German Federal Republic. Between 1954 and 1956, the applicant unsuccessfully submitted his application for a pension to the Secretary of State to the Federal Chancellery, to the Federal Constitutional Court, to the Federal Court of Justice, and to the President of this last mentioned Court personally.

[[1] See *supra*, p. 286, n. 2.]
[[2] See *supra*, p. 352, n. 2.]

The applicant now asked the Commission to intervene in his favour and endeavour to induce the German Federal Republic to give him the pension to which he maintained that he was entitled, and also to induce the Czechoslovak Republic to pay him the arrears of his pension which he had not received between 1922 and 1945.

Held: that the application must be rejected because Czechoslovakia was not a party to the European Convention for the Protection of Human Rights and Fundamental Freedoms, 1950.

The Commission said: " In general, an examination of the file, as it stands, does not disclose a violation of any of the rights and freedoms set forth in the Convention, and in particular of the right to the proper administration of justice, under the conditions laid down and within the limits defined by Article 6 of the said Convention.[1]

" Furthermore, this application is in reality directed against the Czechoslovak Republic. It follows, however, from Article 25, paragraph 1, of the Convention[2] that only the Contracting Parties to the said Convention can be the object of an application which the Commission can receive. It follows, on the other hand, from Article 66 of the Convention[3] that only States which are Members of the Council of Europe and which have duly signed and ratified the Convention can be Contracting Parties. The Czechoslovak Republic fulfils none of these conditions. It appears, therefore, that the application is, on this ground, incompatible with the provisions of the Convention referred to above. The application should thus be rejected on this ground also, in accordance with Article 27, paragraph 2, of the Convention,[4] as being directed against a State not bound by the Convention. "

[Report: *Documents et Décisions*, 1955–56–57, p. 170 (in French).]

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[1] See *supra*, pp. 342–3, n. 1.]
[2] See *supra*, p. 325, n. 2.]
[3] See *supra*, p. 333, n. 3.]
[4] See *supra*, p. 279, n. 2.]

The Individual in International Law—Human Rights and Freedoms—European Convention for Protection of—European Commission of Human Rights—Individual Applications—Applications Against Member State of Council of Europe Having Signed but Not Ratified Convention and Protocol.

Re APPLICATION NO. 276/57 (MRS. X. *v.* GERMAN FEDERAL REPUBLIC).

European Commission of Human Rights. August 29, 1957.

(Waldock, President; Eustathiades, Berg, Faber, Beaufort, Dominedo, Süsterhenn, Petren, Janssen-Pevtschin, Sørensen, Crosbie, Skarphedinsson, Erim.)

THE FACTS.—The applicant was a German national by birth who had acquired French nationality by naturalization in 1929, and who resided at B. in France. She complained, first, of the attitude adopted towards her by certain French authorities in Alsace and, secondly, of the refusal of the authorities of the German Federal Republic to compensate her for loss sustained by her during the war as a result of her detention and deportation. It appeared from the file that, on June 18, 1941, the German occupation authorities in Alsace arrested the applicant, apparently for "anti-national practices", and imprisoned her at C. . . . They then interned her for a time in the concentration camp at D., and subsequently expelled her to unoccupied France in November 1941. The applicant stated that the detention had ruined her health and that her expulsion had caused her considerable material and financial loss. For more than six years she had sought in vain to obtain reparation. She first approached, without result, Herr Adenauer, the Chancellor of the German Federal Republic, and the Governments of Baden-Württemberg, Bavaria, and Rhine-Palatinate. She then put her case to the District Restitution Office (*Bezirksamt für Wiedergutmachung*) of F., which rejected her claim on August 29, 1956. On September 11, 1956, the applicant lodged an appeal against this decision before the Tribunal (*Landgericht, Entschädigungskammer*) of F. On December 18, 1956, the Tribunal refused to grant her legal aid for reasons which she did not disclose in her application to the Commission. However, the applicant continued with her appeal, but judgment was given against her on March 14, 1957, by default and on the documents (*ohne mündliche Verhandlung*), as permitted by Article 209, paragraph 3, of the Federal Law for the Compensation of Victims of the National-Socialist régime (*Bundesentschädigungsgesetz*). At the instance of the District Restitution Office, the *Landgericht* of F. found that Mrs. X. did not belong to any of the categories of persons to which the Law above-cited applied. It found, in particular, that, on her own admission, she had not been persecuted for political opposition to National-Socialism, nor for reasons of race, religion, or philosophical convictions (Article 1, paragraph 1, of the

Law); moreover, if she had been persecuted on account of her French nationality that was not, under Article 167 of the Compensation Law, sufficient to entitle her to claim compensation. Article 167 requires that an applicant shall, at the date of the entry into force of the Law, have the status of a refugee within the meaning of the Geneva Convention of July 28, 1951, on the Status of Refugees. On April 29, 1957 the applicant appealed from the above-mentioned judgment of the Tribunal of F. to the Court (*Oberlandesgericht*) of G. By an order dated May 29, 1957, that Court rejected an application for legal aid (*Armenrecht*) made by the applicant, on the ground that her proposed appeal had no chance of success. On June 18, 1957, the Secretariat of the Commission wrote to the applicant asking her to state whether she had effectively lodged an appeal before the Court of G. or whether she had only made a request for legal aid to that Court with a view to an eventual appeal. On June 20, 1957, the applicant declared that she had lodged an appeal " effectively and definitively " and that she did not know whether she had any other remedies available to her, but she expressed the opinion that a remedy would only be open to her if the Tribunal of F. or the Court of G. had committed a major procedural error—which was not, in her opinion, the case. The applicant complained of having been refused, because she was a Frenchwoman, compensation for loss sustained as a result of the acts of the German occupation authorities in Alsace, that is, on French territory. She alleged that Article 13 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, 1950,[1] had been violated, and claimed compensation amounting to DM 40,000.

Held: that the application must be rejected. France had not ratified the Convention; certain of the applicant's claims against Germany related to facts which occurred before the Convention came into force; and in respect of other claims she had not exhausted local remedies available to her.

The Commission said: "As to so much of the application as is in reality directed against the French Republic.—It follows from Article 25, paragraph 1, of the Convention[2] that only the Contracting Parties to the Convention can be the object of an application before the Commission. It follows, on the other hand, from Article 66 of the Convention[3] that only States Members of the Council of Europe which have duly signed and ratified the Convention possess the character of Contracting Parties. Although a Member of the Council and a signatory of the Convention, France has not yet ratified the Convention; it appears, therefore, that the application does not, in this respect, accord with the above-mentioned provisions of Articles 25 and 66, and, therefore, it is incompatible with the provisions of the Convention. [The application] should accordingly be rejected on this ground, in accordance with Article 27, paragraph 2, of the Convention,[1] as being directed against a State not bound by the Convention.

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[1] [See *supra*, p. 353, n. 2.]

[2] [See *supra*, p. 325, n. 2.]

[3] [See *supra*, p. 333, n. 3.]

" As regards that part of the application which is directed against the German Federal Republic.—The primary facts alleged relate to 1941, that is to say, to a period prior to September 3, 1953, the date of the entry into force of the Convention in respect of the German Federal Republic. According to generally recognized principles of international law, the Convention only governs, in respect of each Contracting Party, facts subsequent to its entry into force in respect of that Party. The application should accordingly be rejected on this ground also, as inadmissible *ratione temporis*.

" Finally, as regards the steps taken and the proceedings instituted by the applicant, under the terms of Article 26 of the Convention the Commission can only deal with a matter after the exhaustion of domestic remedies according to generally recognized principles of international law and within six months from the date on which the final decision was taken. It appears from the reply of the applicant dated June 20, 1957, to the letter which the Secretariat [of the Commission] had sent to her on June 18, 1957, that an action is presently pending before the Court (*Oberlandesgericht*) of G., and that that Court has so far only pronounced on the applicant's request for legal aid and not upon the merits. Moreover, an examination of the file as it stands does not disclose the existence of special circumstances such as to relieve the applicant, according to generally recognized principles of international law, from the obligation to exhaust the available domestic remedies. It therefore appears that the applicant has not yet observed the provisions of Article 26 of the Convention concerning the exhaustion of domestic remedies and the application should accordingly be rejected on this ground, in accordance with Article 27, paragraph 3, of the Convention.[2] "

[Report: *Documents et Décisions*, 1955–56–57, p. 171 (in French).]

[[1] See *supra*, p. 279, n. 2.]
[[2] See *supra*, p. 280, n. 1.]

The Individual in International Law—Human Rights—European Convention on Human Rights and Fundamental Freedoms, 1950—Detention in Alleged Contravention of Convention—Whether Individual Has Rights Derived Directly from Convention Before Domestic Forum.

Re O LAIGHLÉIS (LAWLESS).[1]

Republic of Ireland, Supreme Court. December 3, 1957.

(Maguire C.J.; Lavery, Kingsmill Moore, O'Daly and Maguire JJ.)

THE FACTS.—Acting under powers conferred upon him by the Offences Against the State Act, 1940, the Minister for Justice issued a warrant for the detention of O Laighléis in the Curragh Military Detention Camp from July 13, 1957, for an indeterminate period. The relevant sections of the Act are as follows:

Section 3 (2) provides for the powers conferred by the Act to come into force on the making of a proclamation by the Government "declaring that the powers conferred by this Part of the Act are necessary to secure the preservation of public peace and order."

Section 4 (1) provides:

> "Whenever a Minister of State is of opinion that any particular person is engaged in activities which, in his opinion, are prejudicial to the preservation of public peace and order or to the security of the State, such Minister may by warrant under his hand and sealed with his official seal order the arrest and detention of such person under this section."

Section 8 provided for the setting up of a Commission to which any person detained under the Act could apply in writing to have the continuation of his detention considered. The Commission had power to "inquire into the grounds of such person's detention and shall, with all convenient speed, report thereon to the Government." It was further provided:

> "If the Commission reports that no reasonable grounds exist for the continued detention of such person, such person shall, with all convenient speed, be released."

O Laighléis applied to the Commission on September 8, 1957, to have his detention considered. The Commission made certain procedural rulings, *inter alia*, that it had the power to consider and act upon documents submitted to it by the Government without disclosing their contents to the applicant or his legal advisers. An application was thereupon made for a conditional order of habeas corpus, which was granted on September 18. Upon the High Court deciding against the applicant, an appeal was brought on behalf of O Laighléis to the Supreme Court. It was argued, *inter alia*, that the detention was invalid because it involved the use of powers inconsistent with the European Convention on Human Rights and Fundamental Freedoms, 1950, to which the Republic of Ireland was a party. Alternatively it was argued that the powers given by the Act were to be construed so as not to conflict with the Convention and that therefore the Commission should follow the procedural rules of a court of law.

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[1] The English form of this name is Lawless, and it is under this latter form that most of the press comments on this case are reported. However, in proceedings before the Irish Courts the Irish form was used.

Held: that O Laighléis was lawfully detained.

Rejecting the arguments founded on the provisions of the Convention on Human Rights, Maguire C.J., delivering the judgment of the Court,[1] said: " Mr. MacBride's [counsel for O Laighléis] first series of arguments was based upon the Convention for the Protection of Human Rights and Fundamental Freedoms adopted by the Council of Europe, which was signed at Rome on November 4, 1950, by the Minister for External Affairs, confirmed and ratified by the Government of Ireland on February 18, 1953, and laid before Dáil Éireann [the Lower House of the Irish Parliament] on March 29, 1954. In the Instrument of Ratification the Government of Ireland undertook faithfully to perform and carry out all the stipulations of the Convention. Mr. MacBride contended: (a) that the State, through the Government, having become a party to, and having confirmed and ratified, the Convention, and having undertaken faithfully to perform and carry out all the stipulations therein contained (subject to a reservation not now material contained in the Instrument of Ratification), it was not open to the Government to rely on powers which are in violation of that Convention; and (b) in the alternative, that since the 3rd day of September, 1953, the date upon which the Convention entered into force, the Offences Against the State Acts, 1939 and 1940, and decisions relating thereto, must be construed so as to avoid violating the said Convention solemnly entered into and ratified by the State.

" The provisions of the Convention on which Mr. MacBride relied are as follows:

> " '*Article* 1.
>
> ' The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section 1 of this Convention.'

" Section 1 includes the following Articles:

> " '*Article* 5.
>
> ' (1). Everyone has the right to liberty and security of person.
>
> ' No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:
>
> . . . .

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[1] Article 34. 4. 5. of the Irish Constitution provides that in cases such as this involving " a question as to the validity of a law having regard to the provisions of the Constitution " a single judgment only is to be delivered and the disclosure of any other opinion, whether assenting or dissenting, is forbidden.

> ' (1) (c) the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so;
>
> . . . .
>
> ' (2). Everyone who is arrested shall be informed promptly, in a language which he understands, of the reasons for his arrest and of any charge against him.
>
> ' (3). Everyone arrested or detained in accordance with the provisions of paragraph 1 (c) of this Article shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial.
>
> ' (4). Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.'
>
> . . . .
>
> " '*Article* 6.
>
> (1). In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.'

" Mr. MacBride submitted that Article 5 of the Convention had been violated, for two reasons, firstly, because section 4 of the Act of 1940 authorizes detention of a kind not provided for in Section 1 of the Article and secondly, because the Commission established under Section 8 of the Act of 1940 is not a tribunal of the character specified in Section 3 of the Article. He submitted in the alternative, that detention under Section 4 of the Act of 1940 was not a violation of Article 5 of the Convention if it could be regarded as falling within the middle limb of Section 1 (c) of the Article, *viz.*, detention reasonably considered necessary to prevent the commission of an offence. He also submitted that the functions of the Commission established under Section 8 of the Act could likewise be regarded as not being in violation of Section 3 of Article 5 of the Convention if Section 8 be construed as entitling the person detained to a judicial trial.

" Ireland has a written, rigid Constitution which came into force on December 29, 1937, having been enacted by the People on July 1, 1937. Article 29 of the Constitution deals with ' International

Relations '. Mr. MacBride relied upon Sections 1 and 3 of Article 29, which are as follows:

> " ' 1. Ireland affirms its devotion to the ideal of peace and friendly co-operation amongst nations founded on international justice and morality.
>
> . . . .
>
> ' 3. Ireland accepts the generally recognised principles of international law as its rule of conduct in its relations with other States.'

" These provisions, Mr. MacBride submitted, reproduce the pre-existing Common Law, and by the Common Law, he said, those principles which were commonly accepted as binding by civilised nations became part of the domestic law unless they could be shown to be contrary to it. He referred to the English Authorities; *West Rand Central Gold Mining Co.* v. *The King*, [1905] 2 K.B. 391 at 406–407; *Chung Chi Cheung* v. *The King*, [1939] A.C. 160.[1] From the latter case he cited in particular this passage from the speech of Lord Atkin (p. 167):

" ' . . . [S]o far, at any rate, as the Courts of this country are concerned, international law has no validity save in so far as its principles are accepted and adopted by our own domestic law. There is no external power that imposes its rules upon our own code of substantive law or procedure. The Courts acknowledge the existence of a body of rules which nations accept amongst themselves. On any judicial issue they seek to ascertain what the relevant rule is, and, having found it, they will treat it as incorporated into the domestic law, so far as it is not inconsistent with rules enacted by statutes or finally declared by their tribunals.'[2]

" Sections 1 and 3 of Article 29 of the Constitution clearly refer only to relations between States and confer no rights on individuals; they can in no way assist Mr. MacBride's argument.

" Nor is Mr. MacBride's submission aided by what he says is the position at common law, as set out in Lord Atkin's speech. Inconsistency with municipal law is there stated to be a ground upon which the common law rejects the principles of international law. Mr. MacBride submits that the Act of 1940 is inconsistent with the provisions of the Convention. If it is, then clearly, by the common law principles relied upon, the Act prevails over the Convention. When the domestic law makes its own provisions it cannot be controlled by any inconsistent provisions in international law: *Mortensen* v. *Peters*, 14 Sc.L.T. 227, 8 Sess. Cases 93. The principle of incorporation upon which Mr. MacBride relies applies to such parts of International Law as are based on universally recognised custom, and not to such parts as depend upon convention.

" The insuperable obstacle to importing the provisions of the Convention for the Protection of Human Rights and Fundamental

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[[1] See *Annual Digest*, 1938–1940, Case No. 87.]

[[2] *Ibid.*, at pp. 266, 267.]

Freedoms into the domestic law of Ireland—if they be at variance with that law—is, however, the terms of the Constitution of Ireland. By Article 15 (2) (1°) of the Constitution it is provided that 'the sole and exclusive power of making laws for the State is hereby vested in the Oireachtas [Parliament]: no other legislative authority has power to make laws for the State.' Moreover, Article 29, the Article dealing with international relations, provides at Section 6 that 'no international agreement shall be part of the domestic law of the State save as may be determined by the Oireachtas.'

"The Oireachtas has not determined that the Convention on Human Rights and Fundamental Freedoms is to be part of the domestic law of the State, and accordingly this Court cannot give effect to the Convention if it be contrary to domestic law, or purports to grant rights or impose obligations additional to those of domestic law.

"No argument can prevail against the express command of Section 6 of Article 29 of the Constitution before judges whose declared duty it is to uphold the Constitution and the laws.

"The Court accordingly cannot accept the idea that the primacy of domestic legislation is displaced by the State becoming a party to the Convention for the Protection of Human Rights and Fundamental Freedoms. Nor can the Court accede to the view that, in the domestic forum, the Executive is in any way estopped from relying on the domestic law. It may be that such estoppel might operate as between the High Contracting Parties to the Convention, or in the Court contemplated by Section IV of the Convention if it comes into existence, but it cannot operate in a domestic Court administering domestic law. Nor can the Court accept the contention that the Act of 1940 is to be construed in the light of, and so as to produce conformity with, a Convention entered into ten years afterwards. The intention of the Oireachtas must be sought in the conditions which existed when it became law.

"The Court must therefore reject Mr. MacBride's first series of arguments.

"In the course of the argument reference was made to the provisions in Article 15 of the Convention for a high contracting party derogating from its obligations under the Convention in certain circumstances, *viz.*, 'time of war or other public emergency threatening the life of the nation'. Mr. MacBride said these circumstances were to be equated with the circumstances specified in Article 28 (3) (3°) of the Constitution as warranting legislation in derogation of Constitutional rights, *viz.*, 'time of war or armed rebellion' or 'national emergency . . . affecting the vital interests of the State' arising out of an armed conflict in which the State was not a participant. The circumstances under which Part II of the Act of 1940 may be brought into force (Part II was not in operation at the time of the signing of the Convention for the Protection of Human Rights and Fundamental Freedoms) are a declaration by the Government, by proclamation, that the powers conferred by Part II are necessary to secure ‘ the preservation of public peace and order ’. The latter circumstances Mr. MacBride submitted were not such as would justify notice of derogation under Article 15 being given.

“ In the view which the Court takes of the status of the Convention on Human Rights and Fundamental Freedoms under our municipal law, it has not been necessary for the Court to enter into this question, and the Court does not express any opinion on it. For the same reason, the Court does not find it necessary to express any opinion on the question whether the provisions of the Act of 1940 are in violation of the Convention. The Court has not examined nor has it been invited to examine whether in fact circumstances exist which would justify notice of derogation under Article 15.”

[Report: Unpublished. The above text is taken from a transcript of the judgment, reference to which is 81/1957.]

NOTE.—O Laighléis subsequently addressed a petition to the European Commission on Human Rights, which decided in September 1958 that his detention without proper trial did not violate the European Convention on Human Rights. In view of the importance of the legal principles involved, however, the Commission decided to refer the case to the European Court of Human Rights under Articles 44 and 48 of the Convention. The Government of the Irish Republic was invited to appear. It raised three preliminary objections: (i) the Commission had wrongfully communicated to O Laighléis its Report to the Committee of Ministers; (ii) the Commission had acted irregularly in presenting to the Court the observations of O Laighléis, a private individual; and (iii) as to the form in which the Commission had presented the issues to the Court. Objections (i) and (ii) were subsequently withdrawn, and objection (iii) was not pressed. The Court, having decided to examine the case, upheld the right of the Commission to communicate the Report to the applicant, but stated that at that stage of the case there had been no reason to transmit the applicant's observations to the Court. The case will be reported in subsequent volumes of the *International Law Reports.*

The Individual in International Law—Position of—Fundamental Human Rights and Freedoms—Universal Declaration of Human Rights, 1948—Right to Own Property—International Law and Municipal Law—The Law of India.

BISWAMBHAR SINGH AND ANOTHER *v.* THE STATE OF ORISSA.

India, High Court of Orissa. April 27, 1957.

(Narasimhan, C.J.; Mohapatra J.)

THE FACTS.—This was a petition against the decision of the Government of Orissa to acquire compulsorily certain land of the petitioners (Zamindars) under the Orissa Estates Abolition Act,

1952. The petitioners challenged the constitutional validity of the Act, on the ground, *inter alia*, that the expropriation of their lands violated Article 17 of the Universal Declaration of Human Rights, 1948. The High Court of Orissa upheld the validity of the Act and the petitioners appealed to the Supreme Court, which allowed the the appeal. Subsequently, in 1954, the Orissa Legislature passed an amending Act and the petitioners' case came again before the High Court.

On further appeal,

Held: that the appeal must fail. The provisions of the Universal Declaration of Human Rights might in certain cases be invoked on grounds of public policy but they could not be invoked in the present case because the provisions of the Indian Constitution relating to Eminent Domain were of an overriding nature.

The Court said: " It is not challenged that India is one of the parties to the Universal Declaration of Human Rights proclaimed by the General Assembly of the United Nations on December 10, 1948. Article 17 of the Declaration is as follows:

> ' 17 (1) Everyone has the right to own property alone as well as in association with others.
>
> ' (2) No one shall be arbitrarily deprived of his property.'

[The petitioners] urged that the word ' arbitrarily ' in clause 2 above implies that adequate compensation should be given when a person is deprived of his property. Article 51 of the Constitution directs the State to respect international law and treaty obligations. [They] therefore contended that even the provisions of Article 31 of the Constitution (relating to Eminent Domain) must give way to Article 17 of the Declaration of Human Rights and that any law which deprived a person of property without providing adequate compensation would be void. The obvious answer to this argument is that this Court is bound to uphold the provisions of the Indian Constitution, even though there may be some conflict between those provisions and those embodied in the Declaration of Human Rights. The question as to how far provisions of the Declaration of Human Rights are justiciable in municipal courts is not free from difficulty. Lauterpacht in his well-known book *International Law and Human Rights* observes at page 158:

> '. . . In many countries the Charter of the United Nations has indisputably become part of the law of the land. Thus according to the French Constitution of 1946 treaties ratified by the State derogate from any contrary municipal law without any further act of the national legislature other than that necessary for the ratification of the treaty. This applies also to the Charter of the United Nations. Admittedly, its provisions are directly applicable in the realm of municipal law only to the extent to which they constitute legal obligations of the State.'

But the Indian Constitution has not adopted any of the provisions of the Declaration of Human Rights without modification, and

Article 51 on which some reliance has been placed [by the petitioners], being in the Chapter dealing with directive principles, is not enforceable in this Court in view of the express bar of Article 37. The petitioners, however, relied on *In re Drummond Wren* (1945, 4 Ontario Rep. pp. 778, 781[1]), cited at p. 156 of Lauterpacht's book, where the provisions of the Atlantic Charter were invoked even though they were not directly concerned with legal obligations in the municipal sphere but mainly on grounds of public policy.

" The petitioners also relied on *Sei Fuji* v. *State of California* (96 Cong. Rec. April 28, 1950, Sen. Proc. 6072), where an American Judge held that the United Nations Charter was the supreme law of the land and the Judges were bound to obey the same notwithstanding any provision to the contrary in the Constitution of a State. This case, however, is distinguishable because it appears that the provisions of the United Nations Charter and the Declaration of Human Rights were made part of the Constitution of the United States (see Article 6, section 21). But in India these have not been made part of our Constitution and a Judge of a High Court is bound by oath of his office to uphold the Constitution. Doubtless if there were no express provision in the Constitution like Article 31 or 31 (a), the provisions of the Charter of the United Nations and the Universal Declaration of Human Rights might possibly be invoked in favour of the petitioners, on the doctrine of wise use of public policy, as was done in the Canadian case cited above. But where Article 31 expressly bars the jurisdiction of the Court to question the adequacy of compensation it is futile to rely on Article 17 (2) of the Universal Declaration of Human Rights. Hence though an argument of this type . . . is attractive and requires serious consideration, I must hold that the provisions of the Declaration of Human Rights where they conflict with the provisions of the Constitution will be of no avail in municipal courts. I may also point out that this argument was available when the matter was taken up to the Supreme Court on the previous occasion; but it was not advanced there, presumably because it was not considered tenable. At pp. 154–160 of Lauterpacht's book this question regarding the extent of the legal obligations of the Members of the United Nations to enforce the provisions of the Universal Declaration of Human Rights was discussed and international jurists seem to be agreed that these could not be enforced in municipal courts unless they are made part of the law of the State."

[Report: A.I.R. 1957 Orissa 247.]

NOTE.—Article 31 of the Indian Constitution (as amended) relating to Eminent Domain makes the adequacy of compensation in case of compulsory acquisition of property for a public purpose non-justiciable. On the other hand, Article 51 (C) of the Constitution states that " The

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[[1] See *Annual Digest*, 1943–1945, Case No. 50.]

State shall endeavour to foster respect for international law and treaty obligations." But according to Article 37, this provision is non-justiciable although it is "fundamental in the governance of the country" and binds the Executive and the Legislature. Thus the Court was unable to apply the principles laid down in Article 17 of the Universal Declaration of Human Rights; but it nevertheless expressed the view that the above principles, in particular the prohibition of arbitrary deprivation of property, could be invoked on grounds of public policy.

The Individual in International Law—Position of—Human Rights and Freedoms—European Convention for Protection of—Individual Applications—Arbitrary Internment.

See p. 275 (*Re Application No.* 115/55 (*X.* v. *German Federal Republic*)).

The Individual in International Law—Position of—Human Rights and Freedoms—European Convention for Protection of—Individual Applications—Discrimination.

See p. 277 (*Re Application No.* 181/56 (*X.* v. *German Federal Republic*)).

The Individual in International Law—Human Rights—Supremacy Over Domestic Law—Setting Aside of Settlement of Tax Claim in Favour of Treaty Provisions.

See p. 654 (*Wollemborg Claim*), at p. 661.

The Individual in International Law—Fundamental Human Rights and Freedoms—European Convention on Human Rights, 1950—Expropriation of Property for General Purposes—Guarantees of International Agreement Concluded Subsequent to Expropriation.

See p. 542 (*German Assets in Switzerland Case*).

The Individual in International Law—Position of—Effect of Treaties on Individuals—The Law of Holland.

See p. 584 (*Institut National des Appellations d'Origine des Vins et Eaux-de-Vie* v. *Mettes*).

B—NATIONALITY

I.—In General. Proof of Nationality

Nationality—Proof of—Possession of Passport—Status of Pakistan Citizens in India—Commonwealth Citizenship—The Law of India.

NAZIRANBAI *v.* THE STATE.

India, High Court of Madhya Bahrat. May 7, 1956.

(Dixit and Chaturvedi JJ.)

THE FACTS.—The petitioner, who was the wife of an Indian citizen, migrated in 1948 to Pakistan and joined her father in Karachi. In 1954 she returned to India on a Pakistan passport, but after the expiry of the period for which she was allowed to stay in India she was asked by the Indian authorities to leave. She applied under Article 226 of the Constitution to be allowed to remain in India, contending that she was born and domiciled in India and was the wife of an Indian citizen. She also objected to her expulsion on the ground that even if she were regarded as a Pakistan citizen she would still be entitled to enjoy the rights of a Commonwealth citizen.

Held: that the petition must be dismissed. The petitioner had come to India on a Pakistan passport which must be regarded as evidence of her Pakistan nationality. As she was a foreigner, India was under no obligation in international law to allow her to reside within its boundaries.

The Court said: "A passport is a document of identity and nationality issued to citizens as subjects of a State who intend to travel or visit foreign countries. . . . This being the nature of a passport, I am unable to view the fact that the petitioner Naziranbai obtained a passport from the Pakistan State describing her as a Pakistani and came to India on that passport and got her period of stay in this country extended from time to time as other than evidence of her Pakistan nationality and of her migration to Pakistan after March 1, 1947. She cannot be regarded as an Indian citizen under Article 7 [of the Constitution]."[1] The Court came to the conclusion that the petitioner's case came within Article 7 notwithstanding the fact that she was born and domiciled in India and was the wife of an Indian citizen.

As to the claim of the petitioner to possess Commonwealth citizenship, the Court held that although, according to the Declaration as to Foreign States Order, 1950, every country within the Commonwealth was declared not to be a foreign State, that was a declaration for the purposes of the Constitution only. The Court said: " The Order does not mean that citizens of Commonwealth countries are Indian citizens [even] for the purposes of those Articles of the Constitution which do not contain the words ' foreign State ' and where the question of the interpretation of the expression ' foreign State ' does not arise. Article 7 does not use the words ' foreign State ' . . . and Article 9, in which the words ' foreign State ' appear, has no reference to Article 7. . . . It was then said that under s. 11 of the Citizenship Act, 1955, Naziranbai has the status of a Commonwealth citizen and as such has the fundamental right under Article 19 of the Constitution to move freely throughout the territory of India and to reside and settle in any part of India. No doubt under s. 11 Naziranbai has the status of a Commonwealth citizen. But as a Commonwealth citizen she can have only those rights which the Central Government may, under s. 12 of the Citizenship Act, by Order notified in the Gazette, confer . . . on the citizens of Pakistan. [The petitioner] was unable to point out to us any Order under s. 12 of the Act conferring on the citizens of Pakistan the fundamental rights guaranteed to the citizens of India under Article 19. In the absence of any such notification she cannot . . . claim the fundamental rights under Article 19 as a citizen of Pakistan."

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[1] According to Article 7, a person who has after March 1, 1947, migrated from India to Pakistan " shall not be deemed to be an Indian citizen ".

In conclusion, the Court dismissed the petition but stated that the minor children of the petitioner, who took the domicile of the father, could not be compelled to leave India with their mother. The Court observed: " It is unfortunate that the petitioner . . . has to leave India leaving her husband and minor children here. But I think she can avoid this situation if she applies under s. 5 of the Citizenship Act, 1955, for registration as a citizen of India. . . ."

[Report: A.I.R. 1957 Madhya Bharat 1.]

NOTE.—According to Indian decisions, Commonwealth citizens in India derive no direct benefit from their status as such citizens. They can claim some of the rights of Indian citizens only on the basis of express Orders made by the Government of India under s. 12 of the Citizenship Act, 1955. Such Orders are made on a basis of reciprocity.

II.—Acquisition of Nationality. Nationalty as Affected by Changes of Sovereignty

Nationality—Acquisition of—Compulsory Conferment of Nationality—Recognition by Foreign States—Nationality of Sudeten Germans Between 1938 and 1945—The Law of Holland.

WEBER AND WEBER *v.* NEDERLANDS BEHEERS-INSTITUUT.

Holland, Judicial Chamber of the Council for the Restoration of Legal Rights, The Hague.

May 27, 1953, and *July* 4, 1955.

THE FACTS.—The plaintiffs in this case were born in 1890 and 1894, respectively, at Schlukenau in the Sudeten region of Czechoslovakia. By virtue of the Treaty of Versailles of 1919 they acquired Czechoslovak nationality on January 10, 1920. Since January 23, 1947, they had been Austrian nationals. In the course of proceedings before the Judicial Chamber of the Council for the Restoration of Legal Rights, the question arose whether the plaintiffs should be regarded as enemy aliens in the sense of the Netherlands legislation on enemy property, as " having been at any time after May 10 1940, subjects of an enemy State ".

Held (on May 27 1953): that the plaintiffs acquired German nationality pursuant to the German-Czecholovak Treaty of November 20, 1938,[1] and that they must therefore be regarded as enemy aliens under the Netherlands legislation on enemy property.

The Council said: " As a matter of principle it must be accepted that no change of nationality can be recognized unless the consent of the person concerned to such change has been given. That does not, however, imply that a completely individual right of option for everyone is required. A plebiscite, or the granting of a right of option to groups of the population representing certain national characteristics can be regarded as a correct method of fulfilling the requirements of the principle. In Article 7 of the Munich Agreement of September 30, 1938, between Germany, Great Britain, France and Italy, a right of option was granted in a general sense (' droit d'option d'être inclus dans les territoires transférés ou d'en etre exclus ' [right of option into and out of the transferred territories]). By the Treaty of November 20, 1938, the right of option was not limited to ' persons not of German race ', since Article 4 provides that ' persons of German race who remain Czechoslovak nationals ' (save for an exception not here relevant) could until March 29, 1939, opt for German nationality. The fact that Germany never indicated the organs before which a declaration as to such option should be made, makes no difference." [Report: *Rechtsherstel*, VIII, No. 43/340, p. 881.]

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[1] Treaty between Czechoslovakia and Germany regarding Nationality and Option Questions. German text in *Reichsgesetzblatt*, Part II, No. 52, December 12, 1938; 142 *State Papers* 1938, No. 525.

The plaintiffs filed a petition for a review of the above judgment. They contended that the Council had not taken into consideration the fact that they belonged to a category of persons to whom the Treaty of November 20, 1938, entirely denied a right of option and that, in consequence, the German nationality imposed upon them by that Treaty ought not to be recognized under international law. They challenged, in particular, the finding that the right of option was adequately regulated in the Munich Agreement and in the Treaty of November 20, 1938, and maintained that it was not there regulated in such a manner that the nullity of both Treaties must be assumed. The petition was heard by a special Chamber of Review of the Council.

Held (on review, July 4, 1955): that the former judgment must be reversed. The petitioners could not be regarded as enemy aliens in the sense of the Netherlands legislation on enemy property.

The Chamber of Review said: " In this respect it must be stated that the judgment appealed from has overlooked the fact that in the Treaty of November 20, 1938, contrary to the ' droit d'option d'être inclus dans les territoires transférés on d'en être exclus ' promised by the Munich Agreement, no right of option was granted to the Sudeten Germans, to which category the petitioners belonged. The group of ' deutsche Volkszugehörige ' [persons of German race] indicated by Article 4 of the Treaty does not include Czechoslovak citizens of German origin, to whom German nationality was granted by virtue of Article 1 of the Treaty. It was comprised of Czechoslovak citizens of German origin who retained their Czechoslovak nationality and did *not* acquire German nationality by virtue of Article 1 of the Treaty. In this instance, those Czechoslovak citizens of German origin were meant who on October 10, 1938, were domiciled outside the Sudeten region annexed by Germany and who on that date did not possess the ' Heimatschein ' [domicile] mentioned in Article 1. Furthermore, Article 2 of the Treaty gave the right to opt for Czechoslovak nationality only to ' Personen *nicht-deutscher Volkszugehörigkeit* ' [persons not of German race] who, pursuant to the provisions of Article 1, acquired German nationality. For the rest, no right of option was granted. German nationality was imposed on Czechoslovak citizens of German origin coming under the definition of Article 1 (the group usually called Sudeten Germans) without the right to opt to retain Czechoslovak nationality. The right of option was not, therefore, adequately regulated by the Munich Agreement and the Treaty of November 20, 1938.

"In consequence, the question arises whether under Netherlands law effect can be given in this case to the Treaty of 1938 with regard to the German nationality imposed upon Sudeten Germans. Generally speaking, the question whether a person possesses the nationality of a foreign State must be decided in accordance with the law of that State. Foreign law will, however, not be applied in this country if it is contrary to Netherlands public policy. The recognition of a compulsory change of nationality, effected without the consent of the individual concerned and without granting him a right of option, would be contrary to such policy. The imposing of German nationality upon Sudeten Germans without first granting them the right to opt for retaining their Czechoslovak nationality should not be recognized in this country. It is therefore immaterial that the Constitutional Decree of the President of the Czechoslovak Republic dated August 2, 1945, recognized and confirmed the German nationality imposed by the Treaty of November 20, 1938. It is also immaterial whether or not the petitioners must be deemed to have retained Czechoslovak nationality."

[Report: *Rechtsherstel*, X, No. 55/486, p. 1215.]

NOTE.—I. See also the judgment of the Judicial Chamber of the Council for the Restoration of Legal Rights, The Hague, in *In re Baroness von Scharberg* given on August 30, 1951 (*Rechtsherstel*, 1951, No. 113; *International Law Reports*, 1951, Case No. 67), followed by the decision of the same Chamber in *In re Menzel* (March 14, 1955: *Rechtsherstel*, IX, No. 55/460, p. 1165), in a sense contrary to the *Weber* case (*supra*). Despite the reversal of its judgment on review, the Judicial Chamber adhered to its view in an (as yet) unreported judgment of August 23, 1955. See, however, *Ratz-Lienert and Klein* v. *Nederlands Beheers-Institute*, reported *infra*, p. 536, and *In re Wetzel*, reported *infra*, p. 434.

II. For cases on the question of the nationality of Sudeten Germans decided in the ordinary courts, see *Nederlands Beheers-Instituut* v. *Nimwegen and Männer* (*N.J.*, 1952, No. 260; *International Law Reports*, 1951, Case No. 63), where the District Court of Arnhem decided in the same sense as the Judicial Chamber in the *Weber* case reported above, while the decision of the Court of Appeal of Arnhem (*N.J.*, 1953, No. 438) was in the sense of the decision on review. (For a discussion of these cases see Tammes in *Netherlands International Law Review*, 1 (1953–1954), pp. 379 *et seq.*)

See also *Public Prosecutor* v. *K.A.H.K.*, a criminal case, decided by the Netherlands Supreme Court on November 2, 1954, confirming a judgment of a lower Court, in which it was *held* that the appellant, originally an Austrian subject, had lost his Austrian nationality between July 3, 1938 (the date of the German Decree on Nationality for the Province of Austria) and July 10, 1945 (the date of the Austrian Law concerning Acquisition of Austrian Nationality). (Report: *N.J.*, 1955, No. 4.)

III. On July 28, 1951, the Netherlands and Austrian Governments entered into an informal Agreement under which assets in Holland of Austrians who had not misbehaved during the war or the occupation were to be returned to their original owners.

Nationality—Acquisition and Loss of—Imposition of Nationality in Pursuance of Unlawful Annexation—Non-recognition of Nationality Thus Imposed—Free City of Danzig—Subsequent Extinction of—Resulting Factual Changes in Nationality.

In re WETZEL.

Holland, Judicial Division of the Council for the Restoration of Legal Rights (De-enemization Chamber).

July 19, 1956.

THE FACTS.—This was an appeal against a decision of the Nederlands Beheers-Instituut (Institute for the Administration of Enemy Property) declaring the appellant's property to be enemy property under the Royal Emergency Decree on Enemy Property of October 20, 1944 (No. E 133). The appellant was formerly a citizen of Danzig, and had become a German national under the " Gesetz über die Wiedereinigung der Freien Stadt mit dem Deutschen Reich " (Law concerning the Reunification of the Free City of Danzig with the German Reich) of September 1, 1939.

Held: that the appeal must succeed. The appellant had never become a German enemy within the meaning of the Decree on Enemy Property.

The Court said: " The Netherlands Institute for the Administration of Enemy Property, at the hearing of July 19, 1956, no longer maintained its claim that former inhabitants of Danzig are to be regarded as enemy subjects in the sense of the Decree on Enemy Property as having acquired German nationality on or about September 1, 1939, by the German annexation of the Free City. The Court now adopts that view since it has officially come to its knowledge that requests from former inhabitants of Danzig to obtain restitution of their property under Article 12 of the Destination Act of July 20, 1951 (*Staatsblad* No. 311) are now being granted by the Ministers of Justice and Finance, and since the Court wishes to avoid contradictory decisions which would not be in the interest of the persons concerned.

" The Court must, however enter into a fresh ground, lately adduced by the Netherlands Institute for the Administration of Enemy Property, *viz.*, that the appellant is a German national under Article 116, paragraph 1, of the Constitution of Bonn,[1] having been born in Danzig in 1899 and being now domiciled in Constance (West Germany). The Court cannot agree with this view. In his book published in 1955 on *Die Staatsangehörigkeit*, Mr. Lichter, when analyzing the legal status of '*volksdeutsche*' refugees, says in so many words that refugees have acquired through these legal provisions *internal* German '*Staatsangehörigkeit*', but that they have not yet acquired *external* nationality since they are stateless. It appears from this commentary that the provision of Article 116, paragraph 1, of the Bonn Constitution is merely intended to regulate internal German relations, so that the persons there mentioned cannot, for the application of Netherlands law, be regarded as 'subjects of Germany'—the less so because it must be assumed that the Crown, when enacting the Decree on Enemy Property in October 1944, intended to treat as enemy subjects only those persons who were to be regarded as such pursuant to the laws which could be taken into account at that moment."

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[1] " German in the sense of this Constitution, subject to contrary regulation by law, is any person who possesses German nationality (' *Staatsangehörigkeit*'), or who, as a refugee or expelled person of German race (' *Volkszugehörigkeit* '), or as the wife or descendant of such person, has been received into the territory of the German Reich as it existed on December 31, 1937."]

[Report: Not published.]

NOTE.—This case and that of *Re Grundmann*, decided by the same Court on January 17, 1957 (unreported) were the last of a series which shows the extent to which the annexations effected by National-Socialist Germany have for many years created a somewhat confused legal situation in many countries, including the Netherlands.

For earlier cases dealing with citizens of Danzig see the (conflicting) decisions of the Council for the Restoration of Legal Rights in *Re Krüger*, decided on September 13, 1951 (*Rechtsherstel*, 1951, No. 108; *International Law Reports*, 1951, Case No. 68), and *In re Nix et Al.*, decided on September 14, 1951 (*Rechtsherstel*, 1951, No. 110; *International Law Reports*, 1951, Case No. 69, with Note). For a legal opinion by a Dutch jurist on these two cases see *Nederlands Juristenblad*, 1954, pp. 785 *et seq.* See also the (as yet unreported) decision in *In re Volkmann*, given on February 4, 1953.

And see *Weber and Weber* v. *Nederlands Beheers-Instituut*, decided by the Council on July 4, 1955 (reported *supra*, p. 431), as regards Sudeten-Germans who lost their nationality as a result of German annexation.

Nationality—Acquisition of—Imposition of Nationality in Violation of Treaty—German-Czechoslovak Treaty Concluded under Duress—Invalidity of—Netherlands Decree on Enemy Property and Trade-Marks Owned by Sudeten Germans—Exterritorial Effect of Czechoslovak Legislation on Confiscation—*Situs* of Trade-Marks.

AMATO NARODNI PODNIK *v.* JULIUS KEILWERTH
MUSIKINSTRUMENTENFABRIK.

Holland, District Court of The Hague.

December 31, 1955, *and December* 11, 1956.

THE FACTS.—In 1932, 1935 and 1937, respectively, three trade-marks for saxophones were registered with the International Bureau for the Protection of Industrial Property at Berne and also with the

Netherlands Bureau for Industrial Property, as belonging to Julius Keilworth, of Kraslice in Czechoslovakia. Subsequently, Keilwerth's factory in Czechoslovakia was nationalized and placed under the management of a Czechoslovak public corporation, the claimant in this action. Keilwerth then went to Germany, acquired a factory there and resumed the production of saxophones. Separate notices concerning the trade-marks were, however, in 1952, 1953 and 1955, respectively, entered by the claimant corporation in the Netherlands registers stating that property in the trade-marks in question had passed to it. On the strength of these notices the claimant now applied for a declaration that the registration of a trade-mark deposited by the defendant was invalid.

When the case was first heard, on December 31, 1955, the Court ordered the claimant corporation to produce evidence that after May 5, 1945, its use of the trade-marks had been prior to that of the defendant. The reasons for this order of the Court, so far as international law is concerned, were (in the words of the Court) as follows:

"It is common ground between the parties that Julius Keilwerth acquired German nationality by virtue of the 'Verordnung über den Erwerb der deutschen Staatsangehörigkeit durch frühere techechoslowakische Staatsangehörige deutscher Volkszugehörigkeit "[1] of April 20, 1939. As he was therefore a German national, the Netherlands Decree concerning Enemy Property of October 20, 1944 (*Staatsblad* No. E 133), applies to him and to his property. Title to his trade-marks, which were enemy property, has therefore passed from him to the State of the Netherlands. The State has not transferred these rights either to the claimant or to the defendant.

"The Decree of the President of the Czechoslovak Republic concerning Confiscation of Enemy Property was dated October 25, 1945. Confiscation under Article 4 of that Decree could only become effective after a decision had been taken by the competent 'National-Ausschuss' [Committee]. With regard to the defendant, such a decision was not taken until December 11, 1947, that is, more than two years after the trade-marks had been transferred to the State of the Netherlands by virtue of the Netherlands Decree concerning Enemy Property. Moreover, the effect of the Presidential Decree was strictly limited to the territory of the Czechoslovak Republic, and it could not, therefore, affect the rights of the State of the Netherlands in those trade-marks. The claimant corporation therefore could not in this action rely on its three registrations."

With regard to the delivery of evidence in reply by the defendant, the Court assumed that he had *persona standi in judicio* in the Netherlands as from July 24, 1951, the date on which the Dutch "Destination Act" of July 20, 1951—an Act for the final disposal of German property—entered into force, unless he could show that any special decision or licence entitled him to appear in court on an earlier date.

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[1] Decree concerning German nationality in the Sudeten German Districts.

After evidence had been filed, the Court, in its second order dated December 11, 1956, admitted both parties to give evidence as to the use of the trade-marks on certain dates.

Held: that the application must fail. The defendant was entitled to register and to use the three trade-marks.

The Court said: " The claimant corporation originally contended that the defendant was a German national before the entry into force of the Netherlands Decree concerning Enemy Property. The defendant, however, maintained that he became a German national by virtue of the Ordinance of the ' Reichsminister des Innern ' of April 20, 1939. In making its order of December 31, 1955, this Court assumed that the parties had agreed that the defendant had acquired ' deutsche Staatsangehörigkeit ' on April 30, 1939, and it consequently concluded that in the view of both parties the defendant should be regarded as having been a German national since 1939, so that the Decree concerning Enemy Property applied to his property. At a subsequent hearing, on September 18, 1956, however, the defendant stated that although he had acquired ' deutsche Staatsangehörigkeit ' under certain German enactments, he was not prepared to admit that according to Netherlands law he had become a German national in 1939, which would have had the consequence of making the Decree concerning Enemy Property apply to him and to his property. The defendant further maintained that according to Netherlands law he had remained a Czechoslovak national until August 2, 1945, that on that date he became stateless under the Czechoslovak Decree of August 2, 1945, and that he had acquired German nationality only on February 22, 1955. He maintained that the Munich Agreement of September 29, 1938, as well as the German-Czechoslovak Nationality Treaty of November 20, 1938, and the German ' Gesetz über die Wiedereinigung der sudeten-deutschen Gebiete mit dem Deutschen Reich '[1] of November 21, 1938, were invalid under international law and that, therefore, he could not have acquired German nationality within the meaning of the Netherlands Decree concerning Enemy Property under any of those instruments. The Court agrees with the argument of the defendant. The German-Czechoslovak Nationality Treaty was invalid because it was concluded under clear and unlawful duress—the effects of which Czechs could not escape—exercised by Germany against Czechoslovakia. It must therefore be accepted that the defendant at the moment when the Netherlands Decree concerning Enemy Property entered into force, did not possess German nationality in the sense of that Decree. Consequently, the property of the defendant did not vest in the State of the Netherlands.

[[1] Law concerning the Reunion of the Sudeten German Districts with the German Reich: see *Ratz-Lienert and Klein* v. *Nederlands Beheers-Instituut, infra,* p. 536.]

"From this it follows that the defendant, under Article 4 of the Industrial Property Emergency Act, 1947, remained entitled to his trade-marks in each case until July 1, 1950, unless he had forfeited his rights for any other reason. The claimant corporation argued that the defendant had forfeited his trade-marks by virtue of the Decree of the Czechoslovak Republic of October 25, 1945, concerning the Confiscation of Enemy Property and concerning the Capital of the National Revival. This Decree cannot be regarded as being operative with respect to assets within Netherlands jurisdiction because, according to Netherlands law, confiscation of property cannot have extraterritorial effect.

"The next point to be examined is whether the rights in the trade-marks must be deemed to be part of the assets of the defendant situated within this country. This Court finds that they are to be so regarded. Article 6 (D) of the Paris Convention for the Protection of Industrial Property of 1883 provides in effect that once a trade-mark has been regularly registered in the State of origin and thereafter in one or more other States parties to the Convention, each of those foreign trade-marks shall from the date of its registration be regarded as independent of the trade-mark registered in the State of origin. This is subject to the condition that each such national trade-mark must comply with the requirements of the municipal legislation of the State in which the subsequent registration takes place. It appears from the extracts from the registers of the Netherlands Bureau for Industrial Property which were produced that the trade-marks in question, after having first been registered in Czechoslovakia and with the International Bureau at Berne, were registered in this country on November 11, 1932, September 27, 1935, and November 5, 1937, respectively. As from those dates they must be regarded as being independent of the State of origin. Therefore, the trade-marks in question were not affected by the Czecholosvak Decree concerning Confiscation.

"The claimant corporation argued further that the defendant did nevertheless forfeit his rights to the trade-marks at the moment that he forfeited his factory in Czechoslovakia. It may be true that, as a rule, the right to the exclusive use of a trade-mark cannot exist without the concomitant possession of a factory or a business the trade-marks of which have the purpose of distinguishing its goods from those of other factories or business enterprises. It is also true that the right to a trade-mark lapses once the person entitled to it no longer possesses the factory or business where the goods are manufactured or handled. But in the case of confiscation of a factory or a business situated in a foreign country, those rules cannot be understood to mean that the original owner of the trade-mark in that country is no longer entitled to continue to enjoy his rights in the trade-mark in this country. For, according to the law of this country, such rights constitute a separate part of his property once he resumes production in a factory located in a country other than the one in which his confiscated factory was situated. To hold otherwise would render illusory the rule that international trade-marks registered in a particular country constitute assets the existence of which is independent of anything which may affect the trade-marks in the country of origin. The claimant corporation did not contest the fact that the defendant controlled and operated his factory outside Czechoslovakia. Therefore, the defendant remained entitled to the trade-marks until July 1, 1950, and can only have lost his rights on that date if he had not used his trade-marks in this country between July 1, 1947, and July 1, 1950. . . ."

[Report: *Netherlands International Law Review*, IV (1957), p. 428.]

NOTE.—See the Note by Judge Erades (*ibid.*, p. 431, note 1), explaining the procedure which enabled the Court to change its view between the first and second hearings of this case. *N.B.* that before the date of the second judgment in this case the Judicial Chamber of the Council for the Restoration of Legal Rights had on June 29, 1956, given its decision in the case of *Ratz-Lienert and Klein* v *Nederlands Beheers-Instituut* (reported *infra*, p. 536), in which it was held that Sudeten-Germans could not be regarded as enemy nationals within the meaning of the Decree concerning Enemy Property.

Nationality—Acquisition of—As Result of Annexation of Territory—*De facto* Annexation of Eupen and Malmédy—Absence of Legal Effect—Absence of Change in Nationality.

ÉTABLISSEMENTS FORIR S.A. *v.* BELGIAN STATE, MINISTER OF FINANCE.

Belgium, Court of Cassation. February 19, 1957.

THE FACTS.—Under a Law of October 15, 1945, a special tax was imposed in Belgium on income and profits derived from commercial and other dealings with the enemy. Article 1 (c) of that Law provided that all income and profits derived from supplies and services to " enemy persons or bodies, or bodies or persons in the service of the enemy, or requisitioned by the enemy, or undertakings placed under compulsory administration by the enemy " were to be assessed for the tax. In pursuance of that provision the appellant Company was taxed in respect of supplies delivered to a customer in Malmédy, in the part of Belgium annexed by Germany in 1940. The Company contested the assessment on the ground that the inhabitants of Malmédy could not be considered to have become German—or enemy—by virtue of the arbitrary annexation of Malmédy, and that its customer was also not in the service of or requisitioned by the enemy, or placed under compulsory administration.

The Court of Appeal of Liège, in a judgment of July 10, 1956, held that the territory of Malmédy had been arbitrarily but nevertheless effectively incorporated in the German Reich and integrated into the German economy, and that supplies delivered to an inhabitant of that territory were correctly assessed for the special tax. This was an appeal from that decision.

Held: that the appeal must be allowed.
The Court said: " The finding of the Court below was not sufficient to show that the supplies were delivered to one of the persons or bodies covered by the exhaustive enumeration of the Law. The consignee had not lost his Belgian nationality, seeing that the *de facto* annexation of the Cantons of Eupen and Malmédy by the Reich had no legal effects."

[Report: *Pasicrisie Belge*, 1957, Part I, p. 739.]

Nationality—Acquisition of—Emigration—Expatriation—*Jus sanguinis*—Relevance of Foreign Judgments Relating to Nationality.

THE STATE *v.* ABDUL HAMID AND ANOTHER.

India, High Court of Punjab. January 9, 1957.

(Kapur and Passey JJ.)

THE FACTS.—This was an appeal by the State of India against the acquittal by a Magistrate of the respondents who had been prosecuted for an offence against the Indian Passport Act and Rules. It appeared that the respondents had migrated as minors with their parents after March 1, 1947, from India to Pakistan and later returned to India but without a permit for resettlement or permanent return. According to Article 7 of the Constitution, therefore, they could not be deemed to be citizens of India. As they were not in possession of passports they were prosecuted, as stated, and acquitted.

Held: that the appeal must succeed and the acquittal be set aside. As the fathers of the two respondents had migrated after March 1, 1947, from India to Pakistan and had acquired Pakistan nationality, their children, the respondents, had automatically acquired the same nationality.
The Court said: "According to international law a child acquires the nationality of a parent and as both . . . minors went to Pakistan, and as, under Article 7 of the Constitution, the respective fathers of the two accused did not have Indian nationality, their children must be taken to have acquired the nationality of their fathers, whatever that was. Apparently they cannot retain Indian nationality unless, according to the Rules made under the Influx from West Pakistan Laws, they have come to this country with a permit for permanent settlement or residence."

One of the respondents had relied on a judgment of a Magistrate in Pakistan (Lahore) who had held that he was an Indian national. The trial Magistrate in India stated in his decision that the copy of the judgment of the Pakistan Magistrate had been accepted in evidence by the prosecution and was therefore admissible according to law. The High Court, regarding the Pakistan decision as irrelevant on this point, continued: "A foreign judgment cannot confer Indian nationality on a non-Indian national, and indeed it would be a dangerous proposition if adjudication by foreign tribunals could confer on a non-Indian the status of an Indian national. At any rate no principle has been quoted or precedent brought to our notice by which this can be a means of acquiring nationality. I am therefore of the opinion that any judgment of the kind produced in this case is wholly irrelevant to the issue."

[Report: A.I.R. 1957 Punjab 86.]

NOTE.—(1) The statement of the High Court of Punjab that " according to international law the child acquires the nationality of a parent " seems somewhat to simplify the issue. The case is here reported largely on account of the peculiarity of the facts.

(2) The Court defined the term " migration " within the meaning of Article 7 of the Constitution as having an element of permanent change of residence. The above case and other similar cases connected with the emigration of Moslems from India to Pakistan show that while there is freedom of emigration (which usually amounts to expatriation), there are definite limits set to re-emigration from Pakistan to India and to the resumption of Indian nationality.

Nationality—Aquisition of—Imposition of Nationality Contrary to Provisions of Treaty—Non-recognition of Nationality Thus Imposed.

See p. 536 (*Ratz-Lienert and Klein* v. *Nederlands Beheers-Instituut*).

V.—Naturalization

Naturalization—Debarment from—By Claim of Exemption from Military Service—The Law of the United States of America.

CEBALLOS *v.* SHAUGHNESSY.

United States, District Court, Southern District, New York. April 15, 1955.

Court of Appeals, Second Circuit. February 6, 1956.

Supreme Court. March 11, 1957.

(Warren C.J.; Black, Frankfurter, Douglas, Burton, Clark, Harlan, Brennan JJ.)

THE FACTS.—This was an action for a declaratory judgment that the petitioner was eligible for suspension of deportation and to restrain the District Director of Immigration from taking him into custody for deportation. The deportation proceedings had been instituted because the petitioner had entered the United States in 1951 on a temporary visa and had remained beyond the period for which he had been admitted. His petition for suspension of deportation was refused by the Immigration and Naturalization Service, because it found that he did not satisfy a prerequisite for such suspension, namely, eligibility for naturalization. His ineligibility was based on a finding that in 1943 the petitioner, as a citizen of Colombia, then a neutral in the Second World War, had applied under Section 3 (a) of the Selective Training and Service Act of 1940 (54 Stat. 885, as amended (then in force)), for relief from service with the United States armed forces. Section 3 (a) provided that " any person who makes such application shall thereafter be debarred from becoming a citizen of the United States ". The local Selective Service board did not act on this application until Colombia had changed its neutral status to that of a co-belligerent. The board then notified the petitioner that he was classified as available for military service. However, the petitioner failed to pass the medical examination and was re-classified as physically defective. The petitioner contended, *inter alia*, that he would be ineligible for naturalization only if the local board had classified him as a neutral relieved from military service and had given him notice of that action, neither of which the board had done. On the defendant's motion to dismiss the complaint,

Held (by the District Court): that the motion to dismiss must be granted. The procedural requirements of the law of the United States had not been satisfied. [Report: 130 F. Supp. 30.]

On appeal,

Held (by the Court of Appeals): that the judgment of the District Court must be affirmed. By simply executing the application for exemption from military service, the petitioner had made himself ineligible for naturalization. [Report: 229 F.2d 592.]

The Supreme Court granted the petitioner's petition for *certiorari*.

Held (by the Supreme Court): that the decision of the Court of Appeals must be affirmed. A neutral alien was at liberty to refuse to enter the armed forces of the United States in time of war. However, the voluntary act of executing and filing an application for exemption from military service effectively debarred him from citizenship under the law of the United States, even though action was taken on his application while the State of which he was a national remained neutral.

The Court said (*per* Brennan J.): " The petitioner's argument on the merits challenges the holding of the Court of Appeals that the execution and filing of Form DSS 301 had the effect as a matter of law of debarring him from becoming a citizen of the United States. He contends that debarment could result only if the local board affirmatively granted the relief applied for by classifying him IV–C on its records and giving him notice of its action. We hold that the petitioner's voluntary act of executing and filing, and allowing to remain on file, the legally sufficient application Form DSS 301 effected his debarment from citizenship under § 3 (a).[1] The explicit terms of the section debar the neutral alien ' who makes such application ' for immunity from military service.

" Legislative history shows this to be the effect contemplated by Congress.[2] This same construction has been adopted in the few court decisions which refer to the section,[3] and administrative construction has consistently given the section this meaning.[1] The neutral alien in this country during the war was at liberty to refuse to bear arms to help us win the struggle, but the price he paid for his unwillingness was permanent debarment from United States citizenship.

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[1] The petitioner's claim that he executed the application in the belief that he was required to do so to obtain assignment to a Latin American contingent of the United States Army was rejected, after hearing, by the Immigration and Naturalization Service. In fact, the Board of Immigration Appeals found that petitioner " fully understood the legal consequences of his action and that he was not [un]duly influenced by other considerations." Cf. *Moser* v. *United States*, 341 U. S. 41 [*Annual Digest*, 1949, Case No. 78].

[2] This appears in both the House and Senate Reports. The House Report states:

" . . . In the case of citizens or subjects of any neutral country, special provision is made to enable them, upon application, to be relieved from the liability for service, but *the making of such application* will debar them from becoming citizens of the United States. . . ." (Emphasis added.) H. R. Rep. No. 1508, 77th Cong., 1st Sess. 4.

The Senate Report states:

" . . . Under the bill reported by the committee, aliens would be liable whether or not they had declared their intention to become citizens. However, aliens who are citizens or subjects of a neutral country would be relieved of liability upon making application in the manner prescribed by the President, but *the making of such application* will debar them from ever becoming citizens of the United States. . . ." (Emphasis added.) S. Rep. No. 915, 77th Cong., 1st Sess. 2.

[3] *Mannerfrid* v. *United States*, 200 F.2d 730; *Navarro* v. *Landon*, 108 F. Supp. 922; see *Machado* v. *McGrath*, 90 U. S. App. D. C. 70, 74, 193 F.2d 706, 710. See *McGrath* v. *Kristensen*, 340 U. S. 162, 172: " By the terms of the statute, that bar only comes into existence when an alien resident liable for service *asks* to be relieved." (Emphasis added.) See *Moser* v. *United States*, 341 U. S. 41, 45: Section 3(a) " imposed the condition that neutral aliens residing here who *claimed* such immunity would be debarred from citizenship." (Emphasis added.)

"The petitioner argues that in any event § 315 of the Immigration and Nationality Act of 1952,[2] and not § 3 (a) of the Selective Training and Service Act of 1940 governs this case. Section 315 of the 1952 Act enacts a two-pronged requirement for the determination of permanent ineligibility for citizenship: the alien must be one 'who applies or has applied for exemption,' and also one who 'is or was relieved or discharged from such training or service on such ground.' That section has no application here. The 1952 Law had not been enacted when the petitioner applied for relief from deportation in 1951[3] and by its terms is expressly made inapplicable to proceedings for suspension of deportation under § 19 of the Immigration Act of 1917 pending, as here, on the effective date of the 1952 Law.[4]"

[Reports: 352 U.S. 599, 1 L.Ed.2d 583, 77 Sup.Ct. 545.]

NOTE.—The above case was cited and followed in *Savoretti* v. *Small*, 244 F.2d 292 (5th Cir. 1957).

In *Re Skender's Petition*, 248 F.2d 92 (2d Cir. 1957), *certiorari* denied, 355 U.S. 931, 2 L.Ed.2d 413, 78 Sup. Ct. 411 (1958), the petitioner for naturalization, a national of Iraq, had applied for exemption from military service while Iraq was still a neutral nation. Nine days after Iraq became a co-belligerent, he was classified as a neutral exempt from military service. The United States Court of Appeals for the Second

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[1] See quotations from Forms DSS 304 and DSS 301 in text [omitted]. And see Selective Service Regulations, § 622.43, effective March 16, 1942, 7 Fed. Reg. 2087. Section 622.43, as revised, effective October 1, 1943, 8 Fed. Reg. 13672, read: ". . . (a) In Class IV–C shall be placed any registrant : . . . (2) Who is an alien and who is a citizen or subject of a neutral country . . . and who . . . files with his local board an Application by Alien for Relief from Military Service (Form 301). . . ."

[2] The Immigration and Nationality Act of 1952, § 315, provides:

"(a) Notwithstanding the provisions of section 405 (b), any alien who applies or has applied for exemption or discharge from training or service in the Armed Forces or in the National Security Training Corps of the United States on the ground that he is an alien, and is or was relieved or discharged from such training or service on such ground, shall be permanently ineligible to become a citizen of the United States.

"(b) The records of the Selective Service System or of the National Military Establishment shall be conclusive as to whether an alien was relieved or discharged from such liability for training or service because he was an alien." 66 Stat. 242, 8 U. S. C. § 1426.

[3] The 1952 Law became effective in December 1952.

[4] The Immigration and Nationality Act of 1952, § 405 (a), provides:

"Nothing contained in this Act, unless otherwise specifically provided therein, shall be construed . . . to affect . . . proceedings . . . brought, . . . or existing, at the time this Act shall take effect; but as to all such . . . proceedings, . . . the statutes or parts of statutes repealed by this Act are, unless otherwise specifically provided therein, hereby continued in force and effect. . . . An application for suspension of deportation under section 19 of the Immigration Act of 1917, as amended . . . which is pending on the date of enactment of this Act, shall be regarded as a proceeding within the meaning of this subsection." 66 Stat. 280, 8 U. S. C. § 1101, note.

Circuit *held* that under Section 315 (a) of the Immigration and Nationality Act of 1952 (66 Stat. 242, 8 U.S.C. § 1426 (a) (superseding Section 3 (a), as amended, of the Selective Training and Service Act of 1940)), which made an alien ineligible for citizenship only if he had actually been relieved from military service, the erroneous order of the Board was merely voidable and not void and that the alien had therefore been relieved from military service within the meaning of the statute.

The same Court *held* in *Velasquez* v. *United States*, 241 F.2d 126 (2d Cir. 1957) that under the Selective Training and Service Act of 1940, an alien who had applied for exemption and then had withdrawn his application one week later was disqualified for citizenship.

In *United States* v. *Kenny*, 247 F.2d 139 (2d Cir. 1957), an alien who had applied for and had been granted exemption from military service was *held* disqualified for naturalization, notwithstanding the facts that he had served in the National Guard under the erroneous impression that such service constituted service in the armed forces of the United States for the purposes of Section 315 of the Immigration and Nationality Act of 1952, had later withdrawn his application for exemption, and had been classified as physically defective.

VI.—Expatriation. Loss of Nationality

Nationality—Loss of—By Acquisition of Another Nationality—Voluntary and Involuntary Acquisition—Whether Acquisition of Citizenship of United Kingdom and Colonies by Registration of Minor Results in Loss of Austrian Nationality—British Nationality Act, 1948—Austrian Nationality Law, 1949.

Re OSTRITZ.

Austria, Administrative Court. November 25, 1957.

THE FACTS.—The appellant, a minor of Austrian nationality, acquired the citizenship of the United Kingdom and Colonies by registration, upon the application of one of her parents, in accordance with section 7 of the British Nationality Act, 1948. Article 9 (1) of the Austrian Nationality Law, 1949, provides that an Austrian citizen loses his Austrian nationality by " expatriation " if he " acquires " a foreign nationality. The Austrian administrative authority whose decision was the subject of the present appeal held that the appellant had lost her Austrian nationality by acquiring the citizenship of the United Kingdom and Colonies in the manner set out above. The appellant contended that registration of a minor as a citizen of the United Kingdom and Colonies did not constitute " acquisition " of a foreign nationality within the meaning of Article 9 of the Austrian Nationality Law, on the ground that in her case the acquisition of the citizenship of the United Kingdom and Colonies was not voluntary.

Held: that the decision denying to the appellant the status of an Austrian citizen must be quashed. The authority responsible for that decision should have enquired whether the procedure under section 7 of the British Nationality Act, 1948, required an expression of the desire, on the part of the appellant, to acquire the citizenship of the United Kingdom and Colonies.

The Court said: " The appellant was from the date of her birth (November 3, 1938) an Austrian citizen. After the Second World War, her mother married a British citizen and went to live in England. The daughters of her first marriage, including the appellant, also went to England. According to Certificate No. O. 17980 issued by the Nationality Division, Home Office, London, the appellant acquired the citizenship of the United Kingdom and Colonies on March 3, 1955, in accordance with the British Nationality Act, 1948. By a document dated November 15, 1956, the competent Austrian authority stated that the appellant, by acquiring a foreign nationality, had lost her Austrian nationality in accordance with Article 9 (1) of the Nationality Law, 1949. The present appeal is directed against this decision.

" The appeal concedes that the appellant acquired British nationality by registration, but it is said that she did not ' acquire ' that nationality because in order to do so some action on her part or that of her guardian would have been required. Accordingly, it is said, there was no ' acquisition of British nationality '. Against that, it is contended that according to Part II of the British Nationality Act, 1948, acquisition of nationality by registration is on a basis of equality with the other modes of acquisition (birth and descent, naturalization and incorporation of foreign territory). According to section 7, the Secretary of State may cause the minor child of a citizen of the United Kingdom and Colonies to be registered as a citizen upon the application of a parent or guardian. It is said that registration can take place *ex officio, i.e.*, even against the wishes of the minor child. In consequence, it is claimed that the acquisition of British nationality was in accordance with the relevant provisions of English law, and that the loss of Austrian nationality occurred antomatically upon the acquisition of British nationality, in accordance with Article 9 (1) of the Nationality Law, 1949.

" According to Article 9 (1) of the Nationality Law, an Austrian citizen loses his nationality by expatriation if he acquires a foreign nationality. The term ' acquisition ' which is here used requires interpretation in two ways. First, it must be assumed that the loss of Austrian nationality occurs only where an Austrian citizen has, in fact, acquired a foreign nationality in accordance with the law of the foreign country concerned. Secondly, it must not be forgotten that when we talk about ' acquisition', we mean that as a rule there must be present the will of the person concerned to acquire something. The question whether in this case the will to acquire something was present must be answered in accordance with Austrian law, otherwise, we would have to concede that the foreign State may make Austrian citizens against their will into foreign nationals be means of a unilateral legislative act. Such a result would certainly not be in accordance with the meaning and purpose of Austrian law. What is decisive in this case, therefore, is whether the appellant when acquiring the citizenship of the United Kingdom expressed her will in a way which is in accordance with the requirements of Austrian law. In view of the fact that no enquiry has been made as to this matter, the decision under appeal must be quashed."

[Report: Zl. 2349/56.]

Nationality—Expatriation—Renunciation of Nationality—Effect of Oath of Allegiance.

See p. 301 (*Gattone Claim*).

VII.—Denationalization

Nationality—Denationalization—Philippine Citizen and United States National Resident in United States—Liability to Exclusion from United States Subsequent to Independence of the Philippines—The Law of the United States of America.

RABANG *v.* BOYD.

United States, Court of Appeals, Ninth Circuit. June 14, 1956.

Supreme Court. May 27, 1957.

(Warren C.J.; Black, Frankfurter, Douglas, Burton, Clark, Harlan, Brennan, Whittaker JJ.)

THE FACTS.—The petitioner was born in 1910 in the Philippine Islands, and had lived in the continental United States since 1930, when he was admitted for permanent residence. In February 1951, he was convicted of violating the federal narcotics laws. He was taken into custody in March 1951, and, after administrative proceedings, was ordered to be deported under the Act of February 18, 1931 (46 Stat. 1171, as amended), which provided for the deportation of " any alien " convicted of violating a federal narcotics law.

Under the Treaty of Paris of 1898 (30 Stat. 1754, T.S. No. 343), Spain had ceded the Philippine Islands to the United States.

Article IX of the Treaty provided that " . . . [t]he civil rights and political status of the native inhabitants . . . shall be determined by the Congress." Pursuant to that Article, the Congress declared, *inter alia*, in the Act of July 1, 1902 (32 Stat. 691, 692), that Filipinos born in the Islands after 1899 were to "... be citizens of the Philippine Islands and as such entitled to the protection of the United States. ..." Upon the proclamation of Philippine independence on July 4, 1946, § 14 of the Philippine Independence Act of 1934 (48 Stat. 464, 22 U.S.C. § 1281a) became operative. Section 14 provided:

> "Upon the final and complete withdrawal of American sovereignty over the Philippine Islands the immigration laws of the United States (including all the provisions thereof relating to persons ineligible to citizenship) shall apply to persons who were born in the Philippine Islands to the same extent as in the case of other foreign countries."

The petitioner applied to the District Court for the Western District of Washington for a writ of habeas corpus and declaratory relief from the order of the Immigration and Naturalization Service deporting him to the Philippine Islands. The application was denied. The petitioner appealed, on the grounds that since he had not made an "entry" into the United States from a foreign country, he was not subject to deportation, and that he could not be involuntarily divested of his status as a national of the United States.

Held (by the Court of Appeals): that the judgment of the Court below must be affirmed. The petitioner lost his status as a national of the United States when the United States relinquished its sovereignty over the Philippine Islands on July 4, 1946, notwithstanding his residence in the continental United States on that date. [Report: 234 F.2d 904.]

The petitioner petitioned for *certiorari* to the Supreme Court, and the writ was granted (352 U.S. 906, 1 L.Ed.2d 115, 77 Sup. Ct. 146].

Held (by the Supreme Court): that the judgment of the Court of Appeals must be affirmed. Under the Philippine Independence Act, persons born in the Philippine Islands and thereby nationals of the United States became aliens on July 4, 1946, regardless of their permanent residence in the United States. The Congress had the power to legislate for the exclusion of Filipinos in the same manner as "foreigners". The deportability of the petitioner was not affected by the fact that, at the time of his entering the continental United States, the Philippines was not a foreign country.

The Court said (*per* Brennan J.): "The petitioner argues that his status as a national, acquired at birth under the Treaty and the 1902 statute, bears such close relationship to the constitutionally secured birthright of citizenship acquired by the American-born, that its divestiture should rest only upon the most explicit expression of congressional intention. In the Independence Act, the Congress granted full and complete independence to the Islands, and necessarily severed the obligation of permanent allegiance owed by Filipinos who were nationals of the United States. Anything less than the severance of the ties for all Filipinos, regardless of residence in or out of the continental United States, would not have fulfilled our long-standing national policy to grant independence to the Philippine people. See *Hooven & Allison Co.* v. *Evatt*, 324 U.S. 652, 674–678, 692. Section 14 of the Independence Act in clear language applies 'to persons who were born in the Philippine Islands.' This language demonstrates, and we hold, as did the courts below, that persons born in the Islands, and who thereby were nationals of the United States, became aliens on July 4, 1946, regardless of permanent residence in the continental United States on that date.

"The petitioner contends that, because he was admitted for permanent residence at the time the Islands were a territory of the United States, he did not enter from a foreign country and therefore cannot be an alien within the purview of the 1931 Act. He relies on *Barber* v. *Gonzales*, 347 U.S. 637,[1] where this Court held that a Filipino admitted for permanent residence in 1930 was not deportable under § 19 (a) of the Immigration Act of 1917 as an alien sentenced for certain crimes 'committed . . . *after entry*'. (Emphasis added.) The word 'entry' was held to be significant of a congressional purpose to limit deportation under § 19 (a) to aliens arriving 'from some foreign port or place', a description which did not fit a territory belonging to the United States. But the 1931 Act differs from the 1917 Act because it is silent as to whether 'entry' from a foreign country is a condition of deportability. By its terms, the 1931 Act applies to '. . . any alien . . . who, after . . . [February 18, 1931], shall be convicted . . .' of a federal narcotics offence. It follows that the holding in *Gonzales* is not applicable.

"The petitioner argues that the requirement of 'entry', as construed in *Gonzales*, was incorporated into the 1931 Act by the provision that deportation shall be accomplished 'in manner provided in sections 19 and 20' of the Immigration Act of 1917.[2] We hold that the reference to the 'manner provided' in those sections draws into the 1931 Act only the procedural steps for securing deportation set forth in those sections. *Bugajewitz* v. *Adams*, 228 U. S. 585. The Congress adopted these procedures by reference instead of spelling them out in the 1931 Act.[3]

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[1] See *International Law Reports*, 1953, p. 276.]

[2] The "manner provided" in § 19 of the Immigration Act of 1917, 39 Stat. 889, amended, 8 U.S.C. (1946 ed.) § 155, was "upon the warrant of the Attorney General." Section 20, 39 Stat. 890, as amended, 8 U. S. C. (1946 ed., Supp. IV) § 165, related to ports to which aliens are to be deported, costs of deportation and other details The Attorney General is required by that section to deport "to the country specified by the alien, if it is willing to accept him into its territory." In the administrative proceedings the petitioner specified the Philippine Islands.

[3] It is not contended that the procedures specified in §§ 19 and 20 were not followed in this case.

" The petitioner urges finally that the requirement of ' entry ' is implicit in the 1931 Act. Citing *Fong Yue Ting* v. *United States*, 149 U. S. 698, he argues that the bounds of the power to deport aliens are circumscribed by the bounds of the power to exclude them, and that the power to exclude extends only to ' foreigners ' and does not embrace Filipinos admitted from the Islands when they were a territory of the United States. It is true that Filipinos were not excludable from the country under any general statute relating to the exclusion of ' aliens '. See *Gonzales* v. *Williams*, 192 U. S. 1, 12–13; *Toyota* v. *United States*, 268 U. S. 402, 411.

" But the fallacy in the petitioner's argument is the erroneous assumption that Congress was without power to legislate the exclusion of Filipinos in the same manner as 'foreigners'. This Court has held that '. . . the power to acquire territory by treaty implies not only the power to govern such territory, but to prescribe upon what terms the United States will receive its inhabitants, and what their *status* shall be. . . .' *Downes* v. *Bidwell*, 182 U. S. 244, 279.[1] Congress not only had, but exercised, the power to exclude Filipinos in the provision of § 8 (a) (1) of the Independence Act, which, for the period from 1934 to 1946, provided:

> ' For the purposes of the Immigration Act of 1917, the Immigration Act of 1924 (except section 13 (c)), this section, and all other laws of the United States relating to the immigration, exclusion, or expulsion of aliens, citizens of the Philippine Islands who are not citizens of the United States shall be considered as if they were aliens. For such purposes the Philippine Islands shall be considered as a separate country and shall have for each fiscal year a quota of fifty. . . .' 48 Stat. 462, 48 U. S. C. (1934 ed.) § 1238.

" The 1931 Act plainly covers the situation of the petitioner, who was an alien, and who was convicted of a federal narcotics offense. Cf. *United States ex rel. Eichenlaub* v. *Shaughnessy*, 338 U. S. 521.[2] We therefore conclude that the petitioner was deportable as an alien under that Act."

Douglas J. dissented on the ground that the petitioner had not made an " entry " into the United States and was not subject to deportation in the absence of an express legislative mandate to that effect. In his dissenting opinion, he said:

" The Act of February 18, 1931, 8 U. S. C. (1946 ed.) § 156a, provided for the deportation of ' any alien ' convicted of violating a narcotic law after the date of the Act. Petitioner is a citizen of the Philippines and is therefore an alien by virtue of the Philippine Independence Act, 48 Stat. 456, c. 84, § 8; and he was convicted of narcotics violation in 1951, which was after his status had been changed from a national to an alien. If the 1931 Act is to be read literally, the deportation of this Filipino is warranted. But to read the Act literally is, I think, to miss its real import.

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[1] See Magoon, Reports (1902), 120:

" The inhabitants of the islands acquired by the United States during the late war with Spain, not being citizens of the United States, do not possess the right of free entry into the United States. That right is appurtenant to citizenship. The rights of immigration into the United States by the inhabitants of said islands are no more than those of aliens of the same race coming from foreign lands.

" Illustrative of the scope of the congressional power is the treatment afforded Puerto Ricans who were first nationals, 31 Stat, 77, 79, and who later became citizens, 39 Stat. 951, 953. See also *Downes* v. *Bidwell*, 182 U. S. 244, 280, as to the status of the inhabitants of other territories acquired by the United States."

[[2] See *International Law Reports*, 1950, Case No. 56.]

" *First.* In 1931 the only aliens here were those who had made an ' entry ' into this country. The condition of ' entry ' seems, therefore, necessarily implicit in the 1931 Act. Without that condition the Act would have had no application whatsoever at the time of its passage, for at that time every ' alien ' was a national of another country who had ' entered ' here. While the Philippine Independence Act later made Filipinos ' aliens,' that class of ' aliens ' who were resident here at the time never made an ' entry ' into this country. As *Barber* v. *Gonzales*, 347 U. S. 637, holds, they were nationals to whom the concept of ' entry ' was inapplicable.

" *Second.* The 1931 Act provides that the offending alien shall be deported ' in [the] manner ' provided in §§ 19 and 20 of the 1917 Act, 8 U. S. C. (1946 ed.) §§ 155, 156. The words ' in [the] manner ' are said to refer to the means for securing deportation which, by § 19 (a) of the 1917 Act, are described as ' upon the warrant of the Attorney General.' *Bugajewitz* v. *Adams*, 228 U. S. 585, 591, construed the language of an earlier deportation Act in that way. It held that ' in the manner provided ' in that Act meant ' the means for securing deportation.' Yet it is difficult for me to say that by that ruling ' in the manner ' became words of art in legislative drafting. The *Bugajewitz* case involved a statute with a very special legislative history. The words ' in the manner provided ' had been substituted for ' as provided.' So it was apparent that Congress by the amendment had narrowed the meaning. There is no such special legislative history here. The words ' in the manner ' seem to me to be synonymous in this setting with ' as provided ' or ' under the conditions of.' And the condition of the 1917 Act most relevant here is a crime committed ' after entry.'

" No matter how the case is viewed, the 1931 Act is applicable only to aliens who had made an ' entry ' in this country.

" This Filipino came to the United States in 1930 and he has never left here. If the spirit of the 1931 Act is to be observed, he should not be lumped with all other ' aliens ' who made an ' entry.' The Filipino alien, who came here while he was a national, stands in a class by himself and should remain there, until and unless Congress extends these harsh deportation measures to his class."

[Reports: 353 U.S. 427, 1 L.Ed.2d 956, 77 Sup. Ct. 985.]

NOTE.—In *Duron* v. *United States*, 246 F.2d 400 (2d Cir. 1957), the United States Court of Appeals for the Second Circuit, citing *Rabang* v. *Boyd*, *held* that Manila, Philippine Islands, was not a " home port in the United States " within the meaning of the Nationality Act of 1940, which provided that service on vessels " which are not foreign vessels, and whose home port is in the United States " would be counted as if it were residence in the United States for the purpose of naturalization.

VIII.—Double Nationality

Nationality—Dual Nationality—Claim by Dual National for Compensation Under Treaty—Test of Dominant Nationality—Treaty of Peace with Italy, 1947.

Spaulding Claim.

Italian-United States Conciliation Commission. December 21, 1956.

(Matturri, Sorrentino.)

The Facts.—On October 30, 1938, the claimant, an American citizen, married Lorenzo Paolozzi, an Italian citizen, in Rome, Italy, and thereby also acquired Italian citizenship. The claimant and her husband lived in Italy until June 1939, when she returned to the United States to await the birth of her first child. In March 1940 she returned to Italy where she purchased some property in Lucca and Rome. From that date until May 1943, she lived intermittently in Italy and in Switzerland. She went to Switzerland in July 1941 to await the birth of her second child, and thereafter returned to Italy. In May 1943 she returned permanently to Switzerland, and in July 1945 she returned to the United States, thereafter making only occasional trips to Italy. In her travels between Italy and Switzerland during the period of the war, the claimant apparently used only her Italian passport. It would also appear that the claimant's husband remained in Italy until 1944, when he joined his wife in Switzerland.

On May 20, 1949, the claimant submitted a claim under Article 78 of the Peace Treaty with Italy of 1947[1] to the Italian Government, who in 1952 rejected the claim on the ground that the claimant, an American national by birth, had acquired Italian nationality in 1938 by marriage to an Italian national. In 1955, the United States Government requested the Italian Government to reconsider the claim in the light of the decision of the Italian-United States Conciliation Commission in the *Mergé* case.[2] The Italian Government confirmed its rejection of the claim and the matter was referred to the Commission. For the United States Government, it was contended that the claimant's nationality was on the relevant dates mentioned in the Treaty of Peace predominantly American. For the Italian Government, it was admitted that the claimant had both Italian and United States nationality, but it was contended that the facts did not come within the ruling in the *Mergé* case under point (7) (*c*), *viz*:

" (c) With respect to cases of dual nationality involving American women married to Italian nationals, the United States nationality shall be prevalent in cases in which the family has had habitual residence in the United States and the interests and the permanent professional life of the head of the family were established in the United States."[1]

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[1] See, for the relevant part of that Article, *infra*, p. 606.

[2] See *International Law Reports*, 1955, p. 443, *sub nom. Mergé Claim.*

In the present case, therefore, the prerequisites of dominant United States nationality were lacking, and the claimant was to be regarded as being of dominant Italian nationality.

Held: that the claim must fail. On the facts of the case, the claimant could not be regarded as being dominantly a United Nations national within the meaning of the Treaty of Peace.

The Commission said: " It is not denied that under Italian Law the claimant is an Italian national as she acquired same as a result of her marriage to an Italian national; likewise, it is not denied that under the legislation of the United States she has preserved her United States nationality. The case of women married to Italian nationals was given explicit consideration in the above cited Decision in the *Mergé* case and it was set down as one of the guiding principles that in these cases United States nationality shall be deemed as prevalent when the family has had habitual residence in the United States and the interests and the permanent professional life of the head of the family were established in the United States.

" In examining the facts of the case at bar, the Commission holds that Mrs. Alice Orpha Spaulding Paolozzi cannot be considered to be dominantly a United Nations national within the meaning of Article 78 of the Treaty of Peace, as interpreted in the *Mergé* Decision, because the family did not have its habitual residence in the United States and the interests and personal professional life of the head of the family were not established there. In fact, Mrs. Paolozzi was married in Italy in 1938. From that point to May of 1943, when she established her permanent residence in Switzerland prior to her departure for America, she resided in Italy and went to America only long enough to have her child born there. The other times she left Italy, in her trips to Switzerland, she apparently travelled under an Italian passport exclusively. It is obvious that her Italian citizenship was dominant in that she remained in Italy and Switzerland with her husband, the head of her household, practically continuously from the date of her marriage until she returned to the United States in 1945.

" Inasmuch as Mrs. Paolozzi, for the foregoing reasons, cannot be considered to be dominantly a United Nations national within the meaning of Article 78 of the Treaty of Peace, the Commission is of the opinion that the Government of the United States of America, acting on behalf of Mrs. Paolozzi, is not entitled to present a claim against the Italian Government, . . ."

[Report: Unpublished (Decision No. 148).]

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[1] *Loc. cit.*, at p. 456.

NOTE.—See also the *Zangrilli Claim* (Decision No. 149), decided by the Commission on the same date, in which the claimant, born on April 9, 1874, and naturalized as an American citizen on October 29, 1900, resided in the United States until 1915, when he returned to Italy and remained there until 1929. In May 1929 he returned to the United States and resided there until 1936; he visited Italy between the autumn of 1936 and July 1937, and then went back to the United States. He did not return to Italy again until September 1946. He had resided in Italy since September 1946 only because he had been unable to return to the United States by reason of old age and ill health. He had used only American passports in his travels and had maintained his American nationality continuously since his naturalization in 1900, and had otherwise conducted himself as an American national since then. Throughout the period of the war and at the time when the damage which was the subject of his claim occurred, he was residing in the United States. It was *held* that the claim must succeed; on the facts of the case, the claimant's United States nationality was dominant.

The Commission said: ". . . Notwithstanding the fact that he resided in Italy from 1915 to 1929, the Commission, on the basis of the [evidence filed] during the proceedings, considers that this sojourn, although a lengthy one, was not accompanied by the intention to reside permanently in this country. Therefore, there is here involved the hypothesis provided for by point 7 (b) of the above-cited Decision [*Mergé* Claim], namely, an Italian national who re-acquired his nationality of origin as a matter of law merely as a result of having sojourned in Italy for more than two years, without the intention of re-transferring his residence permanently to Italy.

"The fact that he now resides in Italy is irrelevant for the purposes of the subject case because it involves events which occurred subsequent to those which the Commission is called upon to consider. . . ."

And see the *Cestra Claim* (Decision No. 165), decided by the Commission on February 28, 1957, in which the claimant, an American national by naturalization, had re-acquired his Italian nationality after residing in Italy between 1934 and 1938 and again from 1954 to the time of the hearing. It was *held* that the claim must succeed.

The Commission said: ". . . the Commission is of the opinion that the sojourn of 1934, in exceeding two years, raises the question of Cestra's dual nationality and therefore the applicability to this case of the principles established in the afore-mentioned *Mergé* decision.

"The Commission is also of the opinion that the instant case does not involve a sojourn coupled with the intention of retransferring residence to Italy; in actual fact Cestra came to Italy periodically, where he had a family and interests, but always for limited periods of time; and if the duration of one of these periods exceeded two years it cannot be assumed without a doubt that claimant intended to resettle definitively in Italy.

"The Commission, therefore, considers that the claimant is entitled to receive compensation for damage as provided for by Article 78 of the Treaty of Peace. . . ."

See also the *Puccini Claim* (Decision No. 173), decided by the Commission on May 17, 1957, where the facts were as follows: The claimant was born at Arliano, Lucca, on December 15, 1886. In 1914 she went to the United States and on January 6, 1915, married Joseph Mattei, an American-born national, thus acquiring American nationality. After her husband's death on July 18, 1937, the claimant returned to Italy to visit her sister and her old mother, travelling on an American passport which was later confiscated by the Italian police. Since 1938 she had been registered as an American at the Police Headquarters of Lucca. During the war she hid in the country to avoid arrest and internment in a concentration camp. In 1946, she sold her property in Italy and returned to the United States. Since the death of her husband the claimant had been supported and maintained out of the income and assets of her deceased husband, which had been and still were invested in the United States. The Commission *held* that the claim must succeed; the claimant came under the rule set down in point (7) (*b*) of the *Mergé* decision, and must be considered to be dominantly a United States national.

The Commission said: " The Commission finds, in the first place, that the claimant is in possession of both American and Italian nationality. Therefore, this case must be considered in the light of the *Mergé* case which has already been decided by this Commission, and it was set down as one of the guiding principles that United States nationality shall prevail in cases involving Italians who, after having acquired United States nationality by naturalization, and having thus lost Italian nationality, have re-acquired their nationality of origin as a matter of law as a result of having sojourned in Italy for more than two years without the intention of retransferring their residence permanently to Italy.

" In examining the facts of the case at bar which disclose that the claimant travelled on an American passport, that she was registered as an American with the Italian police, and that all her income and assets were always in the United States, the Commission must conclude that the claimant's sojourn of more than two years in Italy was not coupled with the intention of permanently re-transferring her residence to Italy. As a matter of fact, when war broke out at the completion of the two-year period, Mrs. Mattei, although she had an American passport, was confronted with difficulties in returning to the United States. At the cessation of hostilities she immediately returned to the United States (in 1946), where she presently resides. Therefore, the Commission considers that she is dominantly a United States national and as such is entitled to receive compensation for damage as provided by Article 78 of the Treaty of Peace. . . ."

Nationality—Dual Nationality—Claim by Dual National for Compensation Under Treaty—Test of Dominant Nationality.

SALVONI ESTATE CLAIM.

Italian-United States Conciliation Commission. May 9, 1957.

(Matturri, Sorrentino.)

THE FACTS.—This was a claim under Article 78 of the Peace Treaty with Italy of 1947, which gave certain rights to " United Nations nationals" who were defined in paragraph 9 (*a*) of the Article as " individuals who are nationals of any of the United Nations . . . at the coming into force of the . . . Treaty [and] . . . on September 3, 1943 ". The claimants were the heirs of Mrs. Marjorie Salvoni, an American citizen by birth, who in 1927 had married Ippolito Salvoni, an Italian national, and thereby also acquired Italian citizenship. After the marriage, Mrs. Salvoni and her husband spent many years in the United States, during which period her husband became an immigrant to the United States and was engaged in business there. In 1937 Mr. and Mrs. Salvoni went to Italy to visit relatives. Before leaving the United States the husband had applied for and received a re-entry permit. From 1937 they both resided in Italy up to the date of Mrs. Salvoni's death in 1951. Evidence was submitted to show that owing to an operation which Mrs. Salvoni had for cancer in 1940, she could not return to the United States. Immediately after the war, she repeatedly attempted to obtain from the United States Government a permit for her husband to return to the United States, but was unsuccessful. In addition, there were numerous letters showing Mrs. Salvoni's attachment to America and her desire to return there, as well as affidavits filed with American consular offices in Italy. Most of Mrs. Salvoni's investments were in the United States, and the only income she received was from trusts established at American banks and administered there.

On behalf of the claimants it was contended that Mrs. Salvoni's nationality had been predominantly American on the relevant dates mentioned in the Treaty of Peace. The *Mergé* case[1] was cited in support of this contention.

Held: that the claim must fail. On the facts of the case, the deceased must be regarded as having been " of dominant Italian nationality ".

The Commission said: " It is not denied that under Italian law the claimant [*sic.*] is an Italian national . . . [which she became] as a result of her marriage to an Italian national; likewise, it is not denied that under the legislation of the United States she has preserved her United States nationality. The case of American women married to Italian nationals was given explicit consideration in the above-cited Decision in the *Mergé* case [*supra*] and it was set down as one of the guiding principles that in these cases United States nationality shall be deemed as prevalent when the family has had habitual residence in the United States and the interests and the permanent professional life of the head of the family were established in the United States.

" In examining the facts of the case at bar, the Commission holds that Mrs. Salvoni cannot be considered to have been dominantly a United States [*sic.*] national within the meaning of Article 78 of the Treaty of Peace, as interpreted in the *Mergé* Decision, because the family did not have its habitual residence in the United States and the interests and personal professional life of the head of the family were not established there. In fact, Mrs. Salvoni came to Italy in 1937 and resided there until her death in 1951. During the war her husband was ' recalled '—and the Commission must assume from this evidence that he was recalled to the Italian Armed Forces. She further stated as a reason for residing in Italy that she wanted to be near her husband who had his business there and would return to the United States as soon as circumstances would permit. From the facts it would seem that if she wanted to return to the United States before or after the war she would have had ample opportunity to do so. As a matter of fact, in a letter written to the Washington Loan & Trust Company, Washington, D.C., dated September 13, 1940, she apparently foresaw the possibility of war and asked for a year's income in advance. It is obvious that her intention, irrespective of her sentiment, was to be with her husband in Italy during those times. Her intention obviously continued after the war as can be seen from her correspondence and the fact that she did not return to America.

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[1] See *International Law Reports*, 1955, p. 443.

" Inasmuch as Mrs. Salvoni, for the foregoing reasons, cannot be considered to be dominantly a United Nations National within the meaning of Article 78 of the Treaty of Peace, the Commission is of the opinion that the Government of the United States of America, acting on behalf of Mrs. Salvoni's successors in interest, is not entitled to present a claim against the Italian Government. . . ."

[Report: Unpublished (Decision No. 169).]

Nationality—Dual Nationality—Claim by Dual National for Compensation Under Treaty—Test of Dominant Nationality.

RUSPOLI CLAIM.

Italian-United States Conciliation Commission. May 15, 1957.

(Matturri, Sorrentino, Messia.)

THE FACTS.—This was a claim by the legal successor of Mrs. Eugenia Berry Ruspoli, deceased, based on Article 78 of the Peace Treaty with Italy of 1947, for compensation for damage to and destruction and loss of certain property at Nemi (Italy), belonging to Mrs. Ruspoli. The right to compensation for war damage was given by para. 4 (*a*) of Article 78 to " United Nations nationals ", who were defined in para. 9 (*a*) as " individuals who are nationals of any of the United Nations. . . ." The claim was originally submitted to the Italian Ministry of the Treasury, who rejected it on the ground that the deceased was under Italian law deemed to be an Italian national by virtue of her marriage in 1901 to an Italian national. The claim was then submitted to the present Commission.

It appeared that the deceased was born in 1869 in the United States of America and therefore had United States nationality. In 1889 she married Henry Burton, also a United States national, who died in 1892 leaving her a considerable fortune. In March 1901, she married Enrico Ruspoli, an Italian national, at Washington, D.C., before the Nuncio of the Holy See. As a result of that marriage she became an Italian citizen and lost her American citizenship. The couple went to Italy and rented an apartment in Rome. They travelled a great deal throughout Europe and, probably, America. It was established that Mrs. Ruspoli was in America at the time of the purchase of the castle at Nemi in 1902. The castle was purchased in her husband's name but, it could be assumed, with money supplied by Mrs. Ruspoli.

Ruspoli died on December 4, 1909, and in his will he left most of his property, including the castle at Nemi, to his family. Much litigation took place concerning the title to the castle. The matter was finally settled by agreement in 1916, and Mrs. Ruspoli obtained title to the castle together with all the personal property therein.

Mrs. Ruspoli arrived in America, for the first time since her husband's death, on March 26, 1910. She remained there for ten months, and then returned to Italy. Thereafter she made many trips between America and Italy. The first American passport issued to her was dated September 21, 1915, and in the application for it filed with the American Embassy in Rome she stated that she was temporarily sojourning in Rome and that her permanent residence was at Oak Hill, in the State of Georgia. She also stated that she was applying for the passport for the purpose of returning to Georgia. Thereafter she applied for and received many other American passports, the last of which was issued on April 26, 1950. It was evident that Mrs. Ruspoli did a great deal of travelling in her lifetime and that, after her marriage to Ruspoli, a considerable portion of her travels was between Italy and the United States. During the period of the two World Wars she lived in America and returned to Italy only after the cessation of hostilities.

In 1929, Mrs. Ruspoli adopted her niece, the claimant herein, in the Surrogate's Court of the City of New York. In the adoption proceedings she stated her residence as New York City. Residence in New York was a necessary prerequisite to give the Court jurisdiction.

On April 29, 1938, Mrs. Ruspoli re-registered in the Register of Inhabitants of Rome as coming from Oak Hill. She paid the fee charged to aliens transferring their residence to Rome and exhibited her American passport, the number of which was duly noted.

At the advent of the Second World War Mrs. Ruspoli had money sent to her at the American Express Company in Rome to pay for her return to America, but the money was blocked as soon as it reached Rome because it belonged to an American citizen. When she finally did leave Italy, on September 4, 1941, her Italian money was seized at the frontier in accordance with Italian law because she was an alien. Mrs. Ruspoli returned to the United States and remained there until 1946. She subsequently returned to Italy several times, until her death in New York in 1951.

It was not disputed between the parties that the deceased was born an American citizen and that upon her marriage to Ruspoli she lost that citizenship and became solely an Italian citizen. Thereafter, Mrs. Ruspoli remained solely an Italian until the death of her husband in 1909. The dispute between the two Governments turned upon the interpretation of the facts after that date.

1. *Contentions of the Government of the United States of America.*— Mrs. Ruspoli regained her American citizenship pursuant to the provisions of Section 3 of the Act of March 2, 1907, which read as follows:

> "That any American woman who marries a foreigner shall take the nationality of her husband. At the termination of the marital relation she may resume her American citizenship, if abroad, by registering as an American citizen within one year with a Consul of the United States, or by returning to reside in the United States, or, if residing in the United States at the termination of the marital relation, by continuing to reside therein."

The United States Government claimed that Mrs. Ruspoli regained her citizenship under the provision " . . . by returning to reside in the United States . . ." and suggested several alternative dates on which she had fulfilled the condition. In any event (it was contended), when she applied for a passport in 1915 she specifically stated that she wanted it " for the purpose of returning home at Oakhill, Georgia " and for the purpose of " residing there and fulfilling her duties of citizenship ". The year 1915 was the first time that American passports were required and the first time Mrs. Ruspoli applied for one. It was argued that 1915 was the latest date on which Mrs. Ruspoli could have re-acquired her American citizenship, but she probably re-acquired it earlier.

It was also argued that Mrs. Ruspoli did not lose her American citizenship by virtue of her marriage to an Italian national in 1901. This argument was based on the Common Law interpretation of American law prior to the enactment of the Act of March 2, 1907.

The American Government also argued that Mrs. Ruspoli lost her Italian citizenship at least in 1915 (when her transfer of residence to the United States was unquestionable), under the provisions of Article 10 of the Italian Law of June 13, 1912, which provided as follows:

> "An alien who marries an Italian national acquires Italian nationality. She preserves it also in widowhood unless, by maintaining or transferring her residence abroad, she re-acquires her nationality of origin."

In any event, it was pointed out, if the Commission should find that Mrs. Ruspoli was in possession of both American and Italian nationality, the facts indicated that her dominant nationality was American. In support of this, reference was made to the many ties which she had with America: her preference for America during both World Wars; the fact that she had travelled with an American passport continuously since 1915; the fact that she was always considered an American by the American authorities; and that on many occasions the Italian authorities also had considered and treated her as an American national.

2. *Contentions of the Italian Government.*—Mrs. Ruspoli never lost the Italian citizenship she acquired when she married her Italian husband. Article 10 of the Italian Law of 1912 imposed two conditions for loss of Italian citizenship, to wit: transfer of residence abroad and re-acquisition of citizenship of origin. While the latter in her case may be questionable, there was no doubt that under Italian law Mrs. Ruspoli did not transfer her residence abroad, and thus did not lose her Italian citizenship. At the very least she ought to be considered as a dual national.

It was also contended that under American law Mrs. Ruspoli did not re-acquire her American nationality of origin. (In support of this the Italian Government submitted a Brief of their American Counsel on the interpretation of American law.) The Italian Government also argued that, in the alternative, Mrs. Ruspoli was dominantly an Italian national under the interpretation given in the decision in the *Mergé* case.[1] This, it was contended, was supported by the facts, which showed Mrs. Ruspoli's almost continuous residence in Italy (in Rome or in the castle at Nemi), her re-registration as a resident of Rome in 1938, and the application for Italian citizenship which was subsequently granted.

In either alternative, whether the deceased had solely Italian nationality or dominant Italian nationality, the petition should be rejected.

Held (by a majority of the Commission, the Italian member dissenting): that the claim must succeed. The history of the deceased showed that her dominant nationality was American.

The Commission said: " 1. . . . Until the American attorney of [the claimant] submitted his Exhibit, both parties agreed in submitting that Mrs. Ruspoli, an American born national, had lost her American nationality when she acquired Italian nationality as a result of her marriage to Prince Ruspoli. The Brief of this attorney contends that the decedent, Mrs. Ruspoli, never lost her American nationality even though she married an Italian subject.

" He bases this assertion on the fact that, under the American ' common law ', which was in force prior to the Act of March 2,

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[1] See *International Law Reports*, 1955, p. 443.]

1907, American women who married aliens did not lose their nationality of origin. To prove his allegations he cited the *Shanks* v. *Dupont* case, concerning the marriage of a woman, born in North Carolina, to a British officer.

" It is not sufficiently proved that the decision in this case is binding and constitutes case-law. Even less, when said case-law should have a derogatory effect on a rule generally accepted in the United States and confirmed by the law of 1907, according to which, prior to the enactment of the Law of September 22, 1922, an American woman who married an alien lost her American nationality. . . .

" 2.—Neither can one admit the American Agent's alternative allegation, that is, that Mrs. Ruspoli was treated as enemy under the last sub-paragraph of paragraph 8 of Article 78 of the Treaty of Peace.

" No convincing proof has been submitted to the Commission in this connection.

" 3.—As it is established that Mrs. Eugenia Berry lost her American nationality when she married Prince Ruspoli, the matter should now be investigated as to whether or not she recovered her nationality of origin when she became a widow.

" The American applicable text is Section 3 of the Law of March 2, 1907, under which a woman who marries an alien can, upon the dissolution of her marriage, re-acquire her American nationality by either one of the following three procedures: (1) registering, if abroad, as an American national, with a United States Consular Office within one year; (2) returning to reside in the United States; (3) if residing in the United States at the time of the dissolution of her marriage by continuing to reside there.

" The application of the first of these three procedures should be excluded because, although Mrs. Ruspoli registered with the United States Consular Office in Rome, she did so on August 10, 1915, that is, six years after the death of her husband, which occurred on December 4, 1909, whereas the first of the procedures provided for by the Law requires that the entry in the Consular Register be made within one year of dissolution of the marriage.

" Neither is the third procedure for re-acquiring nationality applicable in that Mrs. Ruspoli, upon the dissolution of her marriage, resided in Italy and not in the United States.

" There remains to be determined as to whether or not Mrs. Ruspoli recovered her American nationality under the second procedure provided for by the Law of 1907, that is, ' by returning to reside in the United States '.

" Under this rule two elements must of necessity be present in order that Mrs. Ruspoli could be entitled to re-acquire her American nationality: the *animus* and the *facto*. The first is an act of intent; while the latter is a physical fact.

" The key to the interpretation lies in the meaning of the phrase ' returning to reside '. Does it require a sojourn of a certain length of time or just the mere fact of going to the United States with the intent of establishing residence there?

" The citations submitted to this Commission do not reveal either the requirement of a certain length of time, or any concrete and specific determination as to its duration, had it been required. As a result, whatever time-limit were to be adopted, would be arbitrary. The only matter which, from a physical and material standpoint, appears to be an indispensable and necessary requisite, is the transfer to the United States, even if conditioned upon the element of intent, which must be made evident by sufficiently clear outward signs.

" In concurrence with this criterion it cannot be admitted that Mrs. Ruspoli re-acquired her American nationality following her first trip, in 1910, to the United States after she became a widow, because no express statement was submitted by her to assert that this trip was made for the purpose of re-acquiring her American nationality.

" The trip made by the decedent in 1915 is different because that voyage was preceded by her formal statement made at the American Consulate in Rome that she intended to re-acquire her American nationality.

" In this statement Mrs. Ruspoli asserted, under oath, that she intended to return to the United States ' within two months, for the purpose of residing there and fulfilling her duties of citizenship,' and that she wished to have a passport (which was issued to her) for the purpose of returning home at Oakhill, Georgia.

" This statement, together with her transfer to America, to her home in Georgia, in 1915, represents the *animus* and the *facto* required by the second of the procedures provided for by the Law of 1907 for the re-acquisition by Mrs. Ruspoli of her American nationality.

" 4.—It should now be established whether or not Mrs. Ruspoli lost her Italian nationality as a result of having re-acquired her American nationality.

" As American law is applicable in connection with the re-acquisition of her nationality of origin, Italian law must be referred to in connection with the loss of her Italian nationality.

" The pertinent rule here is that contained in Article 10 of the Law No. 555 of June 13, 1912, under which ' an alien woman who marries an Italian national acquires Italian nationality. She preserves it also in widowhood unless, by maintaining or transferring her residence abroad, she re-acquires her nationality of origin.'

" The Third Member accepts the arguments propounded by the Hon. Italian Member on this Commission during the hearing held at Madrid in February 1957 (the third devoted to this case), namely, that the expression of residence specified in Article 10 must be interpreted in accordance with Italian legislation.

" It can therefore be stated that Mrs. Ruspoli did not fulfill all the necessary conditions required for losing Italian nationality under Italian legislation.

" The instant case involves, therefore, a case of dual nationality which comes under the principles established in the *Strunsky-Mergé* decision.[1]

" 5.—Hereunder are the facts which have been alleged and have not been denied, as far as their correctness is concerned; although they are differently valued by both parties to this dispute in connection with the effects thereof on the re-acquisition of nationality:

" (a) the existence of *jus soli* and *jus sanguinis* in the original American nationality of Mrs. Eugenia Berry, born in 1869 in American territory and coming from a typically American family, the family of Captain Thomas, her father, whose closest relatives preserve their American nationality and continue to reside in the territory of the United States.

" (b) her education and her stay in the United States during the first thirty years of her life.

" (c) her marriage, in 1889, performed in the Catholic ritual, to Mr. Henry Burton, a North American citizen, who died in 1892 and who had named his wife as the sole heir to his large fortune. This fortune was increased one year later by the fortune left her by her father which included property and business established in America.

" (d) her second marriage, to Mr. Enrico Ruspoli, on March 2, 1901, in Washington, before the Papal Nuncio.

" (e) the transfer to Italy of Mr. and Mrs. Ruspoli. They rented an apartment in the Palazzo Colonna at Rome, where they established their residence, although they travelled frequently abroad.

" (f) the marriage lasted only eight years and no children were born.

" (g) her conduct following the dissolution of her marriage, and especially:

> " (i) Mrs. Ruspoli's two prolonged stays in America which coincided with World War I and World War II, critical circumstances in which a preference clearly stands out, in view of the fact that fear of danger is not a valid reason, because an ocean trip was far from being devoid of danger with the threat of submarines.

[[1] See *International Law Reports*, 1955, p. 443 (*sub nom. Mergé Claim*).]

> "(ii) the continued use of American passports, which were issued to her in the years 1915, 1916, 1918, 1921, 1923, 1925, 1927, 1932, 1938, 1941, 1946.
>
> "(iii) the fact that in 1929 she performed in New York, and under American law, such an intimate family act as that of adopting her niece, Maria Theresa Droutzkoy Ruspoli.

"All the foregoing points are not lessened in value by the fact that in June 1941 a friend of Mrs. Ruspoli, Baroness Rossi Rugi, requested a certificate of Italian nationality for Mrs. Ruspoli because it is not proved that Baroness Rossi Rugi acted as attorney for Mrs. Ruspoli.

"The repeated signs of preference for the bond with the country of origin, first and after the interlude of her second marriage which lasted eight years, when examined in the light of the "Considerations of Law' of the Decision rendered in the *Mergé* case[1] . . ., lead the majority of the Commission to conclude that Mrs. Ruspoli's dominant nationality was American.

"The preliminary question should therefore be settled in the sense that the Petition submitted by the Government of the United States of America in behalf of Mrs. Maria Theresa Droutzkoy, Mrs. Ruspoli's successor in interest, is to be declared to be admissible, without prejudice to the further investigation to be made on the existence and extent of the damages claimed. . . ."

[Report: Unpublished (Decision No. 170).]

Nationality—Dual Nationality—Claim by Dual National for Compensation Under Treaty—Dominant Nationality That of a Third State.

VEREANO CLAIM.

Italian-United States Conciliation Commission. May 17, 1957.

(Matturri, Sorrentino.)

THE FACTS.—This was a claim based on Article 78 of the Peace Treaty with Italy of 1947 for compensation for damage to and destruction and loss of certain property in Italy belonging to the claimant. The claim had originally been rejected by the Italian Ministry of the Treasury on the ground that the claimant, an American citizen by birth, had acquired Turkish nationality by virtue of her marriage to a Turkish citizen. The matter was referred to the present Commission. It appeared that the claimant had reacquired American nationality after her marriage. On behalf of the claimant it was contended that "even if the claimant had possessed Turkish nationality as well as American nationality on the relevant dates of the Treaty of Peace, she is eligible to assert a claim under

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[1] *International Law Reports*, 1955, at pp. 454–456.]

Article 78 of the Treaty and is entitled to the protection of the United States of America before the Commission in connection therewith; and the claimant's simultaneous possession of the nationality of a third State would not exclude her from the benefits afforded a United Nations national by the provisions of Article 78, as was established by this Commission in the *Strunsky-Mergé* case.[1]

Held: that the claimant was entitled to submit a claim to the Claims Commission. [The claim was dismissed on the merits.]

The Commission said: " The Commission finds that the claimant has a right to file a claim with this Commission, notwithstanding the fact that she may have been in possession of Turkish nationality. This question was already settled in the *Mergé* decision [*supra*] and it was set down as one of the guides in Section 8 therein that

> " ' United Nations nationals who did not possess Italian nationality but the nationality of a third State can be considered " United Nations nationals " under the Treaty, even if their prevalent nationality was the nationality of a third State.' [2] "

[Report: Unpublished (Decision No. 172).]

XI.—Statelessness

Nationality—Statelessness—Admission of Stateless Person—Deportation Order—Impossibility of Finding Country to which Stateless Person can be Deported—The Law of Canada.

Re IMMIGRATION ACT AND HANNA.

Canada, Supreme Court of British Columbia. March 26, 1957.

(Sullivan J.)

THE FACTS.—Hanna, a stateless person, stowed away on a vessel which visited Canadian ports. Being stateless, on arrival at Canadian ports he was denied permission to land, and was detained on board the ship by the Master in order to prevent him from doing so. On the occasion of one such visit to a Canadian port he instituted habeas corpus proceedings to challenge the legality of his detention by the Master of the ship. In these proceedings it was held that Hanna's detention by the Master was not illegal under Canadian law since the Master had acted in accordance with the regulations applicable to " stowaways " which had been passed pursuant to the Canadian Immigration Act.

Hanna thereafter applied to enter Canada, and his status thus changed from that of " stowaway " to that of " immigrant ". On the examination of his application to enter Canada he was unable to produce satisfactory evidence of origin, and a deportation order was made. He sought a declaration that his detention under the deportation order was illegal because that order was incapable of enforcement since, being stateless and with no ascertainable origin, there was no country to which he could be deported.

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[1] See *International Law Reports*, 1955, p. 443, *sub nom. Mergé Claim.*]
[2] *Loc. cit.*, at p. 456.]

Held: that the declaration sought must be granted. A deportation order in respect of a stateless person with no ascertainable origin amounted to a sentence that the person be imprisoned on a vessel for an indefinite period, and no immigration officer had a legal right to make such a deportation order.

Sullivan J. said: " This is a ' hard case ' of the kind of which it is said that bad law is made.

" The appellant George Christian Hanna, whom I shall refer to as Hanna in these reasons for judgment, is a young man without a country—one of those unfortunate ' stateless ' persons of the world whose status is a matter of concern to humanitarians and has prompted men and women of good will of all countries to seek relief for such persons through the agency of the Economic and Social Council of the United Nations. A convention was adopted by that Council in September 1954 to which, however, Canada is not a signatory.

" The matter comes before me by way of *habeas corpus* with *certiorari* in aid. Hanna seeks a judicial declaration that his detention under a deportation order made by F. Wragg, an immigration officer (acting as a special inquiry officer), dated January 18, 1957, and confirmed on appeal to an immigration appeal board duly constituted under the provisions of the Immigration Act, RSC., 1952, ch. 325, is illegal, (1) Because the deportation order is defective, incomplete, impossible of interpretation or enforcement and beyond the statutory authority of Mr. Wragg to make; and (2) Because the immigration appeal board improperly denied Hanna the right to be heard, either in person or by counsel, at the appeal proceedings before such board.

" The issues thus presented for my determination are strictly legal in nature and narrow in their scope. I have no right to reflect upon and must guard against the danger that the strictly legal opinion which I am required to express should be influenced in any degree by considerations of human sympathy for this unfortunate (23-year-old) young applicant in the frustrating dilemma with which fate seems to have confronted him throughout his lifetime prior to his last arrival in Canada as ship-bound prisoner aboard a tramp motor-ship in her ceaseless meanderings from port to port throughout the world."

After referring to the text of the deportation order against Hanna, Sullivan J. continued: " It should be stated at the outset that no Canadian court has power to assist Hanna in his plea that he be given right of residence in Canada. That is a decision for immigration officials, and for them alone, to make. Similarly all right of exercise of discretionary power to exempt from strict compliance with the requirements of the Immigration Act or regulations made thereunder is vested in and is the prerogative of only the minister, deputy minister, director, or such other persons as may be authorised to act for the director. The jurisdiction of the court in all matters relating to immigration is controlled and restricted and for the most part ousted by an express provision of the Act, which reads as follows:

> " ' 39. No court and no judge or officer thereof has jurisdiction to review, quash, reverse, restrain or otherwise interfere with any proceeding, decision or order of the Minister, Deputy Minister, Director, Immigration Appeal Board, Special Inquiry Officer or immigration officer had, made or given under the authority and in accordance with the provisions of this Act relating to the detention or deportation of any person, upon any ground whatsoever, unless such person is a Canadian citizen or has Canadian domicile.'

" That is the law of Canada as the people have enacted it through their Parliament, and the sole duty of this court is to enforce the law of Canada as so enacted. It is needless to add that it would be highly improper—and, indeed, impertinent—for any judge to suggest to an immigration officer of whatever rank, that he would personally like to see executive discretion exercised in a certain manner in any given case.

" It may be helpful to outline Hanna's history and background in brief detail as it is disclosed by the scanty material before me. Most of such material consists of Hanna's sworn testimony, given in the English language, when he was before Mr. Wragg on January 18, 1957, at which time his knowledge and proficiency in the use of our language was not as great as it may be now. He says that he was born at sea and that no known record of his birth is extant. The name of the vessel aboard which he was born, and particulars of her nationality or port of registry are unknown. His father was named George Hanna and supposedly travelled to French Somaliland from Liberia, a small Republic situate on the west coast of Africa. His mother's maiden name was Marian Marika and she was a native of Ethiopia (or Abyssinia)—a country whose status as either empire or vassal of Italy at any given time can be determined only by reference to historical data bearing upon Emperor Haile Selassie's struggles in warfare with the late Benito Mussolini. Hanna understands that his parents met and were married at Djibouti, the capital city of French Somaliland. The accuracy of his information in this respect should be easy to check. French Somaliland is a very small country. It has been a French colony for about 80 years, and one imagines that statistical records of births, deaths and marriages are available at the capital city—a comparatively small place of about 22,000 population. Hanna was the only child born of his parents' marriage and both of his parents are dead. Continuing the narrative according to Hanna's understanding of events, his father left his mother to seek employment in Liberia. Subsequently his mother, being pregnant at the time, and seeking to rejoin her husband, took passage on a ship sailing out of Djibouti. She became ill and gave birth to Hanna when the ship was one day at sea, and because of her illness the ship was put about and returned to Djibouti where she and her newborn child were placed in a hospital or home for women. Thereafter Hanna was cared for by his mother who worked at various times at Addis Ababa and Dire Wawa (both in Ethiopia) and at Djibouti in French Somaliland, until Hanna was six years of age. She then died and thereafter Hanna more or less ' raised himself' as he puts it, with some assistance from a kindly old Turkish gentleman at Djibouti and others, including a Japanese gentleman at Dire Wawa in Ethiopia.

" During his years of infancy and adolescence Hanna seems to have crossed and recrossed the international boundaries of Ethiopia, French Somaliland, British Somaliland and Eritrea (formerly an Italian colony but now a province of Ethiopia by virtue of the recommendation of a United Nations' committee adopted by the General Assembly in 1952) without encountering difficulty with the immigration officials of those countries. I suppose that youth was in his favour at the outset, and I suppose, too, that the international boundaries referred to were not too well defined at the time. That still seems to be the case. I understand that the accurate fixation of the international borders convergent upon the small area of French Somaliland is a problem which presently engages the attention of the United Nations' General Assembly.

" In this way Hanna lived and worked from time to time (*inter alia*) in the ports of Zeila and Berbera in British Somaliland where he picked up a smattering of English. He says that his mother spoke English and, although he never saw his father, it is his understanding that his parents conversed in English. This would be consistent with Hanna's theory that his father was a native of Liberia—a republic which most people look upon as a virtual protectorate of the United States of America, and where English is spoken.

" As he grew older Hanna seems to have encountered and had difficulty with the immigration officers of these adjacent countries, in none of which he could claim right of residence. He thereby learned that possession of a birth certificate is an indispensable requirement of modern society. He learned ' the hard way ' that some of the fundamental human rights with which all men are endowed by their Creator at birth were not his to enjoy without the intervention and benevolent assistance of some temporal power—a power to be exercised in many cases according to the whim or opinion of immigration officers whose numbers are legion in most sovereign states. That is not to say, of course, that he or anyone else possesses an inherent right to enter or remain in Canada unless born here. The late Right Honourable W. L. Mackenzie King, Prime Minister of Canada, said in the House of Commons on May 1, 1947, that

> " 'It is not a "fundamental human right" of an alien to enter Canada. It is a privilege. It is a matter of domestic policy.'

" The same thing might be said with respect to every sovereign state throughout the world, but one doubts that the Prime Minister intended his statement to be a repudiation of Canadian interest or sympathy in such a case of distress as this one, the like of which, I venture to say, has little chance of recurring. It is probable that the Prime Minister made use of the term 'alien' in the popular sense of reference to a person who resides or seeks to reside in a country other than his own; and in that connotation it could be argued that a stateless person like Hanna is not an 'alien' since he has no country of his own.

" I think I should stop there by reminding myself again that the issue before me is a strictly legal one which I am required to divorce from any considerations of equity or humanitarianism. Those things must be deemed to have been embodied in the statute at the time of its enactment.

" Almost three years ago, when he was in the port of Massaua, Eritrea, Hanna stowed away in an Italian tramp steamer in the hope of being carried in her to some country which would grant him asylum and right of residence. His plan met with frustration because upon arrival of such ship at any port he was immediately locked up and denied permission to land. After a year or more of such aimless wandering and imprisonment, Hanna excaped from the Italian vessel when she called at Beirut in the republic of Lebanon, and concealed himself in the hold of the Norwegian motorship 'Gudveig'. As a stowaway in such latter vessel he fared no better than before. He was held prisoner aboard the 'Gudveig' for more than 16 months and made three or more trips to Canada in her until his release under writ of *habeas corpus* in these proceedings. He first came before Clyne J. upon return of a show cause summons on January 18, 1957, wherein he challenged the legality of his detention by the master of the 'Gudveig'. My learned brother there held (correctly, in my respectful opinion) that the master's detention of Hanna was not illegal since the master was subject to and bound by the regulations applicable to 'stowaways' as passed pursuant to the provisions of the Immigration Act. Thereafter Hanna made application to enter Canada and his status was thereby changed from that of 'stowaway' to that of 'immigrant'. An immigrant is defined by sec. 2 (i) of the Immigration Act as follows:

> " '(i) "immigrant" means a person who seeks admission to Canada for permanent residence.'

" I first thought that this change in status was intended to be a favourable gesture to Hanna. I assumed that executive discretion was being exercised (under sec. 2 [5] of the regulations or by order under sec. 62 of the Act) so as to waive the requirements of passport, visa, medical certificate and so forth, and that the intention of senior officials of the department had been that Hanna's qualifications of character, health and general fitness for residence in Canada should be investigated, notwithstanding the absence of so-called travel documents. Counsel assures me, however, that such was never the case—that the *quasi*-judicial machinery of the department was set in motion at Vancouver because officials here thought this had to be done as a matter of law. And so, at a time when it had become a widely publicized matter of general public knowledge or repute that Hanna possessed no proof of birth nor documents of any kind, he was granted the privilege of appearing before three separate departmental tribunals for the purpose of proving—if he could—that he did in fact possess such documents. Of course, he was unable to discharge that onus, and the deportation order followed which is now under attack in these proceedings.

" I come now to an examination of that deportation order. Was it an order which the special inquiry officer had legal authority to make in all the circumstances existing at the time of its making? It contains four separate directives which are stated in the alternative and, presumably, in the order of their importance.

" The most important directive is, No. 1, that Hanna be deported to the place whence he came to Canada.

" The next directive is, No. 2, that he be deported to the country of which he is a national or citizen.

" The next is, No. 3, that he be deported to the country of his birth.

" The final alternative is, No. 4, that he be deported to such country as may be approved by the minister.

" The No. 4 directive is meaningless in the absence of anything to show a possibility of the minister ever finding a country which would be willing to admit this young man in the face of Canada's refusal to admit him. It cannot be assumed that travel documents are of less significance in other countries than here. The thing goes further than that, however, because sec. 40 (2) of our Act makes the minister's power of designation and approval of ' such country ' conditional upon the owners of the M.S. ' Gudveig ' first making request for such ministerial approval. Even then, as I interpret the statute, the approval of the minister could have no effect unless after finding ' a country that is willing to receive him ', Hanna were to indicate that such country is ' acceptable ' to him.

" Directives No. 2 and No. 3 referring, respectively, to country of nationality or citizenship and country of birth, may be discussed together. Neither of these directives could possibly be complied with. In the absence of satisfactory evidence of nationality of a legitimate father and lack of any evidence as to the nationality or registry of the ship aboard which Hanna was born, these directives of the deportation order are meaningless.

"The inescapable fact is that Hanna is a 'stateless person', and the efforts of the department to prove otherwise have not been impressive. I was presented with evidence (consisting of affidavits by lawyers in Oslo, Norway, and a Canadian immigration officer) in support of the submission that Hanna is not 'stateless' and that the words of the directive 'country of your birth', therefore, are not meaningless. The trouble is that whilst the affidavit of the immigration officer fixes Hanna's birth-place as Djibouti in French Somaliland, the Norwegian lawyers suggest that he is an Egyptian who was born at Alexandria. None of this conflicting evidence is credible. It is all based on hearsay and, perhaps, the least said about it, the better.

"That brings me to the consideration of directive No. 1—that Hanna be deported to the place whence he came to Canada. What does it mean?

"The department's position, as I understand it, is that it could mean a number of things which it leaves to other people to determine for themselves. The place whence Hanna came to Canada might be the port of Beirut in the republic of Lebanon since that is the place where he first stowed away in the M.S. 'Gudveig'. Perhaps that interpretation is favoured by the department since it has presented certain material tending to show that if Lebanese authorities can be satisfied that Hanna stowed away at Beirut, they *might* permit him to land in their country—a country, incidentally, which is quite as foreign to Hanna as it is to me. Then again the department seems to suggest that the place whence Hanna came to Canada could be the United Kingdom and an affidavit is presented for the purpose of showing that the 'Gudveig' sailed non-stop from the United Kingdom to Vancouver on her last voyage with Hanna abroad. Perhaps the place whence Hanna came to Canada could be the port of Massaua in Eritrea, since that was the starting point of his aimless wanderings as a stowaway in search of a country which would give him right of residence. Other interpretations are possible, but it seems to me that the matter of correct interpretation is of comparative unimportance here. The thing of importance, as I see it, is that the special inquiry officer here delegated to the masters or owners of the 'Gudveig' the responsibility for saying what his deportation order means; and, apart from the circumstances that he himself does not seem to know what it means, I am of opinion that he has not that power of delegation under the Act.

"I have had reference to the authorities cited by counsel wherein it was held that deportation orders made (as this one was) in form approved by the minister were valid and enforceable notwithstanding their multiplicity of alternative directives, but in none of such cases were the facts comparable to the extraordinary facts of this amazing case. In each of such cases the meaning of the deportation order in the form used was clearly apparent to everyone concerned or affected by it. In no case did the deportation order require subsequent inquiry or investigation by anyone for determination of its meaning. In none of such cases was there a necessarily incidental delegation of his authority by the special inquiry officer who made the order for deportation. These are some of the things which, in my opinion, distinguish Hanna's case from all others.

" From whatever angle one views it, so far as Hanna is concerned, this deportation order amounted to a sentence of imprisonment aboard the ' Gudveig ' for an indefinite term, and in my opinion and finding, no immigration officer had the legal right to exercise such drastic power.

" I find it unnecessary to deal with the complaint as to the manner in which Hanna's appeal to the minister was disposed of by the members of the board of appeal to whom it was referred for hearing, and I shall make no comment concerning it.

" For the reasons previously expressed, there will be judgment for Hanna in these proceedings, with costs. That does not mean that he has established any legal right to enter or remain in Canada. As previously stated, it is for immigration officials and for them alone to grant or withhold that privilege. This judgment does not mean that Hanna may not be deported legally from Canada by further proceedings properly instituted and conducted in accordance with the provisions and intent of the Immigration Act. It means only that the present deportation order is illegal and that Hanna is entitled to be released from detention thereunder; and I so order."

[Report: 21 Western Weekly Reports 400.]

Nationality—Statelessness—Causes of—The Law of Holland.

In re S. (an Infant).

Holland, District Court of Utrecht. June 12, 1957.

The Facts.—S. was the child of a Yugoslav national resident in Germany and his wife, who was formerly of Netherlands nationality. During the course of divorce proceedings between the parents the nationality of the infant came into issue on the question of her guardianship and what law should govern it. The facts appear from the *Held* below.

Held: that the infant was stateless and the guardianship must be provided for in accordance with Netherlands law. The mother did not acquire Yugoslav nationality by marrying a Yugoslav, since Article 3 of the Nationality Law of the Federal People's Republic of Yugoslavia recognised as grounds for acquisition of Yugoslav nationality—apart from the cases of naturalization and conferment of citizenship by treaty—only Yugoslav "origin" or birth in Yugoslavia. Hence the mother kept her Netherlands nationality. But there was no provision in the Netherlands Nationality Act which conferred Netherlands nationality on the child of a Yugoslav father and a Netherlands mother; therefore the infant was not a Netherlands national by birth. On the other hand, the infant did not acquire Yugoslav nationality at birth; she could have done that only if both her parents had been Yugoslavs. The infant was therefore stateless.

[Report: *N.J.*, 1958, No. 135.]

Nationality—Statelessness—Unity of Family—Avoidance of Statelessness—Illegitimate Children—The Law of Switzerland.

FEDERAL DEPARTMENT OF JUSTICE AND POLICE AND ALLACHWERDIJEW *v.* REGIERUNGSRAT OF THE CANTON OF SOLOTHURN.

Switzerland, Federal Tribunal. March 8, 1957.

THE FACTS.—On April 18, 1948, a citizen of Solothurn gave birth to an illegitimate daughter, Nina Edmée Marietta. The child was legitimated by the marriage of her mother to the father on May 27, 1949. The father was then a national of the Soviet Union, but neither mother nor child acquired the nationality of the father. In 1949, the family emigrated to Turkey and there acquired Turkish nationality in the following year. By a decision of December 21, 1956, the Regierungsrat of Solothurn formally found that both mother and daughter had lost Swiss nationality by virtue of their acquisition of Turkish nationality. The present complaint contested that decision with respect to the daughter.

Held: that the complaint must be rejected. Swiss law was primarily concerned to ensure unity of citizenship within a family. It allowed of exceptions to that rule only where statelessness was certain to ensue. In this case the girl and her parents had Turkish nationality.

The Court said: "The law applicable to this case is that obtaining in 1950, *i.e.*, the decision of the Federal Council of November 11, 1941, concerning changes in the provisions relating to the acquisition and loss of Swiss citizenship. Article 5 thereof governs the citizenship of a Swiss woman who marries an alien, and up to a point also that of the children of such marriage. With a view to ensuring unity of citizenship within the family, paragraph 1 lays down that the wife [of an alien] loses [her] Swiss nationality. The children of the marriage are not even mentioned, since in such case they have no link with Switzerland. Paragraph 2 provides for an exception designed to avoid statelessness: despite her marriage to an alien, a Swiss woman may retain her nationality if she would otherwise become stateless. Paragraph 3 extends that exception to children of the marriage (and thus preserves the principle of unity at least for mother and children): in such case they acquire Swiss nationality by birth. Paragraph 4 limits the exception by reference to its purpose: since it is intended to serve only to avoid statelessness, it ceases to apply when that assumption no longer exists.

" Children born prior to marriage to a Swiss woman marrying an alien are not mentioned in Article 5; nor is this necessary. If their father is not the subsequent husband of their mother, their status is unaffected by her marriage and they keep their original nationality. If their father marries the mother, they are legitimated by the marriage and assimilated to children born in wedlock. . . . It is generally recognized that by legitimation the child acquires the nationality of the father and loses that of the mother. Swiss law, again by reference to the principle of unity of citizenship in the family, has always maintained that view (see, *e.g.*, *B.G.E.*, vol. 37, Part I, p. 246; *ibid.*, vol. 45, Part I, p. 161) . . . However, while this was taken as a matter of course in case of legitimation by a Swiss father, it had to be recognized that the nationality of a foreign father could be acquired only in conformity with the law of his nationality. In order to avoid statelessness, the Federal Tribunal accordingly permitted the loss of Swiss nationality on legitimation by a foreign father only in cases in which the child acquired the nationality of the father. Even then the legitimated child was assimilated to one born in wedlock; for the child born in wedlock of a Swiss mother and foreign father acquired Swiss nationality if it did not acquire the nationality of the father. The only difference lay in the fact that the child born in wedlock acquired Swiss nationality at birth, while the legitimated child retained any pre-existing nationality.

"Article 5 of the decision of November 4, 1941, affirmed the pre-existing rules established by the Federal Tribunal and made them somewhat more strict by reference to the view that Swiss nationality was granted exclusively for the prevention of statelessness: thus in paras. 2 and 3 it makes it a condition of retention of Swiss nationality by the wife or its acquisition by her children, that they would otherwise ' inevitably ' be stateless. Paragraph 4 provides that Swiss nationality which is acquired or retained is lost on the acquisition of a foreign nationality. It follows from the assimilation of legitimated children to children born in wedlock that these provisions must be applied to such [legitimated] children in accordance with the intention of the provisions. . . . Such a child would normally lose Swiss nationality on legitimation, and retain it only if it would otherwise inevitably become stateless; it loses it on the acquisition of another nationality. . . . It is inconceivable that the law would wish to treat legitimated children differently from—and, as far as concerns loss of nationality, better than—legitimate children. All the relevant principles of Swiss law—the unity of citizenship in the family, the assimilation of legitimated to legitimate children, and the restriction of exceptions to the case of avoidance of statelessness—require such an interpretation of Article 5. Otherwise, the children of the Allachwerdijew family would all have different nationalities: those born in wedlock before the acquisition of Turkish nationality would have acquired Swiss nationality at birth and lost it; those born after 1950 would never have possessed it . . .; while the legitimated child would have double nationality. This would run counter to the policy of Swiss law.

"The contested decision therefore correctly determined that Nina Edmée Marietta Allachwerdijew lost Swiss nationality in 1950, on the acquisition of Turkish nationality.

"Even if this were not so, however, under the law applicable at the time, she would have lost Swiss nationality on the entry into force of the new Nationality Law of January 1, 1953. The effect of legitimation of the child of a Swiss mother and a foreign father is expressly settled therein, essentially on the lines previously laid down by the Federal Tribunal. . . . Under that Law, Swiss nationality is lost not only if the child acquires the nationality of the father after its coming into force, but also if the child already possessed that nationality."

[Report: *Entscheidungen des Schweizerischen Bundesgerichts*, 83 (1957), Part I, p. 54.]

XII.—Nationality of Corporations

[*See also* PART XI, WAR AND NEUTRALITY: A, VI, Enemy Character.]

Nationality—Of Corporations—Subsidiary of Foreign Corporation—Protection of—Under Treaty of Friendship, Commerce, and Navigation—" National Treatment "—Jurisdiction over—Alleged Violation of Anti-Trust Laws—The Law of the United States of America.

See p. 673 (*United States* v. *R. P. Oldham Co. et Al.*).

C—ALIENS

II.—Position of Aliens

iii.—Treatment by and Responsibilities of the Receiving State

[*See also* PART V, STATE RESPONSIBILITY.]

Aliens—Treatment of—Property of Aliens—Payments under Life Insurance Policies Alien Beneficiaries Resident Abroad—Alleged Inability to Receive, Control and Enjoy Payments—Beneficiaries of American Insurance Policies Resident in Country under Alleged Communist Régime—Deposit of Funds with Court—The Law of the United States of America.

DANISCH *ET AL. v.* GUARDIAN LIFE INSURANCE COMPANY OF AMERICA.

United States, District Court, Southern District, New York.

March 13, 1957.

THE FACTS.—This was an action on policies of insurance on the life of an American decedent, brought by beneficiaries who were residents and citizens of the Polish People's Republic. The defendant admitted its liability to the plaintiffs but resisted payment on the grounds that the plaintiffs' attorneys lacked authority to institute the action and that there was not " a reasonable assurance or likelihood that the plaintiffs would actually receive or have the benefit or use or control of the insurance proceeds" if the money were to be transmitted to them or to the persons purporting to represent them. The defendant urged, as an alternative to dismissal, that pursuant to sections 474 and 978 of the New York Civil Practice Act it be authorized to deposit the funds in court for the benefit of the persons entitled to them, until such time as they could be assured of the actual receipt or beneficial use of the money. On plaintiffs' motion for summary judgment and defendant's motion to dismiss,

Held: that the plaintiffs' motion for summary judgment must be granted but that entry thereof must be held in abeyance for ten days, during which time the plaintiffs would be allowed to apply for a hearing. Failing such an application, the defendant's motion for deposit of the funds in court would be granted. The payment of the funds into court had as its purpose the protection of the legal rights of the beneficiaries and would accordingly not constitute an impairment of the obligation of contracts or a taking of property without due process of law in violation of the United States Constitution. Although there was evidence that the applicable Polish exchange rates would have a confiscatory effect and that the United States Treasury Department considered that there was not a reasonable assurance that Polish payees would receive funds transmitted from the United States, the plaintiffs' denial that they would fail to receive the funds and their demand for a hearing made such a hearing necessary.

After concluding that the defendant had failed to meet the burden of proving the lack of authorization of plaintiffs' counsel, the Court said: "With the jurisdictional issue decided in favor of the plaintiffs, they are entitled to summary judgment, for there is no defense on the merits. The only question remaining is whether that judgment should be conditioned by the application of sections 474 and 978 of the New York Civil Practice Act. There is no provision in the Federal Rules of Civil Procedure covering the situation, but by Rule 83, the District Court may from time to time make and amend rules governing its practice not inconsistent with the federal rules. By Civil Rule 13 of this court, provision is made for the discretionary application of the procedure prevailing in the Supreme Court of the State of New York, in a situation not covered by the provisions of any statute of the United States or of the Federal Rules of Civil Procedure, where there are no parallels or analogies furnished by such statutes and rules, and in default of a procedure previously prevailing in courts of equity of the United States. See *United States* v. *Certain Land, etc.*, D.C., 71 F.Supp. 363, 364. This situation would seem to be one where the New York procedure might appropriately be applied.

"But the plaintiffs argue that to apply it, by ordering the proceeds of the judgment to be deposited in court for the benefit of the plaintiffs, to be paid out on the special order of the court when they subsequently are able to show that they will have the benefit or use or control of the money, would be in violation of the Constitution of the United States. Specifically, it is contended that such statutes so applied would impair the obligation of contracts, in violation of Section 10 of Article 1;[1] would contravene the provision of Section 1 of the Fourteenth Amendment, that no state shall deprive any person of property without due process of law; and would violate the provision of Section 1 of the Fourteenth Amendment, that no state shall deny to any person within its jurisdiction the equal protection of the laws.

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[1] Defendant argues that all the contracts involved in the case were issued subsequent to the effective date (June 2, 1939) of the challenged sections of the Civil Practice Act. One of the policies and two of the supplemental contracts in suit do bear subsequent dates. However, they were issued in accordance with settlement options contained in policies antedating the enactment of the legislation. They were, accordingly, not new contracts, for their terms were fixed when the original policies were made; they were issued not as the result of any new negotiation or agreement, but in discharge of pre-existing obligations. *Aetna Life Ins. Co.* v. *Dunken*, 266 U.S. 389, 45 S.Ct. 129, 69 L.Ed. 342. That the insured was required to present new evidence of insurability did not alter the pre-existing obligations to insure subject to such new evidence, nor did it convert the discharge of those obligations into new contracts.

The remaining policy in suit was made after the effective date of the legislation claimed to impair the obligation of the contract. But it was a North Dakota contract, not subject to the New York law when issued. It is argued that inasmuch as the challenged sections did not operate on the contract until suit was brought in New York, they violate the contract clause of the Constitution. In *Home Ins. Co.* v. *Dick*, 281 U.S. 397, 50 S.Ct. 338, 74 L.Ed. 926, the Supreme Court left open the issue of whether the guaranty of the contract clause relates to the date of a statute's effect on contracts or to the date of its enactment.

" It is, of course, an axiom of constitutional law that a substantial impairment of a means of enforcement is an impairment of the contract obligation. *Sturges* v. *Crowninshield,* 4 Wheat. 122, 4 L.Ed. 529; *McCracken* v. *Hayward,* 2 How. 608, 11 L.Ed. 397; *White* v. *Hart,* 13 Wall. 646, 20 L.Ed. 685; *Edwards* v. *Kearzey,* 96 U.S. 595, 24 L.Ed. 793; *Bronson* v. *Kinzie,* 1 How. 311, 11 L.Ed. 143; *Penniman's Case,* 103 U.S. 714, 720, 26 L.Ed. 602. The plaintiffs cite *Sliosberg* v. *New York Life Ins. Co.,* 244 N.Y. 482, 155 N.E. 749, 751, as authority directly controlling the case at bar. An action had been brought in 1925, prior to United States recognition of the U. S. S. R., to recover on an insurance policy 'expressed to be payable in Russian roubles ' and ' expressed . . . to be performed in whole or in part within the territorial confines of the former Russian Empire. . . . An application was made, pursuant to section 169–a of the Civil Practice Act (a section added by Chapter 232 of the Laws of 1926), to stay the action until the expiration of 30 days next following the recognition de jure of a government of Russia by a government of the United States. The New York Court of Appeals held the statute to be unconstitutional as depriving parties entitled to sue on a contract of a remedy for an indefinite period, that is, until the happening of an event which might never happen.

" But the *Sliosberg* case is, I feel, inapposite. Assuming that a deposit of the proceeds of the insurance policies in court should be ordered, there would nevertheless be no denial of a remedy. Judgment, on the contrary, would have been granted the plaintiffs. Nor would there even be a denial or a postponement of the right of plaintiffs to possession of the property. For the court would be acting on a determination that they would not in any event have the " benefit or use or control of such money ', and that there were ' other special circumstances [making] it appear desirable that such payment . . . should be withheld . . . ', relating to the possibilities of the effectuation of the judgment for the benefit of the plaintiffs. Cases more closely analogous than the Sliosberg case are those involving the distribution of estates. *Cf.*, for example, *In re Braier's Estate,* 305 N.Y. 148, on page 158, 111 N.E.2d 424,[1] at page 428, and cases cited; *In re Weidberg's Estate,* 172 Misc. 524, 15 N.Y.S.2d 252.[2] True, these cases are distinguishable on the ground that they involve decedents' estates, over which the state may exercise the power of controlling distribution, rather than contracts, over which the state's power is limited by the United States Constitution. Nevertheless, the

[1] See *International Law Reports,* 1953, p. 386.]

[2] See *Annual Digest,* 1938–1940, p. 71, n.1.]

conclusion stated is equally applicable, that the procedure of section 269 of the Surrogate's Court Act (analogous to the procedure of sections 474 and 978 of the Civil Practice Act here involved), ' far from constituting an impairment of [plaintiffs' legal] rights, was designed as and in fact is, a potent protector thereof.' *Matter of Weidberg's Estate, supra*, 172 Misc. at page 531, 15 N.Y. S.2d at page 259; *In re Braier's Estate*, 305 N.Y. at page 158, 111 N.E.2d at page 428. The plaintiffs would have title to the funds; they would be set aside for their benefit and account, and be theirs for the asking when reasonable assurance could be given that they would receive the benefit or use or control of the money, and would, in short, enjoy the possession to which they are concededly entitled. Therefore, I cannot conclude that applying the challenged sections would have the effect of impairing the obligations of contracts. Similarly, inasmuch as there would be no impairment of rights at all, there would be no denial of due process or of equal protection of the laws.

" But the exercise of the court's discretion to order the deposit of the proceeds of the insurance policies in court, subject to its further order, depends upon the court's conclusion that the plaintiffs would not have the benefit or use or control of the money, or that there are other special circumstances making it appear desirable that payment should be withheld. The defendant's argument is, essentially, that the court may take judicial notice of the existence in Poland of a Communist government employing police state tactics, precluding the realization of any rights by Polish citizens without special leave from the authorities, and that the right to receive dollar exchange in the Polish People's Republic is precisely the kind of a right which would be preempted and confiscated by the government. In substantiation of this position, affidavits are submitted citing foreign exchange decrees of the Polish government. It is further argued, with supporting affidavits, that even if the plaintiffs were to receive the funds, they would be able to realize only a very small portion of them because of the confiscatory rates of exchange maintained by the Polish government between their currency and the dollar. And finally, the defendant cites the Treasury regulation specifying the Polish People's Republic as one of the countries the residents of which may not be sent United States government funds, because of a lack of reasonable assurance that the payees will actually receive such funds or be able to negotiate checks or warrants for full value.

" The general conditions prevailing in a Communist country are indeed of such common knowledge as to require no proof of their fundamental antithesis to the public policy prevailing in our own country. Yet in the absence of proof, it is inadvisable for a court to hold, on the basis of judicial notice alone, that the general conditions negate the specific likelihood that these plaintiffs would receive the proceeds of a judgment. There can, of course, be judicial knowledge of specific circumstances sufficient to justify a decision, see *In re Weidberg's Estate, supra*; but as distasteful as the court considers the general conditions in Poland to be, he has no judicial knowledge to justify the specific conclusion that these plaintiffs would not receive payment. However, the void of judicial knowledge may be filled by the Treasury Regulation precluding the payment of United States government funds to persons residing in the Polish People's Republic, because of a finding of a lack of reasonable assurance that the payees will actually receive such funds or be able to negotiate checks or warrants for full value. This ' authoritative conclusion reached by the Treasury Department ' was relied upon for decision in *In re Braier's Estate, supra*, 305 N.Y. at page 157, 111 N.E.2d at page 428. But in that case there was no denial that conditions in the foreign country (Hungary) negated the likelihood that the legatee would receive her bequest, and no hearing was sought on the issue. Here, denial is made, supported by affidavits, and a hearing is demanded, although in a roundabout manner; for it is claimed in answer to defendant's cross-motion for summary judgment that a genuine issue of material fact is presented, requiring a trial. The defendant's cross-motion, as indicated, cannot be treated as one for summary judgment, and therefore the raising of an issue of material fact for trial may be treated as a demand for a hearing on the issue of the ' defense ' that there is not a reasonable assurance that the plaintiffs would actually receive or have the benefit or use or control of the insurance proceeds, if the funds were to be transmitted to them.

" Accordingly, the plaintiffs' motion for summary judgment will be granted, but entry of judgment will be held in abeyance for ten days from the date of this memorandum, during which time plaintiffs may apply for a hearing. Failing such an application, the defendant's motion pursuant to sections 474 and 978 of the Civil Practice Act will be granted, appending to the judgment an order requiring the deposit of the proceeds of the judgment in court."

[Report: 151 F.Supp. 17.]

Aliens—Position of—Under Treaty of Friendship, Commerce and Navigation—" National Treatment "—Access to Courts—Whether Amounting to Waiver of Sovereign Immunity of Government.

EUSTATHIOU & CO. *v.* UNITED STATES.

United States, District Court, Eastern District, Virginia.

September 10, 1957.

THE FACTS.—This was a libel by a Greek national against the United States arising out of a collision between a merchant vessel owned by the libellant and a vessel of the United States Navy.

Under the Public Vessel Act (§ 5, 43 Stat. 1113, 46 U.S.C. § 785), the Congress had waived the immunity of the United States as to libels brought by a "national of any foreign government" on condition that the foreign Government "under similar circumstances, allows nationals of the United States to sue in its courts". In addition to contentions based on the municipal law of Greece, the libellant maintained that under Article VI of the Treaty of Friendship, Commerce and Navigation, between the United States of America and Greece, signed at Athens on August 3, 1951 (5 U.S.T. 1829, T.I.A.S. No. 3057, 224 U.N.T.S. 279), granting national treatment to the nationals of the other party with respect to access to courts, Greece had by implication waived its sovereign immunity.

Held: that the Court had jurisdiction and that the parties must proceed to trial on the merits of the controversy. A reciprocal right to bring an action against the Greek Government in similar circumstances existed in Greek law. However, a treaty which granted access to courts by aliens did not waive the sovereign immunity of a party to that agreement.

In an opinion devoted largely to issues of Greek law, the Court said as to the effect of the Treaty of Friendship, Commerce, and Navigation: "The Treaty of Friendship, Commerce and Navigation effective in 1954 provides in Article VI that nationals of either party shall be accorded national treatment with respect to 'access' to the courts. The testimony of one or more of libellant's experts gives the impression that the Treaty created a substantive right which did not theretofore exist, but the briefs argue that the Treaty constituted merely a declaration of pre-existing rights because of the provisions of Article 126 of the Introductory Law to the Civil Code. Under Article 126 aliens are granted the same rights as Greek nationals to sue in the Greek courts. It is clear, however, that the term 'access' as used in Article VI, paragraph 1, of the Treaty refers substantially to *procedural* requirements as indicated by paragraph 5 of Article XXIV defining the word 'access'. It falls far short of granting substantive rights to sue the Greek Government for, to hold otherwise, would suggest that the doctrine of sovereign immunity is abolished as to any country which may be a party to the Treaty. The Court concludes, therefore, that the Treaty adds nothing to the case, and Article 126 of the Introductory Law to the Civil Code is of no assistance unless we are told that the Greek Government may not invoke the doctrine of sovereign immunity in a similar action instituted by a Greek national."

[Report: 154 F.Supp. 515.]

Aliens—Treatment of—Right of Non-resident Alien to Inherit Property from Resident of State Concerned—Requirement of Reciprocity—Distribution as Dependent on Whether Proceeds Will be Received by Beneficiary—The Law of the United States of America.

In re NERSISIAN'S ESTATE.

United States, District Court of Appeal of California, Second District.

November 27, 1957.

THE FACTS.—The decedent, a resident of the United States, directed that his estate should pass to a trustee with directions to distribute the estate to a number of legatees, all of whom were residents of the Armenian Soviet Socialist Republic. The decree of partial distribution by the Probate Court found that the reciprocal right of inheritance required by the law of the State of California did not exist as between residents of the Union of Soviet Socialist Republics or the Armenian Republic and residents of the State of California, and that the Soviet heirs were thus not qualified to take under the will. The Armenian legatees and heirs named in the will appealed from the order of the Probate Court denying their motion to set aside the decree of partial distribution. The ground of the appeal was that the Probate Court had not given the Armenian heirs valid notice of the proceedings in which the decree of partial distribution had been handed down.

Held: that the appeal must be dismissed. Since the Armenian legatees would receive only an insubstantial proportion of the legacies under the will of the decedent, they were not entitled to inherit. Persons not entitled to inherit had no standing to question the distribution of the estate.

After concluding that any defect in the notice to the legatees had been cured by their appearance, the Court said: " This brings us to respondent executors' contention that appellants are non-resident aliens; that no reciprocal rights of inheritance exist among residents of the United States of America and residents of the Soviet Union (see Probate Code, § 259); and that therefore appellants have no right to participate in this estate and no standing in it.

" This contention we think is sound in law.

" If a non-resident alien cannot allege and prove reciprocity he may not inherit under our laws. Probate Code, §§ 259, 259.1; *In re Estate of Knutzen*, 31 Cal. 2d 573, 578, 191 P.2d 747; *In re Estate of Bevilacqua*, 31 Cal.2d 580, 191 P.2d 752; *In re Estate of Karban*, 118 Cal.App.2d 240, 257 P.2d 649; *In re Estate of Giordano*, 85 Cal.App.2d 588, 193 P.2d 771.

" The policy of our law as so expressed finds good practical reasons to support it. Consider the following remarks of the judge of the probate court who heard and denied the motion:

" 'The Court: You might have the law on it, but as a matter of fact how are you going to prove that any distribution to be made here to a Russian subject under Russia would be distributed to him and not taken by the Russian Government?'

" And again,

" 'The Court: . . . That matter has been gone into a number of times, not only by myself sitting in this Court but by other judges of this Court, and the evidence has been abundant that they would only receive—I think in one instance they had received about five per cent of that which was distributed and the Russian government would take the rest of it in duties and what not.'

" It follows therefore that persons not entitled to inherit can take no part in litigation in estates of decedents in this state, and they have no standing to complain of any order made with respect thereto. It has been said by our Supreme Court that persons having no interest in an estate in probate cannot question the manner of its distribution. *In re Estate of Spreckels*, 165 Cal. 597, 604, 133 P. 289. . . ."

(The Court then went on to dispose of certain issues arising under the municipal law of the United States.)

[Reports: 155 Cal.App.2d 561, 318 P.2d 168.]

Aliens—Position of—Status of Refugees within Meaning of Geneva Convention of 1951—Treaties—Interpretation of—Translation into Languages Other Than Original.

GRUNDUL *v.* BRYNER & CO. G.M.B.H. AND RICHTERAMT III BERN.

Switzerland, Federal Tribunal. March 27, 1957.

THE FACTS.—The complainant was born in 1889, in the Baltic Provinces of the Russian Empire. In 1913 he emigrated to China, where he was employed in the Marine Customs Office in Tien-Tsin. On the creation of Latvia in 1918 he acquired Latvian nationality. In 1940, Latvia was occupied by the U.S.S.R. Shortly before the Communists came to power in Tien-Tsin in 1947, the complainant resigned from his post. He was registered by the Shanghai branch of the International Refugee Organization as a "*bona fide* refugee", and given the necessary papers. In 1955 he was given asylum in Norway through the intervention of the I.R.O.

In October 1956, the complainant initiated proceedings against the defendant Company before the Richteramt III in Berne for payment of 5,504 Swiss francs. The defendant Company asked that he be required to give security for costs since he was not resident in Switzerland and could not, as a stateless person, rely on the fact that Norway was a party to the Hague Convention on Civil Procedure of July 17, 1905. The complainant contended that he was a refugee and, as such, exempt from security for costs under Article 16 (3) of the Geneva Convention on the Status of Refugees read together with Article 17 of the Hague Convention. The Richteramt ordered the payment into Court of 1,000 Swiss francs as security for costs. The present complaint before the Federal Tribunal was against that order. The question at issue was whether the complainant could be regarded as a refugee.

Held: that the order of the Richteramt must be annulled.

The Court said: " Both Switzerland (see Federal Decision of December 14, 1954) and Norway are parties to the Convention on the Legal Status of Refugees concluded in Geneva on July 28, 1951. According to Article 1 A (1) (1) of that Convention the term ' refugee ' applies to every person who ' has been considered a refugee under . . . the Constitution of the International Refugee Organization ". When the character of refugee of a person has been recognized by the competent organs of the I.R.O., that decision is binding also on the States parties to the Geneva Convention. These States have reserved the power to re-examine the decisions of the I.R.O. only in cases in which a person was *not* recognized to be a refugee (see Article 1 A (1) (2) of the Convention in its original English and French texts, incorrectly rendered in the German translation).

" It appears from the ' Certificate of Travel ' issued by the ' Philippines and Far East Mission ' of the I.R.O. that the complainant was considered by the I.R.O. to be a refugee (' *bona fide* refugee, eligible for I.R.O. legal and political protection '). He must accordingly be considered to be a refugee in the meaning of the Geneva Convention, in accordance with Article 1 A (1) (1) thereof.

" The complainant can also claim recognition of the status of refugee on the basis of Article 1 A (2) of the Geneva Convention. According to this provision, every person must be deemed to be a refugee who

> ' . . . as a result of events occurring before 1 January 1957 and owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.'

" The expression ' Wohnsitzstaat ' used by the German translation (which does not have the force of law), leads to uncertainty, which may have caused the Cantonal Court to arrive at an incorrect conclusion. On the other hand, the English and French originals make it clear by the phrase ' outside the country of his *former* habitual residence ' (' hors du pays dans lequel elle *avait* sa résidence habituelle ') that the stateless person who wishes to be regarded as a refugee must be outside the country in which he had his ordinary residence before he sought asylum elsewhere ‘ as a result of such events ’.

“ The complainant was from 1913 to 1947 an official of the Marine Customs Office in Tien-Tsin. There is every reason to think that he was resident there throughout that period and until his departure for Europe. After the occupation of continental China by the armed forces of the Chinese People’s Republic in 1947/48 he had to leave the country by reason of his political convictions, and to a certain extent no doubt also because of his membership of a particular social group. For the same reasons, he could not return to his country of origin, Latvia, which was occupied in 1940 by Soviet troops and incorporated in the U.S.S.R. as the Latvian Socialist Republic; nor can he expect any diplomatic protection from it. Whether he is still, as he claims, a Latvian national, or must be considered to be stateless, need not be decided. In either case, he satisfies the conditions under which a person must be considered, in conformity with Article 1 A (2) of the Geneva Convention, to be a refugee.

“ The circumstances enumerated in Article 1 C (1)-(6) of the Convention, under which a refugee loses the right to be protected as such, clearly do not arise in his case.

“According to Article 16 (3) of the Geneva Convention, a refugee must be treated in States parties to that Convention in which he is not habitually resident on the same footing as a national of the State in which he is resident with respect to access to the courts, judicial assistance, and *cautio judicatum solvi*. The complainant has been resident in Norway since 1955. He must therefore be treated in Switzerland as though he was a Norwegian national.

“ Norway, like Switzerland, is a party to the Hague Convention on Civil Procedure of July 17, 1905. According to Article 17, paras. 1 and 2, of that Convention, the courts of one contracting party may not require security from a national of another contracting party who is resident in the territory of a contracting party on the ground that he is an alien or that he is not domiciled or resident within the country. This provision is applicable to the complainant.”

[Report: *Entscheidungen des Schweizerischen Bundesgerichtes*, 83 (1957), Part I, p. 16.]

Aliens—Position of—Status of Refugees within Meaning of Refugees Convention of July 28, 1951—Right to Return to Country of Residence—Time-Limit Imposed by Country of Residence for Return of Refugee—Failure to Observe Time-Limit—Whether Refugee Entitled to Continued Residence on Return after Expiration of Time-Limit—The Law of Austria.

Re SPITZER.

Austria, Administrative Court. May 6, 1957.

THE FACTS.—The appellant was a refugee who in 1949 took up residence in Austria. In 1953 he left Austria for Brazil with a travel document issued by the Austrian Ministry of the Interior and containing a visa whereby he was granted the right to return to Austria on or before January 2, 1954. In fact, the appellant did not return to Austria until 1955, and he was then in possession of a Brazilian travel document containing a visa granted by the Austrian embassy in Rio de Janeiro and giving him the right to stay in Austria until April 15, 1955. In February 1955 he applied to the Austrian Federal Police for a permit to stay in Austria for a further period of one to two years. This application was refused, and the appellant was granted permission to stay in Austria only until July 5, 1955. The appellant claimed that, as a refugee within the meaning of the Geneva Convention of 1951 relative to the Status of Refugees, he was entitled to a residence permit in Austria. The Austrian Ministry of the Interior conceded that the appellant was a refugee within the meaning of the Convention, but contended that as he had not returned within the time-limit originally imposed when he left Austria, he was no longer entitled to claim a right of residence in that country.

Held: that the application must be refused. Since para. 13 (3) of the Schedule to the Convention provided that the time-limit for the return of a refugee to his country of residence may be " a period of not less than three months ", it followed that the country issuing a travel document was under no duty to permit the return of a refugee after the expiration of the time-limit imposed for his return. The appellant was therefore in the same position as any other alien.

The Court said: " It is admitted that the appellant must basically be considered a refugee within the meaning of the Convention. It is contended, however, that by reason of his sojourn in Brazil he is no longer entitled, on the basis of the Convention, to claim the right of residence beyond the period granted in the Austrian permit. This Court shares this view. It must be inferred from Article 31 of the Convention that, in addition to the cases provided for in that Article, *viz.*, those concerning refugees who have entered the country ' illegally ', refugees are generally required to be in a particular country ' lawfully '. The latter phrase is to be found in various provisions of the Convention, *e.g.*, Articles 15, 17, 18, 19, 21, 23, 24, 26, 28 and 32. 'Lawful' residence exists, as a general rule, only when the relevant provisions governing entry into and residence in the country concerned have been complied with. In this context, reference is rightly made to the provisions contained in the Schedule to the Convention. According to para. 1 of the Schedule, the country of a person's residence within the meaning of Article 28 of the Convention is required to issue to the refugee travel documents in a specified form.

"According to para. 13 of the Schedule, each Contracting State undertakes that the [refugee] holder of a travel document shall be re-admitted to its territory at any time during the period of validity of the travel document. As appears, however, from sub-para. 3 of para. 3, the period during which a refugee may be re-admitted may be limited to 'not less than three months'. It follows that the country issuing travel documents is under no duty to re-admit the refugee to an unlimited extent. Having regard to these provisions, the position in the present case is as follows: The travel document issued to the appellant by the Ministry of the Interior contained an Austrian permit giving the right of re-entry. The period of validity of this permit, however, was limited to January 2, 1954. The appellant did not return within this period, and the permit was not extended. It is immaterial why no such extension was granted. In any event, there was no longer any duty, which could be based on the Convention, to re-admit the appellant to Austria after the expiration of the validity of the permit. The appellant can accordingly take up residence in Austria only subject to those conditions which make his residence a 'legal' residence, *viz.*, subject to the conditions which are applicable to all aliens in the matter of residence.

"The appellant entered Austria with a Brazilian travel document stamped with a permit issued by the Austrian Embassy in Rio de Janeiro and valid until April 15, 1955. Where the period of residence is limited by a permit, an alien has no right to stay in Austria for an unlimited period extending beyond the period of validity of the permit granted to him (para. 2 (1) of the Aliens Police Ordinance). Nor are the authorities under any legal duty to grant to an alien whose period of residence has been limited in this way a further period of residence, by extending his permit. In refusing the appellant's application for a permit of residence for two years, the authority concerned, having regard to the legal position as here set out, did not violate the law."

[Report: Zl. 368/56.]

Aliens—Position of—Status of Refugees—Whether Hungarian National Leaving Hungary After Hungarian Uprising in 1956 is a Refugee within Meaning of Refugees Convention of July 28, 1951—Divorce Proceedings by Such Hungarian National in Austria—Competence of Austrian Courts—The Law of Austria.

HUNGARIAN REFUGEE (AUSTRIA) CASE.

Austria, Supreme Court. November 20, 1957.

THE FACTS.—The petitioner was a Hungarian national who left Hungary after the uprising in October 1956 and took up residence in Austria. His wife remained in Hungary, and he now sought to institute divorce proceedings against her in the Austrian courts. The Court of first instance appointed a guardian *ad litem* for the respondent wife because an enquiry into Hungarian law showed that the Hungarian authorities would not permit the serving of a foreign petition in Hungary. The petitioner contended that he was a refugee within the meaning of Article 1 of the Geneva Convention of 1951 relative to the Status of Refugees, notwithstanding that the Hungarian uprising had occurred long after January 1, 1951;[1] and that the Austrian courts were therefore entitled to exercise jurisdiction in the present case.[2]

Held: (1) that the Hungarian uprising in October 1956 was one of the " events " contemplated by Article 1 (A) (2) of the Convention, notwithstanding that it had occurred long after January 1, 1951, and that the Austrian courts were competent to exercise jurisdiction in the case; and (2) that the guardian *ad litem* had been properly appointed.

The Court said: " The Court below took the view that the uprising in Hungary in October 1956 was directed against the Communist domination established in that country after the end of the Second World War. It is said to have been an attempt to rid the country of that domination, and must therefore be regarded as the result of events occurring before January 1, 1951. The Court of first instance further said that it would be inequitable to treat Hungarians who fled from Hungary in connection with this uprising differently from persons who left their home countries earlier for the reasons stated in the Convention, and to deny them the protection of the Convention. In the opinion of the Court below, therefore, the Austrian courts are competent to deal with the divorce petitions of so-called Hungarian refugees . . . The Hungarian authorities refuse to co-operate in matrimonial proceedings where only one of the parties is a Hungarian national. In fact, the Hungarian authorities have recently again protested against all attempts of the Austrian courts to effect the service of divorce petitions, by post or otherwise. Nor is it possible to effect service on Hungarian nationals through the Austrian diplomatic representation in Hungary, as has been stated expressly in a circular of the Ministry of Justice dated July 1, 1955. The Court below was therefore right to appoint a guardian *ad litem*.

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[1] Article 1 (A) (2) of the Convention provides that the term " refugee " shall apply to any person who " as a result of events occurring before January 1, 1951, and owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country . . . "

[2] Article 12 (1) of the Convention provides that " the personal status of a refugee shall be governed by the law of the country of his domicile or, if he has no domicile, by the law of the country of his residence."

" In so far as the appeal criticizes the view of the Court below that, subject to further proof, the petitioner must be regarded as a refugee within the meaning of the Convention, this Court has already (in judgments dated April 10, 1957, and July 24, 1957) approved the view that the uprising in Hungary in October 1956 must be regarded as the result of events occurring before the date referred to in Article 1 (A) (2) of the Convention, and it sees no reason to depart from this view. The limitation said to be contained in Article 12 (2) of the Convention—whereby rights previously acquired by a refugee and dependent on personal status, more particularly rights attaching to marriage, shall be respected by the Contracting States, *inter alia*, only subject to the condition that they would have been recognized by the State concerned if the person had not become a refugee—cannot, as is contended, lead to the conclusion that even where a person is a refugee a divorce is not possible, because in the case of persons other than refugees the Austrian courts are not entitled to exercise jurisdiction. On the contrary, a refugee within the meaning of the Convention, who, in matters of personal status, is on a footing of equality with Austrian citizens, can invoke the jurisdiction of the Austrian courts in the same way as an Austrian citizen, *viz.*, without satisfying the requirement that the decision of an Austrian court must be entitled to recognition by the law of the home country of the husband."

[Report: JBl., 1958, p. 364.]

Aliens—Treatment of—Treaty Providing for National Treatment —Franco-Spanish Treaty of 1862—Whether " National Treatment " Can be Made Subject to Conditions—The Law of France.

See p. 600 (*Re Balseiro.*)

Aliens—Position of—Liability to Military Service—As Condition of Eligibility for Naturalization—Claim of Exemption—The Law of the United States of America.

See p. 442 (*Ceballos* v. *Shaughnessy*).

III.—Expulsion of Aliens

i.—Right of Expulsion

Aliens—Expulsion of—Equality of Treatment as Compared with Nationals—The Law of Argentina.

Re LEIVA.

Argentina, Cámara Nacional de Apelaciones de Resistencia.

December 20, 1957.

THE FACTS.—The petitioner, Tomás Leiva, was held by the immigration authorities for deportation on grounds of illegal entry into the country on October 5, 1957. He sought his release on a writ of habeas corpus. The Fiscal of the Court of Appeals expressed the opinion that the writ must issue for the following reasons: the petitioner had been denied a hearing by the immigration authorities; an alien who is a resident of the country enjoys the same protection of his individual liberties as does a citizen; the Supreme Court has held that an alien may only be expelled in pursuance of the formalities established by law (*Fallos de la Corte Suprema*, vol. 117, p. 165). It was argued on behalf of the petitioner that he was a political fugitive who had invoked the " right of asylum ". The jurisdiction of the federal Court in this matter was also questioned.

Held: that the writ of habeas corpus must issue. An alien enjoyed the same legal protection as did a national of the country.

The Court said: " As the Supreme Court held in the cases of *Re Hernandez* (*Fallos de la Corte Suprema*, vol. 173, p. 179) and *Re Barabás de Zlatnik* (*Revista Jurídica Argentina La Ley*, vol. 12, p. 623), once an alien has been admitted into the country, he is to be treated as a resident thereof. Furthermore, he has a right to petition for a writ of habeas corpus, and the federal Courts are competent to take cognizance of such petition. After an alien has become a resident of the country, he is no longer subject to the jurisdiction of the Bureau of Immigration; but the Bureau may, however, institute proceedings against him for violation of Article 29 of Law 13.482.[1]

" The Fiscal of this Court has made an exhaustive study of the question before us. We adopt his reasoning and, consequently, order that the action under appeal be revoked and that the writ of habeas corpus be issued in favour of Tomás Leiva."

[Report: *Revista Jurídica Argentina La Ley*, vol. 89 (January–March 1958), p. 204.]

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[1] *Anales de Legislación Argentina*, VIII, p. 210.

Aliens—Expulsion of—Necessity for Proof of Alien Status—The Law of Gambia.

Chief Superintendent of Police *v.* Camara.

Protectorate of Gambia, High Court. January 25, 1957.

(Miles C.J.)

The Facts.—The appellant, Camara, was convicted by the Protectorate Court of the Western Division and was sentenced to a term of imprisonment. The Magistrate also made a recommendation for his deportation under s. 24 of the Repatriation of Convicted Aliens Ordinance, 1949. The alien status of the accused was not alleged at the trial, nor admitted by him. The accused appealed against the sentence and conviction, and also against the recommendation for deportation.

Held: that the appeal against sentence and conviction must be dismissed, but the appeal against the recommendation for deportation must be allowed. Where a recommendation for deportation was made, the person to be deported must be shown to be an alien.

The Court, after considering the appeal against sentence and conviction and finding it to be unfounded, said: " It is clear that the appellant's principal complaint is against the making of the recommendation for deportation. There was, in fact, no evidence before the Magistrate that the appellant was an alien. I have repeatedly said that if it is desired to ask for a recommendation for deportation, evidence must be given that the accused person is an alien, as defined by section 2 of the Ordinance, unless this is admitted by the accused. The recommendation is not supported in the present case . . . and it is accordingly set aside."

[Report: 2 *West African Law Reports* 207.]

Aliens—Expulsion of—Right of Expulsion—Asylum—Under Municipal Law—Service on Vessel as Presence in State Concerned—The Law of the United States of America.

See p. 153 (*Ching Lan Foo* v. *Brownell*).

Aliens—Expulsion of—Equality of Treatment as Compared with Nationals—The Law of Argentina.

D—EXTRADITION

I.—In General

Extradition—In General—Pursuant to Treaty—Suspension of Extradition Treaty by Reason of State of War between Parties—Revival of Treaty by Unilateral Notification Pursuant to Peace Treaty—Subsequent Conduct of Parties—Conclusiveness of.

See p. 883 (*Argento* v. *Horn et Al.*).

II.—Extradition of Nationals

Extradition—Of Nationals—The Law of Honduras.

Re Extradition of López Saravia.

Honduras, Supreme Court. January 8, 1957.

The Facts.—In 1955 the defendant, Atanasio López Saravia, while in the Republic of El Salvador committed the crime of homicide and then fled to Honduras. The District Court of El Salvador, after due investigation and questioning of eye witnesses, filed a petition with the Honduras Supreme Court for extradition of the accused to stand trial in El Salvador. The accused was arrested in Honduras in 1956 and was given ten days in which to file an answer with the single Supreme Court Judge appointed to hear his plea against extradition in first instance. From the answer, it was learned that the accused was a national of Honduras, as was proved by production of a birth certificate, and extradition was refused. The decision of the trial Judge was based principally on the ground that it was not obligatory to extradite a national of one's own country, but that the trial should be held in the competent national court, based on the information and documents received from the foreign court. Extradition was not obligatory under either national or international law (specifically, the Bustamante Code of Private International Law).

On appeal to the full Supreme Court,

Held: that the decision of the Judge of first instance must be affirmed.

The Court said: "After due consultation of the judgment rendered in first instance, under date of January 8 of the present year, in which extradition of the accused, Atanasio López Saravia, is refused . . .

" The above judgment was based on the following considerations: (a) ' That the accused Atanasio López Saravia has accredited his status as a native of Honduras by certification of his birth registration, issued by the Secretary of the Ministry of the Villa de

Goascaren, Department of Valle,' and (b) 'that according to the provisions of Article 345 of the Bustamante Code, the contracting parties are not compelled to deliver their own nationals, but rather to try them in their own competent courts.'

"The extradition of the accused, Atanasio López Saravia, having been refused, and the trial judgment being correct, it is proper to uphold it . . . "

[Report: *Gaceta Judicial*, Año 26, No. 1181, June–July 1957, p. 46.]

III.—Conditions of Extradition. Extraditable Crimes

Extradition—Conditions of—Extradition Treaty between Germany and Switzerland—Extradition for Larceny Mandatory under Treaty—Extradition "May also be Granted" for Attempted Larceny—Whether Extradition for Attempted Larceny Mandatory or Permissive—Act Charged Constituting Single Offence in Requested Country and Several Offences in Requesting Country—Whether Legal Qualification of Offence or Set of Facts Underlying Offence Decisive for Duty of Requested Country to Grant Extradition.

Re GERBER.

German Federal Republic, Federal Supreme Court. April 11, 1957.

THE FACTS.—Switzerland requested the extradition of a person who was alleged to have committed and attempted to commit a number of offences in Switzerland, including larceny, damage to property and "breaking the peace of a private home". The two last-mentioned offences were unknown to German law as separate offences where the facts underlying the criminal act charged justified a prosecution for burglary according to German law. Two questions required the decision of the Court: (1) whether the German-Swiss Extradition Treaty of January 24, 1874, which made extradition mandatory for the completed offence of larceny and provided that extradition "may also be granted" for attempted larceny, was to be interpreted so as to impose a duty upon the German authorities to extradite a person for attempted larceny; and (2) whether Germany was under a duty to extradite a person where the offence charged was burglary according to German law but constituted three separate offences under Swiss law, namely, larceny, damage to property and "breaking the peace of a private home".

Held: (1) that Germany was under a duty to extradite for attempted larceny; and (2) that the set of facts underlying the offence charged was decisive, and that Germany was under a duty to extradite, notwithstanding that the legal qualification of the offence according to German law differed from its legal qualification according to Swiss law.

The Court said: "According to Article 1 (1) of the German-Swiss Extradition Treaty of January 24, 1874, both parties are under an obligation to extradite certain persons in all cases in which according to the Treaty extradition is permissible. This, according to No. 11 of the offences referred to, includes larceny. According to paragraph 2 of this Article, extradition may also be granted in the case of an attempt, provided that according to the municipal law of the Contracting Parties an attempt is 'a punishable offence'. The wording chosen in paragraph 2—if looked at in isolation—may give the impression that in the case of paragraph 1 the requested State is under a legal duty to extradite, whereas according to paragraph 2 extradition is in the discretion of the requested State. However, an interpretation which meets the purpose of the obligations under the Treaty must lead to the result that paragraph 2 equally imposes a duty upon the requested State to grant extradition.

"The history of the Treaty is no longer known. Shortly after the conclusion of the Treaty, the discretionary provision contained in paragraph 2 was debated in the German Parliament and the view was expressed that paragraph 2 imposes a genuine legal duty upon the requested State to grant a request for extradition in respect of an attempt to commit the offence concerned. The then authorized representative of the German Government confirmed this view. Paragraph 2 of Article 1 does not stand alone, but must be interpreted in the context of the fundamental provisions contained in paragraph 1. The connection between the two paragraphs shows that paragraph 2 was not intended to provide an exception to the legal duty laid down in paragraph 1, but quite generally extended extradition to cases of attempts at criminal offences. It is not known why the authorized representatives of the parties at the time when the Treaty was concluded did not choose a clearer wording. In any event, it cannot be assumed that when concluding the Treaty they had in mind any obligation other than that assumed from the very beginning to give practical effect to extradition between Switzerland and Germany. The intention, as far as can be seen, was always to regard the provision contained in Article 1, para. 2, as constituting a legal duty for both parties. Although, having regard to the numerous cases of extradition between the two countries, this question might have resulted in disputes over cases in which only attempts were charged, not one single case has become known in which a legal decision was required for the interpretation of Article 1, para. 2. In view of this, the first question must be answered in the affirmative.[1]

[[1] The first question put to the Supreme Court in accordance with Section 27 (2) of the German Extradition Law was as follows: "Does Article 1, paragraph 2, of the German-Swiss Extradition Treaty provide for a legal duty to extradite for an attempt if all the conditions there laid down are satisfied?"]

"In items 11 and 12 of the annex to the warrant of arrest dated August 16, 1956, the accused is charged with burglary and damage to property, as well as burglary, damage to property and breaking the peace of a private home. The accused committed the acts of larceny in such a manner that he broke windows and then entered the premises concerned. In item No. 11, damage amounting to 30 Swiss francs was caused. The Treaty does not provide for extradition in respect of breaking the peace of a private home, and in the event of damage to property the agreement between the German Reich and Switzerland of September 2–October 12, 1925, provides for extradition only where the damage caused amounts to at least 100 Swiss francs or 80 Reichsmark. In terms of German law, what the accused did constituted aggravated larceny according to Sections 242 and 243 (2) of the German Penal Code. The acts constituting damage to property and breaking the peace of a private home are automatically contained in Section 243 of the Code, as integral parts of the offence of burglary. Swiss municipal law does not recognize this legal evaluation of the offence. According to Swiss law, in addition to larceny, the offences of breaking the peace of a private home and of causing damage to property are independent offences. It is generally recognized, both in doctrine and in jurisprudence, that extradition is permissible in cases in which, according to German law, the breaking of the peace of a private home and causing damage to property are merely constituents of the offence of burglary, whereas according to Swiss law they are independent criminal offences; it is also recognized that extradition is permissible regardless of whether an application has been made for a criminal prosecution and regardless of the extent of the damage caused. When dealing with a request by a foreign country to extradite, the basis of the request is not the legal qualification of the offence according to the foreign law concerned, but the facts underlying that offence as ascertainable from the warrant or the judgment, as the case may be. The official interpretation accompanying the German Extradition Law states that 'extradition is permissible where the offence in respect of which it is requested would at least constitute a crime in the technical sense under German municipal law'. According to German municipal law, the amount of the damage caused is immaterial so far as concerns the permissibility of extradition. According to that law, neither damage to property nor breaking the peace of a private home is a legally independent offence existing side by side with burglary. If Germany requests Switzerland to grant extradition in respect of this uniform offence, Switzerland is under a duty to grant extradition in accordance with the Treaty. The Swiss Government acts accordingly. In the reverse case the same set of facts imposes a duty upon Germany to grant extradition even if that set of facts is viewed in a different light in Switzerland. Accordingly, question No. 3[1] must be answered in the negative."

[Report: *BGHSt.*, vol. 10, p. 221.]

Extradition—Conditions of—Principle of Speciality—The Law of Switzerland.

WÄCHTER *v.* STAATSANWALTSCHAFT DES KANTONS ZÜRICH.

Switzerland, Federal Tribunal. April 5, 1957.

THE FACTS.—In 1955 the appellant had been convicted in Zürich of a number of offences, including one of fraud committed in Austria, and had been sentenced to a total of 21 months' imprisonment. He escaped, and fled to Austria, where he was arrested and sentenced to eight months' imprisonment in respect of the fraud that had been committed in Austria. On completion of his term of imprisonment he was extradited to Switzerland for the purpose of serving his sentence for some of the other offences, but extradition was denied in respect of the fraud committed in Austria and one other offence. On November 8, 1956, the Obergericht of the Canton of Zürich altered the sentence of 1955 to one of 13 months' imprisonment. The appellant asked the Federal Tribunal to set that decision aside, on the ground that the sentence had been incorrectly calculated. The question at issue before the Tribunal was whether that appeal was receivable, as being made against a decision susceptible of appeal and not merely against a measure of execution of an earlier decision.

Held: that the appeal was receivable. The application of the principle of speciality required a new calculation of the length of sentence to be imposed.

The Court said: "According to Article 268, paragraph 2, of the Federal Code of Criminal Procedure, appeals lie only against decisions concerning sentence, and not against arrangements for the execution of a recognized sentence. In this case, however, the Court had to undertake the evaluation of the sentence anew. Article 68, para. 1, of the Penal Code requires the Judge, in cases where the offender has incurred penalties of imprisonment in respect of several offences, to sentence him to the highest penalty, and to increase its duration appropriately. If, before serving this sentence, the offender flees abroad and the foreign authorities grant extradition only in respect of some of the offences, the Swiss Judge must separate the sentence appropriate to the offences for which extradition is granted from that appropriate to the others. . . . Such a proceeding relates to the substance of the sentence and not merely to the manner of its execution, and constitutes a decision in the meaning of Article 268, para. 2, of the Federal Code of Criminal Procedure.

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[1] The second question put to the Supreme Court became immaterial in view of the answer given by the Court to the first question. The third question put to the Court was as follows: "Is the decision concerning the permissibility of extradition influenced in any way by the fact that one and the same offence constitutes burglary according to German law and larceny as well as damage to property and breaking the peace of a private home according to Swiss law, and that extradition is requested also in respect of the two last-mentioned offences and that the damage caused amounts to less than 80 Deutsche Mark?"]

" This is so in the present case. As in the case reported in B.G.E., vol. 82, Part I, p. 167, the execution of the sentence imposed by the Swiss Judge prior to extradition was made impossible by the principle of speciality. This principle is recognized both in the Extradition Law of 1892 and in the pertinent extradition treaties (Austrian-Swiss Extradition Treaty of 1896, Article XIII; Franco-Swiss Extradition Treaty of 1869, Article 8), according to which extradition is granted only on the condition that the person extradited will not be tried or sentenced for any offence other than that for which extradition is granted. Accordingly, the sentence to be served in Switzerland had to be calculated anew, to the exclusion of offences in respect of which extradition was not granted. In this case this had also to be done quite apart from the requirements of the Austrian-Swiss Extradition Treaty, in view of the fact that a sentence was served in Austria for the fraud committed there. The offender could, according to Article 6 (2) (3) of the Penal Code, no longer be punished for that offence in Switzerland."

[Report: *Entscheidungen des Schweizerischen Bundesgerichtes*, 83 (1957), Part IV, p. 111.]

Extradition—Conditions of—Offences Committed on Foreign Vessels in National Waters of State from which Extradition Sought—Discretionary Power of State in Whose Territory the Offence was Committed—German-Norwegian Extradition Treaty of 1878—The Law of Norway.

Re KELINSKI.

Norway, Appeal Committee of Supreme Court. April 12, 1957.

THE FACTS.—A German sailor had killed another member of the crew, also a German national, of a German vessel which was lying in a Norwegian harbour. The German Embassy in Oslo requested his extradition. The note was transmitted to the Ministry of Justice which sent it to the Attorney-General, who supported the application.

Article 4 (1) of the Norwegian Extradition Law of June 13, 1908, provides:

> " Extradition must not take place, when, under Norwegian law, the alleged offence is to be considered as having been committed in Norway."

Article 25 (2) provides:

> "The provisions contained in existing treaties shall remain in force even if opposed to the provisions of the present Law."

An Extradition Treaty had been in force between Norway and Germany from January 19, 1878. Certain changes were made on March 7, 1907, and the Treaty was re-validated after the Second World War by means of an Exchange of Notes of September 25 and October 22, 1952. By Article 1 of the Treaty, extradition is permitted only for crimes committed in the State seeking extradition. The Article provides also that extradition can be requested in respect of crimes committed outside the territory of the requesting State provided that the offence is one which according to the law of the other Party is also punishable if committed abroad.

By Notes between the German Foreign Office in Bonn and the Norwegian Legation in Bonn dated April 18 and 29, 1953, the two parties agreed upon an interpretation of this Article. In the German text the form of the provision was facultative; it stated that extradition "could take place". The Norwegian text stated that extradition "should take place" if the crime had been committed inside the territory of the requested State. The two parties agreed that the German text was the correct one.

The issue in the present case was whether this provision of the Treaty authorized extradition in respect of crimes committed within the territorial limits of the State from which extradition was sought.

The Court of first instance reached the conclusion that extradition for crimes committed within Norway would be so extraordinary that, in the absence of express words, the presumption was against it. In addition, the Court found that the preparatory work relating to the Extradition Law supported this view. The Attorney-General appealed against this finding, and the Court of Appeal held, by two votes to one, that the appeal should be dismissed.

On further appeal,

Held (by the Appeal Committee of the Supreme Court): that the appeal should be allowed.

The Committee said: "The Appeal Committee agree with the view of the minority of the Court of Appeal to the effect that the words 'outside the territory of the requesting State' do not limit the possibility of extradition to offences committed outside the territory of the requested State. There is no such limitation in the words used. And the Committee cannot see any basis for introducing such a limitation by interpretation. The Committee are of opinion, as is also stated by the Attorney-General, that it would have been natural to choose another terminology if the intention had been to limit the provision to acts committed in third States. As mentioned, it is clear since the Exchange of Notes of 1953 that the last paragraph of Article 1 is facultative, so that it is left to the discretion of the authorities in the requested State to decide in each case if extradition shall be granted.

" The Committee add that it is most natural and equitable that such a case be adjudged in Germany, and that the public Counsel for the defence has informed the Committee that Kelinski himself desires to be transmitted to Germany and to have the case decided there."

[Report: *Rt.*, 1957, p. 444.]

Extradition—Conditions of—Discrepancy Between Law of Requested Country and Relevant Treaties in the Matter of Penalties —Extradition for Political Offences—Burden of Proof—The Law of Argentina.

Re D'EMILIA.

Chile, Supreme Court. May 28, 1957.

THE FACTS.—Argentina requested the extradition of Evhenero Júpiter D'Emilia Alvarez on a charge of fraud. As there was no extradition treaty with Chile, Argentina invoked the Convention on Extradition signed at Montevideo on December 26, 1933,[1] which was ratified by Chile in 1935 and by Argentina in 1956. It was argued on behalf of the petitioner that extradition should be denied because of a discrepancy between Argentine law and the texts of the pertinent Treaties regarding the penalty for the alleged offence, and because he might be subjected to persecution as a political offender. The case was brought to the Supreme Court on appeal.

Held: that the request for extradition must be granted.

The Supreme Court said: " An examination of the judgment under appeal indicates that the requirements for extradition proceedings established in Article 647 (Nos. 1, 2 and 3) of our Code of Penal Procedure have been complied with in the present case, that is, the identity of the fugitive has been established, the offence with which he has been charged is an extraditable offence according to treaties now in force, or, in the absence of relevant treaties, according to the principles of international law, and the surrender of the accused is being requested for this offence. The Court below refused the extradition request, however, on the ground that the penalty for the offence does not conform to the requirement of Article 1 (b) of the Convention on Extradition concluded at Montevideo on December 26, 1933, that ' the offence must be punishable by a minimum penalty of one year of imprisonment '.

" In the absence of a bilateral extradition treaty between Chile and Argentina, in order to arrive at any conclusion in this case we must examine the penal laws of the two States as well as those principles of international law which are embodied in the above Convention, ratified by Chile on July 2, 1935, and promulgated by Supreme Decree No. 942 of August 6, 1935, and ratified by Argentina on April 19, 1956, and published in the Code of Private International Law or ' Bustamante Code ' (July 14, 1933).[1] The American States are generally agreed that the extradition process is governed by the principles which appear in both the Convention and the Code. Extradition, according to Von Liszt and Florian, ' is an act of international judicial assistance '; it is also defined as ' an institution of international juridical reciprocity ' (Garraud), and as ' an act of international penal assistance ' (Article 344, Bustamante Code).

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[1] *L.N.T.S.*, vol. 165, p. 45.

" The requirements of Article 647 of the Code of Penal Procedure have been met as follows: (a) the identity of the fugitive has been established; (b) the fugitive is charged with fraud or swindle, a punishable offence according to Article 172 of the Argentine Penal Code which provides that ' any person found guilty of defrauding another by the use of an assumed name, false identity or documents, undue influence, *breach of trust* [emphasis supplied by the Court] or misappropriation of property, or of credit, commission, enterprise or business, or by resort to any other artifice or fraudulent scheme shall be punished by imprisonment from one month to six years ', and, it may be added, that this offence is also punishable under Articles 467 (1), 468, and 470 (1) of our Penal Code; and (c) there is a reasonable presumption that the accused has committed the offence with which he is charged. This last point is supported by an official order that Evhenero Júpiter D'Emilia be held in preventive custody for the offence of fraud and that his property be attached in sufficient amount to cover the sum of 60,000 pesos in national currency. According to Article 366 of the Code of Criminal Procedure of the Federal Capital of Argentina,

> ' detention will be changed into preventive custody in the following circumstances: (1) where there is a reasonable presumption of the commission of an offence by the accused; (2) where the prisoner either made a statement at the preliminary investigation or refused to do so; (3) where there is sufficient evidence in the opinion of the judge to warrant holding him for trial '.

Article 411 of the same Code provides that

> ' when the order for preventive custody is issued, the judge shall also order the attachment of the property of the defendant to a value sufficient to guarantee any fine as well as the enforcement of his civil liability. The defendant may substitute a real or personal bond for this attachment ';

and in Article 140 it is stated that

> ' (1) the defendant shall be declared in contempt if after proper notification he fails to answer the subpoena or summons '.

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[1] *L.N.T.S.*, vol. 86, p. 111.

It may be observed that all of these documents which appear in the record have been duly authenticated. Thus the record shows that D'Emilia Alvarez is charged with an offence which is recognized in both the Argentine Penal Code (Article 172) and our Code (Articles 467 (1), 468, and 470 (1)) and which is punishable by imprisonment of from one month to six years in the former Code and by imprisonment from 541 days to five years in the latter Code. The Montevideo Convention (Article 1 (b)) and the Bustamante Code (Article 354) provide that the penalty for the offence in the requesting and asylum States may not be less than one year of imprisonment.

" The broad range in sentence admissible under these principles of international law permits a distinction to be made in terms of the gravity of the offence, that is, whether the offence affects the social order of the State slightly or seriously. The Penal Codes also reflect this sociological concept in that they afford sufficient latitude for consideration of all the circumstances attending the offence. This principle of flexibility as opposed to a rigid system of penalties is demonstrated not only in the provision of Article 172 of the Argentine Code for a penalty of one month to six years for fraud, but also in our Penal Code, which permits the imposition of penalties ranging from 541 days to five years for the same offence. It does not follow, however, that the minimum penalty exacted for the offence need be the minimum fixed in the Code because the final decision will be affected by consideration of the various factors attending the case. On the basis of this reasoning, we must conclude that this requirement for extradition has been fulfilled because, although his case has not yet been tried nor sentence pronounced, D'Emilia has been ordered to be held in preventive custody for an offence which is punishable by more than one year of imprisonment according to the laws of both States (Article 3 (a) of the Montevideo Convention; Article 358 of the Bustamante Code).

" With regard to the defence of possible political persecution of the accused if extradition is granted, we have pointed out many times that extradition for political or related offences in not admissible under international law (Article 3 (e) of the Montevideo Convention; Article 356 of the Bustamante Code). Article 356 of the Bustamente Code provides that extradition

> ' shall not be granted if it can be shown that the extradition request has been made in fact for the purpose of trying and punishing the accused for an offence of a political character, in accordance with the same definition [*i.e.*, as defined by the asylum State] '.

The burden of proof is on the accused to show that the extradition request has been made for this purpose. D'Emilia has testified, *inter alia*, that ' he supposed that he would be tried ' for offences of a political character because he had ' sympathized with the ideology and political program of ex-President Perón '. But a supposition is not the same thing as a categorical affirmation, and the record does not contain the proof necessary for credence to be given to this argument."

[Report: *Revista de Derecho, Jurisprudencia, y Ciencias Sociales y Gaceta de los Tribunales*, vol. 54, Nos. 3–4 (May–June 1957), p. 72.]

Extradition—Conditions of—Double Criminality—Evidence Necessary to Justify Surrender to Requesting State—Anglo-Portuguese Extradition Treaty, 1892—The Law of Southern Rhodesia.

Ex parte DE ASSUNCAO.

Southern Rhodesia, High Court. May 2, 1957.

(Morton J.)

THE FACTS.—The petitioner, a Portuguese national then resident in Southern Rhodesia, was wanted in Portugal to face his trial on charges of two offences alleged to have been committed by him there in 1955. Having received through the Portuguese Consul-General in Salisbury, acting under the Anglo-Portuguese Extradition Treaty of 1892, a requisition for the extradition of the petitioner on both these charges, the Governor, in the exercise of the powers conferred upon him by section 7 of the Southern Rhodesia Extradition Act (Chap. 29) and the English Extradition Act, 1870, sent to the magistrate an order requiring him to issue his warrant for the apprehension of the petitioner on one of the charges only. The Acting Magistrate of Umtali accordingly issued a warrant committing the petitioner to prison to await the warrant of the Governor for his surrender pursuant to the Extradition Act, 1870. The petitioner sought the setting aside of the Acting Magistrate's warrant.

Held: that the Acting Magistrate's warrant must be set aside. While a warrant for the apprehension of a person, whose extradition has been requested, could be issued on evidence sufficient to justify his apprehension if the crime in question had been committed in the requested State, the committal of that person pending his surrender to the requesting State could only take place on the production of such additional evidence as would justify his committal for trial if the crime had been committed in the requested State.

Morton J. said: "The magistrate's issue of his warrant of arrest is not directly questioned in this petition, and I only mention the circumstances of its issue because of what followed and because the petitioner asks for costs to be awarded against the first respondent if his petition succeeds. The magistrate was empowered to issue this warrant on such evidence as would in his opinion justify its issue if the crime had been committed in Southern Rhodesia. The crime was described in the Governor's order as the crime of carnal knowledge of a girl under 16 years of age. This is a crime in this Colony if the carnal knowledge was unlawful, and if the petitioner had committed the crime in this Colony, either one of two requisites would have justified the issue of a warrant. The first was a written application subscribed by the Attorney-General or by the local public prosecutor or any commissioned officer of police setting forth that, from information taken upon oath, there were reasonable grounds of suspicion that the petitioner had committed the offence; the second was information to the like effect made on oath before the magistrate himself. If the first requisite is present, there is no need for the magistrate himself to see the information taken upon oath. What was before the magistrate in this instance was a Governor's order asking for the issue of the warrant, accompanied by a warrant of arrest signed by a Portuguese judge in Lisbon and a document styled a certificate, in which the Head of the Department of Law Suits of the Sixth Criminal Court of Lisbon certified that in that Court and under his care there were ' writs ' of a criminal law suit against the petitioner at the instance of the Public Attorney, which writs, he certified, showed by way of evidence that the petitioner, who was a married man, in May 1955, and on other occasions in that year, had sexual intercourse with a named girl of 13 years of age and that this intercourse was unlawful in Portugal. The certificate did not specifically say that this evidence had been taken on oath, but from the tenor of the documents the magistrate could infer that it had been so taken and could well be of the opinion that what corresponded to the first requisite in our law for the issue of a warrant of arrest was before him.

" When, after the arrest, the prisoner is brought before the magistrate, the matter assumes a very different aspect. The magistrate must hear the case in the same manner, and has the same jurisdiction and powers, as near as may be, as if the prisoner were brought before him on a preparatory examination charged with an offence committed in Southern Rhodesia. He must determine whether it is an extradition crime, that is to say, whether as described in terms of our law it is one of the crimes described in terms of English law in the Extradition Acts, 1870 and 1932. He must next decide whether the crime as committed in the foreign country is one to which an Order in Council has applied those Acts and what relevant limitations, if any, have been made to their application. For these purposes the relevant Orders in Council ought, as the majority of the Court held in *The King* v. *Governor of Brixton Prison, ex parte Servini* [1914] 1 K.B. 77, to be produced in evidence before the magistrate in the presence of the prisoner. In terms of sec. 10 of the 1870 Act the magistrate must then see that the foreign warrant of arrest is duly authenticated, and finally he can only order the prisoner's committal if such evidence is produced as (subject to the provisions of the Act) would, according to the law of this Colony, justify the committal for trial of the prisoner if the crime of which he is accused had been committed in Southern Rhodesia.

"The first ground of the petition is that the relevant Orders in Council were not produced in evidence. These were S.R. & O. Nos. 102 of 1894 and 678 of 1933, which applied the Extradition Acts 1870 to 1906 to the Extradition Treaty with Portugal of 1892 as modified by the Convention of January 20, 1932. In his replying affidavit the magistrate admits that these were not produced in evidence, but says that in a text book entitled *Clarke upon Extradition*, published in 1903, he had before him a copy of the Treaty of 1892. The Order in Council of 1894 did not in itself contain any limitations, restrictions, conditions, exceptions or qualifications which were not set out in the Treaty. For practical purposes, therefore, the magistrate was, as regards the Treaty of 1892, in the same position as he would have been in if this Order in Council had been formally produced. The Order in Council of 1933 and the Convention of 1932 did contain a further condition on the surrender, so far as it applies to this Colony, of British subjects or citizens of Southern Rhodesia. However the documents before the magistrate alleged the petitioner to be a Portuguese citizen born in Portugal, and neither at the hearing nor in this petition has he claimed to be a British subject by birth or naturalisation or a citizen of this Colony; therefore the fact that the magistrate was unaware of this later Order in Council caused no apparent prejudice to the petitioner. The position in this case is the same as in the *Brixton Prison* case (*supra*) and the respondents have shown sufficient cause why the warrant of committal should not be set aside on this ground.

"The next ground of the petition is that there was not such evidence before the magistrate as would have justified him in committing the petitioner for trial. The evidence necessary for this purpose is, as Jessel, M.R., pointed out in *R.* v. *Weil*, 15 C.C.C. 189, very different from the evidence raising a reasonable suspicion which in our law will justify mere arrest, yet in the present case no more was produced than had been produced for the warrant of arrest. Normally, of course, on a preparatory examination into this charge, only the best evidence is receivable, that it so say, the oral testimony of witnesses to the commission of the offence. In extradition proceedings sections 14 and 15 of the 1870 Act, and section 4 of the Extradition Act, 1873, authorise the admission of secondary evidence in the form of depositions or statements on oath or affirmations taken in a foreign state, but only if the originals or copies of such depositions, statements on oath or affirmations purport to be certified under the hand of a judge, magistrate or officer of state of the foreign state in which they were taken to be the originals or true copies, and are also authenticated by the oath of some witness, or by being sealed with the official seal of the minister of justice or some other minister of state. The magistrate admitted in evidence and relied upon the document styled a certificate, which I have earlier described. Although there was nothing to show that it had been made upon oath, he held it to be a deposition in the widest sense of the word, and within its meaning as used in section 14 of the Act. I must point out that, even if the oral evidence of the certifier had been tendered, it would not in our law have been admissible because it was in itself secondary evidence of the contents of the writs or depositions in the custody of the Lisbon Court. On this ground alone the certificate should have been rejected. In my view, however, 'deposition' in the context of section 14 means a deposition made upon oath, and this view is strengthened by the provisions of Article X of the Treaty of 1892, which require the authorities of the British Dominions to admit as valid evidence the *sworn* depositions or the affirmations of witnesses taken in the dominions of Portugal, or copies thereof, if they are certified and authenticated as required by section 15 of the Act. The certificate was wrongly admitted in evidence by the magistrate. The position therefore is, not that there was some evidence, the sufficiency of which is questioned, but that there was adduced no receivable evidence at all of the commission of the offence. The magistrate could, if the authorities had made it appear that the depositions of the witness or witnesses mentioned in the certificate would be produced later, have committed the petitioner to prison for further appearance in terms, as near as may be, of section 87 of the Criminal Procedure and Evidence Act, but he had no jurisdiction to commit him to prison to await surrender. On this ground the petitioner succeeds.

" This petition concerns a criminal matter and if the petition complains only, as it seems to me to do, of the magistrate's exercise of his judicial discretion in the interpretation of his jurisdiction, this Court will not exercise its discretion on costs in favour of the petitioner. Mr. Christie founds the petitioner's claim for costs against the first respondent on the submission that, on the facts disclosed, the Governor ought not to have initiated the proceedings in this Colony by issuing his order to the magistrate. Section 7 of the 1870 Act says that on receipt of a requisition the Governor may issue his order, and may, if he thinks fit, refuse to send any such order if he is of opinion that the offence is one of a political character. In the present case there was no question of any such ground for refusal, and if in these circumstances the first 'may' conferred any discretion on the Governor, it was an administrative discretion, into the propriety of the exercise of which this Court will not enquire in the absence of any allegation that the decision was grossly unreasonable. But had the Governor any discretion at all? Articles VIII and IX of the Treaty with Portugal provide that

> 'the requisition for the extradition of an accused person must be accompanied by a warrant of arrest issued by the competent authority

> of the State requiring the extradition, and by such evidence as, according to the laws of the place where the accused is found, would justify his arrest if the crime had been committed there '

and that

> ' if the requisition for extradition be in accordance with the foregoing stipulations, the competent authorities of the State applied to shall proceed to the arrest of the fugitive '.

It seems, therefore, that in the present case there was an obligation placed on the Governor, by Treaty if not by law, to issue his order, leaving the decisions, as he did, in all subsequent proceedings to the judicial discretion of the magistrate—*cf.* remarks of the Privy Council in *Attorney-General of Canada* v. *Fedorenko* [1911] A.C. 735 on identically similar Articles in the Treaty with Russia.

" The warrant of the magistrate committing the petitioner to prison to await surrender is set aside. There will be no order as to costs."

[Report: Rhodesian and Nyasaland Law Reports, 1957, p. 318.]

IV.—Procedure of Extradition

Extradition—Procedure of—Opinion of Court as Prerequisite of Decision by Government—The Law of Belgium.

In re ROZZONI.

Belgium, Court of Cassation. January 7, 1957.

THE FACTS.—This was an appeal from an opinion of the Chambre des Mises en Accusation of the Court of Appeal of Brussels on a request for the extradition of the applicant. The question at issue was whether an appeal lay against such an opinion.

Held: that no appeal lay against the opinion.

The Court said: " By a Law of March 15, 1874, the Government was empowered to decide, on its own exclusive responsibility, on requests for extradition from a foreign Government, after having sought the opinion of the chambre des mises en accusation of the Court of Appeal within the jurisdiction of which the alien was arrested. That opinion does not bind the Government or confer a right on the alien. It accordingly does not constitute a decision which can be appealed against in pursuance of Article 15 of the Law of August 4, 1832."

[Report: *Pasicrisie Belge*, 1957, Part I, p. 510.]

Extradition—Procedure of—Request for Extradition—Necessity for Conformity with Procedure of Requested State—The Law of Venezuela.

Re Rossi.

Venezuela, Federal Court. February 8, 1957.

The Facts.—Italy requested the extradition of Giacomo Rossi Bruno on charges of misappropriation of funds while he was a cashier at the Bank of Naples. The requesting State invoked the Treaty of Extradition and Judicial Assistance in Penal Matters with Venezuela of August 23, 1930. The petitioner denied the charges, stating that he had come to Venezuela voluntarily for business purposes. He also challenged the form of the extradition request.

Held: that extradition must be refused. Extradition would not be granted where the request did not conform with the requirements laid down in the law of the asylum State.

The Court said: " Article 6, paragraph 2, of the Venezuelan Penal Code provides that

> " ' a request for the extradition of an alien charged with common crimes may only be granted by the competent authorities acting in pursuance of the requirements established in treaties to which Venezuela is a party and which are in force, or, in the absence of same, in accordance with the provisions of Venezuelan law.'

It follows, then, that the present proceedings are governed by the terms of the Treaty of Extradition and Judicial Assistance in Penal Matters concluded with Italy on August 23, 1930, which Treaty is now in force. According to Article 9 of this Treaty,

> " ' The nature and gravity of the charges upon which the extradition request is based and the statement of the penal law which has been applied or is applicable thereto must be substantiated by proof that the fugitive has been found guilty of said charges or that a warrant or equivalent order has been issued for his arrest.
>
> " ' The documents to which reference is made must be submitted in their original form or in authenticated copies in the form required by the laws of the requesting State and must be accompanied by the texts of the laws which were applied or are applicable to the charges, and, if possible, by a description of the fugitive as well as other data which can be used for purposes of identification.
>
> " ' The extradition request and accompanying documents must be drawn up in the language of the asylum State.
>
> " ' Extradition shall be granted in conformity with the laws of the asylum State.'

With regard to the last part of the above Article, it must be emphasized that the asylum State is under an obligation to make sure that the requirements of its laws are being observed, for this kind of proceedings affects the peace and good order of the country.

" The extradition of Giacomo Rossi Bruno is being sought on a charge of larceny of 25,479,000 Lire from the Bank of Naples. This class of offence is dealt with in its various elements in Articles 624 and 61, paras. 7 and 11, of the Italian Penal Code. As the validity of this request must be decided in terms of Venezuelan law, however, we must determine whether the requirements of our law regarding passive extradition have been complied with. It is generally recognized that the assumption upon which extradition is based is the existence of mutual confidence between the asylum State and the requesting State, a confidence which is founded, in principle, upon a similarity in their substantive and procedural penal laws and upon a mutual concern for the impartial administration of justice. In resorting to this proceeding, the Government of the asylum State must determine whether extradition in a given instance is in the public interest, for the Government must not be party to a proceeding which is inimical to the legal concepts upon which extradition must be based.

" The extradition process serves two purposes: it enables the requesting State to recover a criminal who has taken refuge in a foreign country; it enables the asylum State to protect its own peace and good order by ridding its territory of a real or alleged fugitive from justice. According to one publicist:

' This concern for public order leads us to conclude that extradition is not only a political act whereby one State delivers a criminal to another State, but also a juridical act in that the asylum State provides a penal jurisdiction which is *subsidiary* to that of the State in which the alleged offence took place.'

" We must consider the requirements of Venezuelan law regarding extradition within this frame of reference. Article 391 of the Code of Penal Procedure provides:

> " ' Where a foreign Government requests the extradition of any person found in Venezuelan territory, the Federal Executive, acting in pursuance of the provisions of the Penal Code, shall submit the request to the Federal and Cassation Court [now the Federal Court] together with the accompanying documents. The Court shall decide the matter in accordance with the provisions of Article 6 of the said Code and *shall only grant extradition in pursuance of an order issuing from the competent foreign tribunal* ' [emphasis supplied by the Court].

In the case before us, the Italian Government has not submitted an ' order issuing from the competent tribunal ', yet this is an imperative and indispensable requirement of the statute quoted above, and one which is unquestionably essential to any concept of the nature of public order. Suppose that Venezuela were the requesting State, that is, that we were dealing here with a matter of active extradition, it would not suffice to submit to the asylum State a statement that the fugitive had been found guilty of the offence charged against him or that a warrant had been issued for his arrest, although these are requirements of Article 182 of our Code of Penal Procedure; it would also be necessary for the Supreme Court of the Republic to rule on the lawfulness of the proceeding. The Federal Court, or formerly the Federal Supreme and Cassation Court, would have to determine whether the Government might request extradition; and if this Court decided in the affirmative, it would send a copy of the order to the Federal Executive (Article 390 of the Code of Penal Procedure). Our law requires that this same judicial process be observed when the Venezuelan Government is asked to surrender a convicted criminal or an accused person (Article 391 of the Code of Penal Procedure). This provision of our law does not make any extraordinary demand; it is simply supplementary to that concept of reciprocity which is at the basis of the extradition process. This requirement can be easily understood in terms of that 'jurisdictional guarantee' which is universally recognized as an authoritative legal principle and which is contained in most legal systems. The best evidence of such a guarantee is an act or decree issuing from the competent judicial authorities of the requesting State. This jurisdictional guarantee protects the interests of the accused person by preventing the Executive Branch of the Government from authorizing extradition where there has not been full compliance with all of the conditions established in law to safeguard the rights of the accused person.

"When regulations affecting the public order, such as the provisions of Article 391 of our Code of Penal Procedure, are at issue, the competent court must refuse to order extradition if these procedural requirements have not been observed, for they are as binding as the rules of substantive law. For example, in the case of the extradition of a national or where an alien is charged with a political offence, the prohibitions of Article 6 of the Venezuelan Penal Code constitute regulations which affect the internal public order and, consequently, they must be respected in the interpretation of treaties dealing with this subject matter. Similarly, the requirement of Article 391 that extradition may only be granted in pursuance of an order issued by a competant foreign court must be respected. In regard to this point, a noted Italian publicist has stated:

> " 'For these reasons certain juridical conditions and forms are established by law to govern the extradition process, and these requirements may not be contravened by treaty terms, because the Executive Power does not have the right to do anything which would violate the laws of the State.' (Impallomeni, *Instituzioni*, p. 218.)

The reasoning behind this statement is obvious: if the Government were enabled to enter into international agreements without regard to the provisions of internal law affecting a particular subject matter, such as extradition, this would amount to a delegation of legislative power, which act is prohibited by the Constitution. The Treaty between Venezuela and Italy, however, far from being in conflict with Venezuelan law, conforms with it and requires that it be respected in every case, for Article 9 of the Treaty provides that

> " '*Extradition shall be granted in conformity with the laws of the asylum State*' [emphasis supplied by the Court].

" Given the requirement of our law that extradition may only be granted ' pursuant to an order issued by a competent foreign court' and the fact that no such order has been submitted in the present proceedings, we cannot authorize the extradition of the Italian national, Giacomo Rossi Bruno."

[Report: *Gaceta Forense*, 2ª Etapa, No. 15 (January-March 1957), p. 58.]

V.—Political Crimes

Extradition—For Political Offences—War Crimes—Under Treaty of Extradition—Political Asylum—As Affected by Resolutions of the General Assembly—Force of Resolutions—The Law of the United States of America.

KARADZOLE *ET AL. v.* ARTUKOVIC.

United States, District Court, Southern District, California.

April 3, 1956.

Court of Appeals, Ninth Circuit. June 24, 1957.

Supreme Court. January 20, 1958.

THE FACTS.—This case arose out of the request of the Federal People's Republic of Yugoslavia for the extradition of Artukovic as a fugitive charged with the war crime of murder. Previous proceedings in this case, which turned on the continuing validity of the Treaty of Extradition of 1901 between the United States and Serbia, are reported *sub nom. Ivanevic* v. *Artukovic* in *International Law Reports*, 1954, p. 66.

Upon remand of the case to the District Court, Artukovic maintained, in support of his petition for habeas corpus, that the offence for which he had been indicted in Yugoslavia was " of a political character " within the meaning of Article VI of the Treaty of Extradition between the United States and Serbia, signed at Belgrade on October 25, 1901 (32 Stat. 1890, T.S. No. 406), and that he was hence not subject to extradition. The indictment charged that Artukovic had, while Minister of the Interior from April 16, 1941, to October 10, 1942, in the so-called " Pavelic " Government in Croatia, ordered the killing of thousands of persons. Yugoslavia was at that time under German and Italian occupation.

Held (by the District Court, *sub nom. Artukovic* v. *Boyle*): that the writ of habeas corpus must issue and that the petitioner must be discharged. The offences for which the surrender of the petitioner was sought related to conduct of a political character, for which he could not lawfully be extradited. [Report: 140 F.Supp. 245.]

On appeal,

Held (by the Court of Appeals): that the judgment of the District Court must be affirmed. Since the acts attributed to Artukovic had been committed by him in his official capacity against nationals of Yugoslavia while various factions were contending for power within that country, the crimes charged were political offences, for which the petitioner was not subject to extradition under the terms of the Treaty. The offences did not lose their character as political offences because they were also asserted to be " war crimes ". The Resolutions of the General Assembly of February 13, 1946, and October 31, 1947, recommending the removal of war criminals to the countries where their crimes had been committed, did not have " sufficient force of law " to alter the general rule relating to political offences.

The Court said: " This proceeding arises on *habeas corpus* prior to hearing before a committing magistrate, and is entirely proper if the District Court confines its determination to the question whether the committing magistrate has jurisdiction.[1] *Terlinden* v. *Ames*, 1902, 184 U.S. 270, 22 S.Ct. 484, 46 L.Ed. 534; *In re Heilbonn*, 1853, 1 Park.Cr.R., N.Y., 429. The committing magistrate has jurisdiction, at this stage of the case, if there is a treaty and the commission of extradictable offenses is charged. *Terlinden* v. *Ames*, *supra*; *In re Luis Oteiza y Cortes*, 1889, 136 U.S. 330, 10 S.Ct. 1031, 34 L.Ed. 464; *In re Stupp*, 1875, 23 Fed.Cas.No. 13,563, 12 Blatchf. 501; *Ornelas* v. *Ruiz*, 161 U.S. 502, 508, 16 S.Ct. 689, 40 L.Ed. 787; *Fernandez* v. *Phillips*, 268 U.S. 311, 45 S.Ct. 541, 69 L.Ed. 970.[2] In *Terlinden* v. *Ames*, *supra*, the writ of *habeas corpus* was issued before the examination by the commissioner was entered upon, and the inquiry was held to be confined to the question of jurisdiction of the commissioner or magistrate. It was therein determined that the committing magistrate had jurisdiction and the petition for the writ was dismissed. But it was pointed out in the case that [184 U.S. 270, 22 S.Ct. 488] ' On the face of the complaint extraditable offences were charged to have been committed . . .'

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[1] We find in II Hyde, *International Law* (2nd Revised Edition, 1945), p. 1026, footnote 3, the following language which is here pertinent:

" . . . The situation [that there is no appeal from the decision of the committing magistrate] would be otherwise, however, in the fanciful case where, irrespective of the testimony offered, it should appear from the allegations of the complaint that extradition of the accused was sought in order to prosecute him for a political offense, and the decision of the committing magistrate was adverse to the contentions of the prisoner."

In the instant case we have no decision of the magistrate, but if the complaint and attached documents clearly show a political offense, such decision would not be necessary.

[[2] See *Annual Digest*, 1925–1926, Case No. 233.]

" We have previously held that a valid treaty exists between the United States and Yugoslavia. *Ivancevic* v. *Artukovic, supra.* The sole question therefore before the District Court was whether on the face of the Complaint and the attached Indictment, together with the facts of which the court could take judicial notice, it could clearly be said that the offenses charged were of a political character. Appellant argues that it was error for the District Court to so hold. We initially determine this point without considering any possible legal significance that might result because the offenses charged are called ' war crimes ' in the Indictment, and the fact that appellant admits that Artukovic is sought as a ' war criminal.' Perhaps the leading case on the subject is *In re Castioni*, (1891) 1 Q.B. 149. In that case, the following pertinent comments are made:

" Denman, J. (page 156).

" ' I think that in order to bring the case within the words of the Act and to exclude extradition for such an act as murder, which is one of the extradition offences, it must be shewn that the act is done in furtherance of, done with the intention of assistance, as a sort of overt act in the course of acting in a political matter, a political rising, or a dispute between two parties in the State as to which is to have the government in its hands, before it can be brought within the meaning of the words used in the Act.'

" Denman, J. (page 159).

" ' The question really is whether, upon the facts, it is clear that the man was acting as one of a number of persons engaged in acts of violence of a political character with a political object, and as part of the political movement and rising in which he was taking part.'

" Hawkins, J. (page 165).

" ' Now what is the meaning of crime of a political character? I have thought over this matter very much indeed, and I have thought whether any definition can be given of the political character of the crime—I mean to say, in language which is satisfactory. I have found none at all, and I can imagine for myself none so satisfactory, and to my mind so complete, as that which I find in a work which I have now before me, and the language of which for the purpose of my present judgment I entirely adopt, and that is the expression of my brother Stephen in his History of the Criminal Law of England in vol. ii, pp. 70, 71. I will not do more than refer to the interpretations, others than those with which he agrees, which have been given upon this expression, " political character "; but I adopt his definition absolutely. The third meaning which may be given to the words, and which I take to be the true meaning, is somewhat more complicated than either of those I have described. An act often falls under several different definitions. For instance, if a civil war were to take place, it would be high treason by levying war against the Queen. Every case in which a man was shot in action would be murder. Whenever a house was burnt for military purposes arson would be committed. To take cattle, &c., by requisition would be robbery. According to the common use of language, however, all such acts would be political offences, because they would be incidents in carrying on a civil war. I think, therefore, that the expression in the Extradition Act ought (unless some better interpretation of it can be suggested) to be interpreted to mean that fugitive criminals are not to be surrendered for extradition crimes, if those crimes were incidental to and formed a part of political disturbances. I do not wish to enter into details beforehand on a subject which might at any moment come under judicial consideration.'

" Hawkins, J. (page 167).

" ' I cannot help thinking that everybody knows there are many acts of a political character done without reason, done against all reason; but at the same time one cannot look too hardly and weigh in golden scales the acts of men hot in their political excitement. We know that in heat and in heated blood men often do things which are against and contrary to reason; but none the less an act of this description may be done for the purpose of furthering and in furtherance of a political rising, even though it is an act which may be deplored and lamented, as even cruel and against all reason, by those who can calmly reflect upon it after the battle is over. For the reasons I have expressed, I am of the opinion that this rule ought to be made absolute, and that the prisoner [ought] to be discharged.'

" The *Castioni* case was recently reconsidered by the English courts (Queen's Bench Division) in *Ex parte Kolczynski*, 1954, 2 Weekly Law Reports 116 (1955); 1 All E.R. 31.[1] The case involved seven Polish sailors who seized control of a trawler and steered to an English port where they sought asylum. Warrants were issued in Warsaw charging them with extraditable offences. The English court held that the seamen had proved to the satisfaction of the court that the requests for extradition had in fact been made with a view to trying or punishing them for an offense of a political character.[2] It was stated in the case:

" Cassels, J.

" ' The words " offence of a political character " must always be considered according to the circumstances existing at the time when they have to be considered. The present time is very different from 1891, when Castioni's case was decided. . . . '

" Lord Goddard, C.J., stated:

" ' The Court in *Castioni's case* were careful to say that they were not giving an exhaustive definition of the words " of a political character." . . . The evidence about the law prevalent in the Republic of Poland today

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[[1] See *International Law Reports*, 1954, p. 66.]

[2] In the *Kolczynski* case, we note that the opinion of Hawkins J., in *In re Castioni*, 1 Q.B. 149, 163, as to the duties of magistrates was not followed. The opinion apparently stands (although the point is not entirely clear) for the proposition that in England the committing magistrate is to determine whether the requisition for the surrender of the fugitive criminal has *in fact* been made with a view to try to punish him for an offense of a political character. See comment in 18 Modern Law Review 380, (1955, Stevens & Sons Limited, London). Compare discussion of similar problem in American cases of *In re Lincoln*, D.C., 228 F. 70, 74; *In re Ezeta*, D.C.E.D. Cal. 1894, 62 F. 972 and *Laubenheimer* v. *Factor*, 7 Cir., 1932, 61 F.2d 626, 628 [*Annual Digest*, 1931–1932, Case No. 160].

shows that it is necessary, if only for reasons of humanity, to give a wider and more generous meaning to the words we are now construing, which we can do without in any way encouraging the idea that ordinary crimes which have no political significance will be thereby excused.'

" American cases[1] have more or less adopted language used in *Castioni*. In the instant case we are dealing with a so-called relative political offense in that a common crime is said to be connected with a political act.[2] Other than the fact that Artukovic is called a ' war criminal ' by appellant, we note the following facts as showing a marked degree of connection between the alleged murders and a political element. Appellee Artukovic is not charged with personally murdering anyone, rather it is charged that the murders were carried out on his ' orders '.[3] The Indictment accuses Artukovic ' for having, in the course of 1941 and 1942, when Yugoslavia was occupied by German and Italian troops, issued orders based on criminal motives, hatred and the desire for power, to members of bands of which he was one of the leaders, to carry out mass slaughters of the peaceful civilian population of Croatia, Bosnia and Herzegovina. . . .' The Indictment states (in the Explanation of the Indictment) that the ' accused Artukovic was the so-called Minister of the Interior in the " Cabinet " of Ante Pavelic '. It is also stated that ' Direction and control over the concentration camps, over the internment of people in the camps and over the treatment (Point 8 of the Indictment) was discharged, along with Pavelic, by the accused Artukovic, who was the so-called Minister of the Interior in Pavelic's " Cabinet " at that time. This has been established through numerous so-called legal and other kinds of orders which were prepared by the accused Artukovic himself, which he issued and signed alone or together with Pavelic. . . .' It is also stated that Artukovic and Pavelic prescribed a ' so-called legal order on August 16, 1941, on the " Utasha Security Service " which under the " Legal Order " of November 25, 1941, controlled concentration camps and passed decisions on deportations to these camps.' The Indictment further states that the ' crimes committed by the accused Artukovic simultaneously constitute great international crimes foreseen by International Law, specifically Law No. X of the Control Council for Germany and by Article 6 of the Statute of the International Military

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[1] *In re Ezeta*, D.C.N.D.Cal.1894, 62 F. 972; *Ornelas* v. *Ruiz*, 1896, 161 U.S. 502, 16 S.Ct. 689, 40 L.Ed. 787; *Luis Oteiza y Cortes* v. *Jacobus*, 136 U.S. 330, 10 S.Ct. 1031 34 L.Ed. 464; *United States ex rel. Giletti* v. *Commissioner of Immigration*, 2 Cir., 35 F.2d. 687.

[2] See Vol. I *Oppenheim's International Law*, Lauterpacht (7th Ed. 1948) § 334; Garcia-Mora, " The Present Status of Political Offenses in the International Law of Extradition and Asylum," 14 University of Pittsburgh Law Review 371; Garcia-Mora, *International Law and Asylum as a Human Right*, Public Affairs Press, 1956, pp. 73–102.

[3] Appellant, in its brief, points out that " participation " in any of the enumerated crimes and offenses is also an extraditable offense if such participation may be punished in the United States as a felony. Article II of the treaty.'

Tribunal . . .' The amended Complaint alleges over 200,000 murders or participations in murders.

" The District Court properly took judicial notice of the fact that Ante Pavelic was the Premier of Croatia during World War II, and of the fact that various factions representing different theories of government were struggling for power during this period in Croatia. We conclude that the finding by the District Court that the offenses for which the surrender of Artukovic was sought were offenses of a political character was correct.

" We now consider the question whether because the offenses are also called ' war crimes ' they have lost their character as ' political offenses ' within the meaning of the treaty. Appellant argues that ' war crimes ' are crimes for which extradition is to be granted within the meaning of international acts to which the United States is a party. It is argued by recent legal writers that the ' barbarity and atrocity of the crimes [crimes against the law of war and crimes against humanity] committed weigh so heavily upon the common crime element that the political act has practically ceased to exist and, therefore, that the extradition of the offender is the only justifiable course of action.'[1]

" Appellant in essence argues that by virtue of resolutions[2] taken in 1946 and 1947 by the United Nations General Assembly

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[1] Garcia-Mora, *International Law and Asylum as a Human Right*, pp. 91–102 and particularly pp. 91–93, commented on in 24 University of Chicago Law Review 202 and 55 Michigan Law Review 618; 21 The British Yearbook of International Law (1944), 59–95, Lauterpacht; Vol. II *Oppenheim's International Law* (7th Ed. 1952), Lauterpacht, pp. 566–588 and particularly footnote 4, p. 588; Garcia-Mora, " The Present Status of Political Offenses," 14 University of Pittsburgh Law Review 371, 394. Cf. Neumann, " Neutral States and the Extradition of War Criminals," 45 American Journal of International Law 495.

[2] United Nations Resolution of February 13, 1946: (*United Nations Yearbook*, 1946–47, p. 66)

" The General Assembly:

" taking note of the Moscow Declaration of 1 November 1943 by President Roosevelt, Marshal Stalin and Prime Minister Churchill concerning enemy atrocities in the course of the war, and of the declaration by certain allied governments of 13 January and 18 December 1942 concerning the same matter;

" taking note of the laws and usages of warfare established by the fourth Hague Convention of 1907;

" taking note of the definition of war crimes and crimes against peace and against humanity contained in the Charter of the International Military Tribunal dated 8 August 1945;

" believing that certain war criminals continue to evade justice in the territories of certain States;

" Recommends

" that Members of the United Nations forthwith take all the necessary measures to cause the arrest of those war criminals who have been responsible for or have taken a consenting part in the above crimes, and to cause them to be sent back to the countries in which their abominable deeds were done, in order that they may be judged and punished according to the laws of those countries;

" And Calls Upon

" the Governments of States which are not members of the United Nations also to take all necessary measures for the apprehension of such criminals in their respective territories with a view to their immediate removal to the countries in which the as to the surrender of alleged war criminals, it is incumbent on this Court to hold that Artukovic is charged with an offence which is extraditable.

" We have examined the various United Nations Resolutions and their background and have concluded that they have not sufficient force of law to modify long standing judicial interpretations of similar treaty provisions. Perhaps changes should be made as to such treaties. A well-known authority[1] recently commented on the point as follows:

" ' It would appear that codification of offenses against the law of nations should be developed to indicate those offenses with a political aspect which should be excluded from the concept of " political offense " and made subject to extradition to the country where the offense was committed, or to the jurisdiction of an international criminal tribunal, if such were established. . . . It seems probable, however, that due process of law would be better assured if an international criminal tribunal had jurisdiction of such offenses.'

" Other points raised by the appellant we need not consider based on our decision." [Report: 247 F.2d 198.]

On petition for writ of *certiorari*,

Held (by the Supreme Court *per curiam*, Black and Douglas JJ. dissenting): that the petition must be granted, the judgment vacated, and the case sent back to the District Court for the discharge of the writ of habeas corpus and the remand of the respondent to the custody of the United States Marshal in order that a hearing

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crimes were committed for the purpose of trial and punishment according to the laws of those countries."

See also Resolution of General Assembly adopted December 15, 1946, as to the screening of displaced persons, refugees, prisoners of war and other persons of similar status, with a view to identifying war criminals, quislings and traitors. (*United Nations Yearbook*, 1946–47, p. 170.)

" Resolution of General Assembly, October 31, 1947: (*United Nations Yearbook*, 1947–48, p. 222)

" The General Assembly

" Noting what has so far been done in the matter of the surrender and punishment, after due trial, of the war criminals referred to in its resolution adopted on 13 February 1946,

" Reaffirms the aforementioned resolution;

" Reaffirms also its resolutions on the subject of refugees adopted on 12 February 1946 and on 15 December 1946;

" Recommends Members of the United Nations to continue with unabated energy to carry out their responsibilities as regards the surrender and trial of war criminals;

" Recommends Members of the United Nations, which desire the surrender of alleged war criminals or traitors (that is to say nationals of any State accused of having violated their national law by treason or active collaboration with the enemy during the war) by other Members in whose jurisdiction they are believed to be, to request such surrender as soon as possible and to support their request with sufficient evidence to establish that a reasonable *prima facie* case exists as to identity and guilt, and

" Reasserts that trials of war criminals and traitors, like all other trials should be governed by the principles of justice, law and evidence."

[1] Quincy Wright, Professor Emeritus of International Law, University of Chicago, 24 University of Chicago Law Review 202, 206.

might be held under 18 U.S.C. § 3184 (dealing with a hearing on the warrant for the surrender of the accused to a foreign country).

[Reports: 355 U.S. 393, 2 L.Ed.2d 356, 78 Sup. Ct. 381.]

NOTE.—In sending the case back to the District Court for a hearing under 18 U.S.C. § 3184, the Supreme Court acceded to the view of the United States Government, transmitted to the Court by the Solicitor General, that a hearing should be held in order to adduce "evidence from which it may be determined whether or not all of the acts alleged to have been committed by respondent constituted crimes of a political character" (Memorandum for the United States, p. 5). A memorandum from the Legal Adviser of the Department of State, dated December 11, 1957, annexed to the Memorandum for the United States Government, stated in part:

> "The Department of State is of the view that the offense of murder, even though committed solely or predominantly with the intent to destroy, in whole or in part, a national, ethnical or religious group, is none the less 'murder' within the meaning of the Extradition Treaty here involved, and is not thereby rendered an offense of a 'political character' within the meaning of Article VI of the above-mentioned treaty. . . . Even if the fact of which the District Court took judicial notice be correct, it does not appear on the face of the pleadings that all of the offenses which Artukovic is therein alleged to have committed were necessarily connected with such struggle for power.
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> "There is also a suggestion in the indictment that the acts of the defendant constituted 'war crimes'. Even though this might be so, it is the opinion of the Department that some of the murders alleged to have been committed might constitute 'murder' within the meaning of the Extradition Treaty here involved, under the circumstances alleged, particularly in the absence of any suggestion of tactical or strategic considerations motivating each of the alleged crimes." (Memorandum for the United States, pp. 8–9.)

The apparent view of the Supreme Court that evidence must be heard on the nature and surrounding circumstances of the offences with the commission of which Artukovic was charged before it would be possible to determine whether they constituted political offences casts doubt on the correctness of the holding of the Court of Appeals, even though strictly the reversal turned on a matter of municipal procedural law.

Upon a hearing pursuant to 18 U.S.C. § 3184, the United States Commissioner held that the demand of the Government of Yugoslavia for the extradition of Artukovic should be denied. In his view, there was not reasonable and probable cause to believe that the accused was guilty of any of the crimes charged, and the crimes were in any event offences of a political character (170 F. Supp. 383 (S.D. Cal. 1959), to be reported in the *International Law Reports* for 1959).

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Extradition—For Political Offences—Caracas Convention on Territorial Asylum, 1954—Lack of Universality—Effect of—The Law of Chile.

Re CÁMPORA *ET AL.*

Chile, Supreme Court. September 24, 1957.

THE FACTS.—Argentina requested the extradition of Héctor José Cámpora Demaestre and five other prominent supporters of the régime of ex-President Juan Perón, who had sought political asylum in Chile after escaping from preventive custody in Argentina. The charges against the fugitives may be summarized as follows: Cámpora, former President of the Chamber of Deputies, wanted for malfeasance in office and misappropriation of government property in violation of Article 261 of the Argentine Penal Code; John William Cooke Lenzy, former chief of the Peronista Party, wanted for larceny, arson, and destruction of property, including participation in the burning of churches on June 16, 1955, as well as public intimidation, all of which were offences in violation of Articles 164, 184, 186, and 211, respectively, of the Penal Code; José Gregorio Expejo Vera, former Secretary-General of the General Confederation of Workers, charged with illegal association in violation of Article 210 of the Penal Code together with participation in commando activity; Pedro Andrés José Gomis Fargas, former head of the Petroleum Workers Syndicate, wanted for public intimidation, misappropriation of government property, and fraud, which constituted offences in violation of Articles 212, 261, 172, and 174, respectively, of the Penal Code; Guillermo Patricio Kelly Varela, former chief of the Alianza Libertadora Nacionalista (a branch of the Peronista Party), charged with illegal association, public intimidation, homicide, illegal detention, assault, trespass, theft, incitement to violation of law, extortion, and arson, all of which were offences in violation of Articles 210, 141, 142, 89, 150, 162, 209, 168, 167, and 186 (3), respectively, of the Penal Code; Jorge Antonio Chibene, sought for monopoly in violation of Law 12.906, as well as violations of exchange controls, dealings in contraband, fraud and other activities incompatible with public office-holding, illegal association, and the bribery of prison guards, which were offences in terms of Articles 300, 265, 256, 174 (5), 210, and 258, respectively, of the Penal Code. In the opinion of the Argentine Government, the above charges constituted criminal offences. The defence pleaded that these charges were political offences which are non-extraditable, and invoked, *inter alia*, provisions of the Convention on Territorial Asylum of March 28, 1954,[1] in support of this argument. Extradition was denied by the Court of first instance, which held that some of the charges against the fugitives were political offences or motivated by political considerations and that other charges were not supported by sufficient proof or did not meet the requirements of Chilean law. The case was brought to the Supreme Court on appeal.

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[1] Pan American Union, Law and Treaty Series No. 47 (1954).

Held: that the request for the extradition of Kelly on criminal charges must be granted; that the request for the extradition of the other five fugitives must be refused because certain charges constituted political offences, for which extradition may not be granted, while other charges were not supported by adequate proof or did not conform to the requirements of Chilean law.

The Court said: " Chilean courts are required by the terms of Articles 637, 647 (2), and 651 of the Code of Penal Procedure to decide extradition requests in conformity with the provisions of treaties in force between the parties, or, in the absence of such treaties, in conformity with the principles of international law. Given the first of these requirements, it might be assumed that the Montevideo Convention of 1933,[1] which is binding upon both Chile and Argentina, could be invoked in these proceedings; however, this Convention is not applicable because Argentina only ratified it on April 19, 1956, that is to say, at a date subsequent to the dates of commission of the offences for which extradition is sought. Article 19 of the Convention stipulates that it may not be invoked with regard to offences which antedate the deposit of ratifications. Therefore, in the absence of an international agreement bearing upon the case, the Court must make its determination on the basis of principles of international law pertinent to this type of action.

" The term ' principle ' is defined by the Dictionary of the Spanish Academy as ' an original cause or truth ', ' the basis, source, origin, or fundamental supposition upon which any proposition is founded '. It follows that the principles of international law may be defined as the basic norms of this branch of the law which have been generally accepted by a majority of States. These principles may be formulated at international conferences or congresses called by States for this purpose.

" In Chilean practice, preference is given to those principles of international law which, having been approved by the Government, constitute the law of the land. In respect to extradition, pertinent principles can be found in two sources: the Code of Private International Law (Bustamante Code) of February 13, 1928,[2] which was concluded by the American States at the Pan-American Conference held at Habana, and which has been ratified and promulgated as law by Chile; and the Montevideo Convention of December 26, 1933, which has now been ratified by both States. On the other hand, the Convention on Territorial Asylum which was concluded at the Caracas Conference on March 28, 1954, and which has been invoked by the accused, cannot be given equal weight in the present proceedings with the Conventions cited because it has not been ratified by either Chile or Argentina. For Chile the Convention on Territorial Asylum is a mere project of law which cannot affect the norms established by the other two Conventions until it has been ratified. Furthermore, taking note of the fact that only six of the twenty signatories have ratified this Convention, we must conclude that the 1954 Convention has not received general acceptance among nations.

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[1] Convention on Extradition, adopted at the Seventh International Conference of American States on December 26, 1933; *L.N.T.S.*, vol. 165, p. 45.

[2] *Ibid.*, vol. 86, p. 111.

" According to the Bustamante Code and the Montevideo Convention, to doctrine, and to our jurisprudence, the following principles must be observed in extradition proceedings:

" (a) The offence for which extradition is sought must be a crime in both the asylum State and the demanding State (Article 353 of the Code of Private International Law; Article 1 (b) of the Montevideo Convention);

" (b) The offence must be punishable by a minimum of imprisonment for one year (Article 354 of the Bustamante Code; Article 1 (b) of the Montevideo Convention). It may be noted that the latter Agreement provides that the minimum penalty in both States must be at least one year's imprisonment;

" (c) The offence charged must have been committed in the State which has initiated the request for extradition, and a warrant must have been issued for the arrest of the accused (Articles 351, 354, and 365 (1) of the Code of Private International Law; Articles 1 (a) and 5 of the Montevideo Convention);

" (d) The offence charged must not be a political offence or one connected therewith. In this regard Article 355 of the Code of Private International Law provides that ' Political offences and acts related thereto, as defined by the asylum State, are excluded from extradition.' Article 356 of this Convention states that extradition ' shall not be granted, if it can be shown that the extradition request has been made in fact for the purpose of trying and punishing the accused for an offence of a political character, in accordance with the same definition.' The Montevideo Convention provides in Article 3 (e) that the asylum State is not obliged to grant extradition ' where the offence is of a political nature or of a character related thereto ', and adds in Article 4 that ' the determination of whether or not the exceptions referred to in the previous Article are applicable shall belong exclusively to the State to which the request for extradition is addressed.'

" Although the term ' political offence ' is not defined in our positive law nor in the Conventions cited above, according to generally accepted principles a political offence is one involving any attempt against the political organization of the State or the political rights of its citizens, that is, an attack upon the constitutional order of the country concerned. This definition also comprehends acts which have as their objective a change in the established political or social order in the country. The majority of publicists differentiate between political offences and criminal offences by taking into account the objectives of the accused, that is, they are as much concerned with the objective aspect of the offence as with its subjective aspect. Political offences are founded in motives of political or public concern and are characterized by altruistic or patriotic sentiments, while criminal offences arise from egoistical motives of two kinds, those which are more or less excusable (emotion, love, honour), and those which are reprehensible (revenge, hatred, profit).

" Several kinds of political offences may be distinguished: there is the pure political offence which involves an attempt upon the political organization of the State; the improper political offence which threatens the social or economic order in the State; the mixed or complex political offence which involves a simultaneous attack upon law and order, such as the assassination of the Head of State for political reasons; and there are related offences, common crimes which are committed in the course of attempts against the security of the State or which are otherwise associated with political offences. The intent of the accused determines whether a common crime can be regarded as connected with a political offence.

" Some publicists, among them Garraud, define the term ' political offence ' as comprehending crimes directed against the internal or external security of the State, including offences affecting the exercise of civic rights, such as electoral fraud, attacks by the press upon the political order, injury of administrative or judicial authorities, unauthorized interference with public functions, and membership of illegal political organizations.

" The term ' related offence ' [*delito conexo*] must be defined for purposes of the present proceedings according to Chilean law, being the law of the asylum State (Article 355 of the Code of Private International Law). According to Article 165 of the Organic Code on Courts, ' related offences ' are defined as ' those offences committed by two or more persons acting in conspiracy with one another; those offences committed by two or more persons at different times and in different places if such acts result from a previous conspiracy; those offences committed for the purpose of perpetrating or facilitating the perpetration of other offences; and those offences committed in order to avoid the consequences of other offences.'

" Adverting to the Caracas Convention on Territorial Asylum of 1954, we find in Article 3 that no State is obliged to surrender persons who are persecuted for political reasons, while Article 4 provides that extradition will not be granted if, in the determination of the asylum State, surrender of the persons concerned is being sought for political offences, for common crimes which have been committed for political objectives, or for predominantly political reasons. While these provisions may be regarded as amplifying the provisions of both the Bustamante Code and the Montevideo Convention with respect to this subject matter, they cannot be considered to have the stature of general principles of international law so as to be able to modify the provisions of the other two Conventions, for, as we pointed out earlier, the Caracas Convention on Territorial Asylum has not been ratified by either Chile or Argentina, in contrast with the Bustamante Code which is the law of the land and the Montevideo Convention which now binds both States.

" Furthermore, it must be observed that there are textual differences between Articles 3 and 4 of the Caracas Convention and the provisions of the various extradition treaties to which Chile is a party. In the Extradition Conventions concluded with Spain in 1895 and with Uruguay, Ecuador, and Paraguay in 1897, only political offences and related offences are described as non-extraditable offences. The Extradition Treaties with the United States of 1890 and with Great Britain of 1897 both contain provisions similar in terms to Article 356 of the Bustamante Code. The Treaties with Bolivia, Colombia, Peru, and Brazil, of 1910, 1914, 1932, and 1935, respectively, provide that extradition will be granted if the fugitive is charged with an offence which constitutes a common crime, notwithstanding a plea of political motive or objective by the accused. None of the twelve Extradition Treaties to which Chile is a party contains any provision excluding from extradition a person charged with a criminal offence which has allegedly been committed for political reasons; and none of these Treaties contains any provision so broad in scope as Article 4 of the Caracas Convention, which would deny every extradition request arising from predominantly political motives. This Article certainly differs from Article 356 of the Bustamante Code, which provides that extradition shall be denied only where it can be shown that the request was initiated for the purpose of trying and punishing the accused for an offence of a political character.

" The Universal Declaration of Human Rights, approved by the United Nations General Assembly on December 10, 1948,[1] provides in Article 14 that the right of asylum may not be pleaded as a defence against prosecutions arising out of criminal charges. This provision is narrower in scope than those provisions of the Pact of Caracas to which reference has been made.

" As we pointed out earlier, the principles of international law are understood to be those fundamental norms of this branch of law which have been generally accepted as authoritative by a majority of States. The opinions of publicists, judicial decisions, codes and foreign laws on the subject, or an unratified convention or draft treaty on the subject do not have sufficient weight or authority to transform a decision of an international conference into a principle of international law; rather must the existence of international practice or the general acceptance of the norm be shown before its transformation into a principle of international law can be considered to have taken place. This requirement is particularly important when the so-called principle is invoked for the purpose of altering concepts which have been established in Chilean law (as in the case of the Bustamante Code) or in a convention which has been ratified by the interested parties (as in the case of the Montevideo Convention), or in treaties which have been concluded by Chile with various States (as in the case of the twelve Extradition Treaties currently in force).

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[1] United Nations, *Yearbook on Human Rights for 1948*, p. 466.

" Articles 3 and 4 of the Caracas Convention, by prohibiting extradition for common crimes which have been committed for political objectives or where surrender of a fugitive is sought for predominantly political reasons, both amplify and modify the pertinent provisions of the Bustamante Code and the Montevideo Convention. Given this result and the fact that the Caracas Convention has only been ratified by six States, not including Chile or Argentina, it must be concluded that this Convention lacks that universality or general acceptance among States which is necessary before its provisions can be accepted as *principles of international law* which have the force to change principles established in our positive law and in our treaties and conventions dealing with this subject-matter. The principles embodied in the Bustamante Code and the Montevideo Convention can only be changed by the norms of this Convention if the latter has been assented to by this country or if these norms should develop into practice generally accepted by jurisconsults and judges.

" Articles 647 (3) and 646 of the Code of Penal Procedure, which guarantees the sovereignty of Chile, empower the courts to evaluate the evidence submitted by the demanding State in support of its extradition request, to determine whether the charges are valid, and whether the presumption of guilt of the accused is well founded. The existence of a warrant for arrest issued by the requesting State is not conclusive evidence. These rules supplant the provision of Article 365 of the Bustamante Code regarding evidence of the guilt of the accused, in accordance with the Chilean reservation to this Convention which provides that ' the provisions of present or future laws of Chile shall take precedence over the said Code, in the event of any conflict between them '.[1]

" Having determined what norms are to be applied in the present extradition proceeding, we must examine the charges which have been made against each of the accused." The Supreme Court then examined the charges in detail and concluded that extradition should be denied in the cases of Cámpora, Antonio, Cooke, Espejo, and Gomis because the penalties for the offences did not meet the requirements of Chilean law or there was inadequate proof of the charges or the charges constituted political offences for which extradition could not be granted. The extradition of Kelly was conceded on charges of extortion, homicide, and robbery, with the proviso that he could only be tried for these specific offences and that if he were convicted, the death penalty must not be exacted.

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[1] Chile, *Boletín de las Leyes 1934* (January–June 1934), pp. 911–912.

[Report: *Revista de Derecho, Jurisprudencia, Ciencias Sociales y Gaceta de los Tribunales* vol. 54, Nos. 7–8 (September–October 1957), part 2, sec. 4, p. 197.]

Extradition—For Political Offences—Burden of Proof—The Law of Argentina.

See p. 499 (*Re D'Emilia*).

VI.—Miscellaneous

Extradition—Miscellaneous—Alleged Abduction from Foreign State—Informal Expulsion—Whether Constituting Violation of Treaty of Extradition—Right of Accused to Object—The Law of the United States of America.

See p. 256 (*United States* v. *Sobell*).

PART VII

DIPLOMATIC AND CONSULAR INTERCOURSE AND PRIVILEGES

A—PERMANENT DIPLOMATIC ENVOYS

III.—Privileges and Immunities of

i.—Diplomatic Envoys and their Staff

Diplomatic Privileges and Immunities—Immunity from Jurisdiction—Waiver of—Whether Diplomatic Representative Can Validly Waive Immunity Without the Authority of His Government—The Law of Luxembourg.

BOLASCO *v.* WOLTER.

Luxembourg, Tribunal of Luxembourg, September 26, 1957.

THE FACTS.—The plaintiff brought an action for possession of land of which the defendant, a Counsellor of the Italian Embassy in Luxembourg, was the tenant. Before the Court of first instance the defendant contested the action on the merits, without raising a plea to the jurisdiction. The Court treated his defence on the merits as a waiver of his immunity from the jurisdiction, and gave judgment in the plaintiff's favour. The defendant appealed.

Held: that the appeal must be allowed and the judgment of the Court of first instance quashed, on the ground that a diplomatic representative was not entitled to waive his immunity from the jurisdiction without the authority of his Government. As no such authority had been given, there was no valid waiver of the defendant's immunity.

The Court said: " The appellant contends that the Judge of first instance ought to have declined to exercise jurisdiction because he, the appellant, is a Counsellor at the Italian Embassy in Luxembourg and in that capacity entitled to immunity from the jurisdiction of the courts of Luxembourg, The defence on the merits of the case raised before the Court of first instance was incapable of constituting a waiver of his immunity, on the ground that his Government had not given him authority to waive that immunity. The Decree of the National Convention of the 13th Ventôse of the Year II precludes all authorities from interfering in any manner whatsoever with the servants of foreign Governments and provides that 'any claims which might be made against them shall be submitted to the *Comité du salut public*, which alone is competent to deal with such claims'.

This provision of municipal law incorporates an international custom whereby diplomatic representatives are entitled, during the period of their mission, to immunity from the jurisdiction of the courts of the country to which they are accredited. The class of persons entitled to immunity from jurisdiction in their capacity as diplomatic representatives comprises not only the chief of the mission but also any person who forms an integral part of a diplomatic mission in an official capacity. This group accordingly includes, in particular, the counsellors of a diplomatic mission. The courtesy owed by States to one another forms the basis of the immunity from jurisdiction to which diplomatic representatives are entitled. It requires that this immunity shall be complete so as to apply before both the civil and the criminal courts, and not only so far as concerns acts performed in an official capacity, but also proceedings arising out of acts performed in a private capacity. Immunity from jurisdiction is accorded to diplomatic representatives in the interest of the State they represent, and not in their personal interest. It follows that diplomatic representatives cannot validly waive their immunity except by authority of their Government. The appellant is a counsellor at the Italian Embassy in Luxembourg. In the Court of first instance he defended the action on the merits without the authority of the Italian Government to waive his immunity. It follows that he is entitled to claim immunity from the jurisdiction of the Luxembourg courts and that he has not validly waived that immunity. The Judge of first instance therefore had no jurisdiction to determine the action for possession brought by the respondent against the appellant. His judgment must be reversed, because it decided in favour of the exercise of jurisdiction and determined the action on the merits."

[Report: *Pasicrisie luxembourgeoise*, vol. XVII, p. 173.]

Diplomatic Immunities—Foreign Legation as Co-Surety for Obligations Incurred by Minister—Whether Implying Waiver of Immunity—The Law of Argentina.

ORTIZ *v.* HAMAD.

Argentina, Supreme Court. December 10, 1956.

THE FACTS.—The Egyptian Legation at Buenos Aires agreed to become co-surety *in solido* (*fiador solidario*) for obligations incurred by the then Minister, Hassam Moharram Bey. The present action to recover under this contract was brought by Ana T. Ortiz Basua Ido de Olazábal against his successor as Minister, Mahmoud M. Hamad. The Procurator General in his report on the case to the Supreme Court stated that the execution of this bond constituted a renunciation of the Legation's immunity from suit in the Argentine courts, but that the action should be dismissed because it was brought against the incumbent Minister instead of the Legation, thus violating the provisions of the penultimate paragraph of Article 24 (1) of Law 13.998.[1]

Held: that the action must be dismissed.

The Court said: " The terms of the contract whereby the said Legation assumed the condition of co-surety *in solido* and guaranteed the execution of certain obligations contracted by the then Minister Plenipotentiary do not afford sufficient grounds for bringing an action against his successor. The present action engages the personal responsibility of the current Minister and is, consequently, not an appropriate proceeding in which to initiate an inquiry into the effects of a contract which concerned his predecessor."

[Report: *Revista Jurídica Argentina La Ley*, vol. 90 (April–June 1958), p. 144.]

Diplomatic Immunities—Staff of Embassy—Secretaries—Original Jurisdiction of Supreme Court of Argentina—Refusal of Embassy to Waive Immunity.

Re CANO.

Argentina, Supreme Court. December 28, 1956.

THE FACTS.—The Supreme Court of Argentina has original jurisdiction over cases concerning ambassadors, ministers and foreign consuls.[1] The Court will, however, hear such a case only if the embassy of the sending State authorizes the appearance of the diplomatic or consular officer summoned. In the present case, involving its Secretary, the Spanish Embassy refused this authorization.

Held: that the case must be dismissed for want of jurisdiction.

The Court said: " The Ministry of Foreign Relations and Worship has notified us that the Spanish Embassy does not approve of the submission of its Secretary, Agustín Cano, to judicial process outside the jurisdiction of the ordinary courts of the State; consequently, we must rule, in accordance with the established practice of this Court, that the case cannot be heard in the Court's original jurisdiction."

[Report: *Revista Jurídica Argentina La Ley*, vol. 90 (April–June 1958), p. 380.]

NOTE.—See also *Oucinde* v. *Pérez del Arco*, decided on May 3, 1957, by the Cámara Nacional de Apelaciones de Paz of the Federal Capital, in which the defendant, an officer of the Spanish Embassy in Argentina, moved the dismissal, on the ground of his diplomatic immunity, of an action brought against him. The Court *held* that the action must be dismissed for want of jurisdiction, and said: "The Supreme Court of Argentina has original and exclusive jurisdiction over cases concerning ambassadors, ministers and foreign consuls, under Article 101 of the Constitution,[1] Article 7 of Law 27[2], Article 1 (3) of Law 48,[3] and Article 24 (1) of Law 13.998.[4] It follows, therefore, that the competence of a lower court to hear a case may be questioned on these grounds at any stage in the proceedings. (*Jurisprudencia Argentina*, vol. 14, p. 1241; *ibid.*, vol. 48, p. 681; *Fallos de la Corte Suprema*, vol. 194, p. 415. See Fernández, *Código de Procedimientos*, 2nd ed. (1942), p. 21; Alsina, *Tratado*, vol. 1, p. 699.) As the diplomatic character of the defendant has been attested to in communications from the Ministry of Foreign Relations and Worship and from the Spanish Embassy, we must concur in the opinion of the Fiscal that this Court lacks jurisdiction in this case." [Report: *Revista Jurídica Argentina La Ley*, vol. 90 (April–June 1958), p. 355.]

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[1] *Anales de Legislación Argentina*, X–A, p. 221. The relevant provision reads as follows: " Lawsuits may not be brought against the persons referred to above [ambassadors, ministers plenipotentiary, members of their families, or personnel of embassies or legations, having diplomatic status], unless their Government has authorized their submission to the jurisdiction."

Diplomatic Immunities—Chargé d'Affaires *ad interim*—Immunity of—The Law of Argentina.

BLAGA DE COMAN *v.* MOISESCU *ET AL.*

Argentina, Supreme Court. July 5, 1957.

THE FACTS.—An action for damages was brought by Maria Blaga de Coman against Anton Moisescu, Chargé d'Affaires *ad interim* of the Rumanian Legation at Buenos Aires, and others. The question was raised as to whether the case should be heard by the Supreme Court sitting as a court of original jurisdiction. The Procurator General reported to the Supreme Court that Moisescu and three of the defendants had diplomatic status and that as the Legation had indicated that the Government of the People's Republic of Rumania would not authorize their appearance in court, they could not be held for trial. In his opinion, the other defendants, who did not have diplomatic status, could be tried in the lower courts.

Held: that the case did not come within the original jurisdiction of the Supreme Court and must be remitted to the lower courts.

The Court said: "The original jurisdiction of this Court extends only to persons who enjoy diplomatic immunity.[5] Persons who are not so privileged under our law shall be subject to legal process in the ordinary courts."

[Report: *Fallos de la Corte Suprema*, vol. 238, p. 198.]

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[1] See Article 101 of the Constitution of 1853 (*Anales de Legislación Argentina*, 1852–1880, p. 79).

[2] *Ibid.*, p. 354.

[3] *Ibid.*, p. 364.

[4] *Anales de Legislación Argentina*, X–A, p. 221.

[5] Article 24 (1) of Law 13.998 (*Anales de Legislación Argentina*, X–A, p. 221).

iii.—The Family and Retinue of Diplomatic Envoys

Diplomatic Immunities—Families of Members of Staff of Legation —Wife of First Secretary Involved in Traffic Accident—The Law of Argentina.

Re D'Athouguia da Rocha Fontes.

Argentina, Supreme Court. July 5, 1957.

The Facts.—The defendant, Francisca D'Athouguia, wife of the First Secretary of the Portuguese Legation at Buenos Aires, was involved in a traffic accident. The question arose as to whether the Supreme Court's original and exclusive jurisdiction over cases involving diplomatic officers also extended to members of their families. In the opinion of the Procurator General, such cases did not fall within the original jurisdiction of the Supreme Court.

Held: that the case must be dismissed for want of jurisdiction. The Court said: "Article 24 (1) of Law 13.998,[1] which lists the persons privileged to be heard by the Supreme Court sitting as a court of original jurisdiction, is not in conflict with the provisions of Article 101 of the Constitution.[2] The point at issue here is whether the privilege of ambassadors or ministers plenipotentiary to appear before this Court extends also to members of their families. Although the text of Article 24 cited above includes the phrase ' or to the personnel of the embassy or legation who have diplomatic status ', we do not condiser that it can be construed so as to extend the original jurisdiction of this Court to the members of the families of such persons. Consequently, the present proceedings, which arose out of a traffic accident involving an automobile driven by Doña Francisca D'Athouguia da Rocha Fontes, wife of the First Secretary of the Portuguese Legation, do not come within the special competence of the Supreme Court."

[Report: *Fallos de la Corte Suprema*, vol. 238, p. 196.]

Diplomatic Privileges and Immunities—Domestic Servants Nationals of Receiving Country—Reciprocity—The Law of Belgium.

Public Prosecutor *v.* Sluys.

Belgium, Court of Appeal of Brussels. February 19, 1957.

The Facts.—The appellant, a Belgian national, was charged with homicide by negligence as a result of a road accident on January 3, 1956. He entered a plea to the jurisdiction, on the ground that he was employed as a chauffeur by the United States Embassy in Brussels, and as such enjoyed immunity from jurisdiction.

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[1] *Anales de Legislación Argentina*, X–A, p. 221.

[2] *Anales de Legislación Argentina*, 1852–1880, p. 79.

Held: that Belgian nationals who were members of the retinue of a diplomatic agent did not enjoy immunity from jurisdiction.

The Court said: " The principle of the immunity of diplomatic agents accredited to foreign Governments is neither provided for by law (except, very vaguely, in the Decree of 13 Ventôse Year II), nor by international treaties, but forms part of international law as universally recognized by civilized nations.

" Montesquieu formulated this principle as follows:

" ' With regard to ambassadors, the dictates of the law of nations and not of political law must be followed. If they abuse their representative character, they are sent back to their home country, and may even be accused before their master who thereby becomes their judge or their accomplice ' (*Esprit des lois*, I, Ch. 21, 1. 36).

" With reference to the independence which is essential for the execution of their mission, the immunity of diplomatic agents has been recognized by all publicists. It is agreed that they cannot be prosecuted and that offences of which they may have been guilty can only be brought to the attention of the Government, which takes the measures required by the circumstances and may complain to the State which the agent represents (Hans, *Principes de droit pénal*, Nos. 201–8; *Pand. Belges*, v° *Agent diplomatique*, Nos 250–8). It is also unanimously agreed that the immediate family of the Minister, the official staff of the mission and even the personal retinue of the agent enjoy immunity. However, in respect of the last category this is made subject to the condition that they do not have the nationality of the State to which the mission is accredited. (Rigaux and Trousse, *Les crimes et délits*, II, p. 251; *Novelles*, v° *Droit pénal*, t. 1er, No. 391.)

" These various doctrinal conclusions were codified in the record of the session of October 18, 1929, of the Institute of International Law (New York session), which constitutes the most recent expression of the principles applicable to civilized nations in this field. They constitute the logical development of the principle set out by Montesquieu. Indeed, while a Government may inform a foreign State of the offence committed by one of its agents or a member of the retinue and expect that State to institute appropriate proceedings, it would be powerless in relation to one of its own nationals, whose criminal activity would accordingly go unpunished.

" The defence has produced a certificate from the State Department of the United States attesting that in that country, in pursuance of Article 252 (4) of the United States Code, immunity from jurisdiction is accorded even to domestic servants of United States nationality who are in the service of a foreign ambassador accredited to the President.

" However, this is so only during the employment of the United States national by the foreign diplomatic agent; he may be prosecuted for offences committed during his employment after that employment has come to an end (Opinion of the State Department to the Attorney General of Maryland, submitted by the defence). This means that, while the United States, for reasons of international courtesy, extend the benefit of immunity to their own nationals during the currency of a contract with a foreign diplomatic agent, they nevertheless consider that the offender remains subject to their jurisdiction during his employment, and merely postpone the proceedings until such time as the contract shall have come to an end.

" This practice is made possible by the fact that Anglo-Saxon law does not know the concept of prescription. Complete reciprocity cannot be granted by Roman Law countries, where that concept would rule out the possibility of any sanction being applied.

" While international practice must be founded on courtesy and reciprocity, a fundamental difference in the principles related to the public policy of the States concerned constitutes an obstacle to according complete reciprocity; this does not, however, affect our attitude of courtesy towards a State with which we have historical links."

[Report: *Pasicrisie Belge*, 1957, Part II, p. 174.]

iv.—The Official Residence of a Diplomatic Envoy

Diplomatic Immunities—Property Used as Embassy—Whether Immune from Jurisdiction—The Law of Sweden.

See p. 221 (*Beckman* v. *Chinese People's Republic*).

C—RIGHT OF OTHER PERSONS TO PRIVILEGES AND IMMUNITIES

II.—Representatives Sent by and Accredited to the United Nations

Diplomatic Immunities — Representatives of Foreign States Accredited to United Nations.

See p. 202 (*Knocklong Corp.* v. *Kingdom of Afghanistan et Al.*).

D—CONSULS

III.—Privileges and Immunities of Consuls

Consuls—Privileges and Immunities of—Consul as Co-plaintiff in Civil Action—Duty to Deposit *Cautio Judicatum Solvi*—Consul as Resident in Receiving State—Execution of Order for Costs Against Foreign Consul—Declaration Made by Consul in Course of Legal Proceedings—Application of Principle *Pacta Sunt Servanda*—Consulate as Juridical Person—Proof of Status of Consulate—Whether Immunity Need be Pleaded—Certificate of Ministry for Foreign Affairs.

KENDAL *v.* CONSUL-GENERAL OF SPAIN IN JERUSALEM *ET AL.*

Israel, District Court of Tel-Aviv. July 14, 1957.

THE FACTS.—In a civil action between the applicant and the second respondent (as plaintiff), the Consul-General of Spain in Jerusalem had, by order of the trial Judge, been joined as co-plaintiff. Application having been made to the Registrar for the deposit by the co-plaintiff, the Consul-General, of a *cautio judicatum solvi* on the ground that he was resident abroad, the Registrar refused on the ground that the plaintiff was regarded as resident in Israel. On application to the trial Judge,

Held (upholding the order of the Registrar): that the Consulate-General exists indefinitely in Israel, and that having regard to the declaration of the Consul-General as to his willingness to pay the costs if awarded against him, the Court would exercise its discretion and made no order for the deposit of security for costs.

The Court said (*per* Lamm J.): " I agree with counsel for the applicant that the finding of the learned Registrar that the Consul-General is deemed to be a resident since he has voluntarily agreed to be joined as plaintiff in this action, is not correct. The test lies not in the fact that the action has been brought by the Consul-General; the conclusion at which the Registrar has arrived is correct for a different reason. The purpose of the *cautio* is to ensure that if, in the event, costs should be awarded there will exist assets out of which to pay them. Consequently, if there is a plaintiff who ordinarily resides within the jurisdiction there is no need for the *cautio* since there is always someone from whom the costs can be recovered, if so ordered by the Court.

" It is true that personally the Consul-General is only temporarily in Israel and there is a strong likelihood that he will shortly be transferred outside the jurisdiction. But the Consulate-General, as an entity, is permanently resident. The incumbents of the office of Consul change, but the Consulate, as an institution, continues to exist and to act so long as the relations between the two States remain unchanged (and there is no need to assume that there will be any change for the worse in the near future).

"The contract which is the subject of the present action was not executed by the then serving Consul-General in his personal capacity, but was made with the bearer of the Office—the Consul-General—and this contract is binding upon every Consul who fills that office. Even if the Consul is only temporarily resident in Israel, the Consulate, as an entity, and the incumbent of the office of Consul, are not temporary. Even if I accept the definition of ordinary resident contained in the Defence Service Law, 1949[1]—as a person whose ordinary place or residence is within the territory in which the law of the State of Israel applies—I do not see why, on the one hand, we should be so certain that an ordinary resident might not suddenly leave the country and, on the other hand, that we should be afraid lest the Consulate-General of Spain in Jerusalem should be closed and cease its activities . . .

"More serious is the second contention of counsel for the applicant, that even if an order for costs were to be made against the plaintiff, it would be impossible to execute it because of the immunity of the Consul-General. True, we must be careful not to assimilate the status of a consul to that of a diplomatic representative. A consul does not enjoy diplomatic immunity: *Shebabo* v. *Heilen* (No. 2) (*International Law Reports*, 1953, p. 400); Hackworth, *Digest of International Law*, vol. 2, p. 621. . . . I have already stated that in this case the Consulate-General of Spain in Jerusalem constitutes an entity, and not the Consul himself. Accordingly, if costs are awarded against the Consul-General and the judgment should go to execution, payment will be sought not out of the Consul's private property but from the assets of the Consulate-General. I concur in the opinion expressed by Judge Vitkon in the *Shebabo* case previously cited, that property of the Consulate cannot be attached and that no other form of execution can be levied against it. As was said in *Duff Development Co., Ltd.* v. *Government of Kelantan* (*Annual Digest*), 1923–1924, Case No. 65): 'Nor does the waiver of the privilege, implied by submitting to arbitration, involve an actual submission to the enforcement of the award.' True, that case concerned arbitration, but the difference is not material. In that case, as in the present case, there was no possibility of execution. In another case costs have been awarded, and met by a plea of immunity as a ground for not paying them. There was no question of execution. The only sanction available is to refuse leave to appeal. 'If the privilege is insisted upon as a protection against execution for costs ordered to be paid by the Court below, an appeal by the Sovereign may be stayed if application is prompt.' *Duff Development Co., Ltd.* v. *Government of Kelantan* (cited *supra*).

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[1] Authorized translation in *Laws of the State of Israel*, 3 (1949), p. 112.

"If there is no possibility of execution of an order for costs against the Consul, then it follows that the defendants have no security for the costs which may be awarded them unless security is given, and it appears to me that in a normal case I would require a plaintiff who resides outside the jurisdiction to deposit security for costs, or I would require the Consul who is appearing as plaintiff to deposit security. I have the power to do this. It is stated in the *Annual Practice* for 1950, at p. 1447, that plaintiffs whose persons are privileged from arrest, such as ambassadors, may be required to give security. [The Judge also referred to *Costanedu* v. *Clydebank Engineering Co., Ltd* ([1902] A.C. 524), *Costa Rica* v. *Erlanger* (3 Ch. Div., 62), and to the American *Corpus Juris Secundum*, vol. 20, sect. 127, and continued:] But before the Registrar the Consul, through his legal representative, intimated his willingness to bear any costs which the Court might award against him. Having regard to that, it appears to me that it would not be in accord with international courtesy for me not to take that into account. It does not seem to me that a declaration by a representative of a foreign State, a Member of the United Nations, given to a competent court, would not be recognized by that representative at the proper time. *Pacta servanda sunt* is one of the principles of international law, and the said declaration comes within the scope of that principle.

"Accordingly, the Consul's declaration before the Registrar is sufficient and there is no need for additional security. Furthermore, by rule 285 (1) of the Rules of Court of 1938, the Court, Judge or Registrar may, if it or he deems fit, order a plaintiff in any action to give security for the payment of all costs incurred by any defendant. The circumstances in which the Court may use its discretion and order security are not specified, and there is nothing equivalent to the English rule according to which a plaintiff ordinarily resident out of the jurisdiction may be ordered to give security for costs, though he may be temporarily resident within the jurisdiction. Nevertheless, the Israel courts usually apply that rule and I agree that they should do so as regards plaintiffs who are ordinarily resident out of the jurisdiction. But this must not be regarded as a rigid rule, and the learned editor of the *Annual Practice* for 1953 correctly pointed out that this rule is framed in terms which are vague and elastic (at p. 1541) . . .

"Accordingly, it seems to me that the very possibility that the Consulate of Spain in Israel might be closed is not sufficient justification for me to regard it as resident outside the jurisdiction. With regard to the fact that the defendants would not be able to have recourse to the Execution Office if judgment should be given in their favour, it should be pointed out that it is not only foreign Powers that are not subject to the Execution Office. The Government of Israel, also, is not subject thereto, and it would not occur to any legal practitioner to request the Government of Israel to deposit security for costs in an action before the Israel courts initiated by the Government. And if it be objected that in such circumstances application could be made to the High Court of Justice, which would certainly give appropriate relief should the Government of Israel not implement an obligation imposed upon it by a court, it does not follow that the court should order a foreign State to deposit security simply because that particular remedy is not available. There is a presumption that the Government of Israel will discharge its judgment debts and there is a similar presumption that a foreign representation will implement an undertaking given by it . . .

"As regards the plaintiff's contention that the argument based upon immunity was not raised before the Registrar and therefore cannot be raised before me, and that no certificate from the Ministry for Foreign Affairs has been produced to establish the status of the Consulate, there is no rule preventing the parties from raising here arguments which had not been raised before the Registrar.

" This hearing is not an appeal, in the legal sense, from the decision of the Registrar and therefore no person is estopped from raising arguments which were not raised before the Registrar. The status of the Consulate does not depend upon the circumstance that the plea of immunity was or was not raised before me. Whether pleaded or not, I cannot ignore the immunity. As regards the Foreign Ministry certificate, it is an elementary proposition that execution will not issue against a Consulate, and therefore a certificate would be redundant."

[Report: 15 *Pesakim Mehoziim* (1958), p. 3.]

NOTE.—As in the *Shebabo Case* (*supra*), this case concerned a Consul-General who had not requested or received an exequatur from the Government of Israel. However, in contradistinction to the situation in the former case, Spain had not, at the time of these proceedings, recognized Israel, and no diplomatic or consular relations subsisted between the two States. In a survey of the law and practice of Israel in the matter of diplomatic intercourse and immunities submitted to the Secretariat of the United Nations, the following passage appears:

> " The Government of Israel has acquiesced in the presence within its territory of persons styling themselves consuls, being in possession of valid consular patents, sent by States—they are very few in number —which have not recognized Israel and which do not maintain formal diplomatic or consular relations with her. These consuls carry on their activities without any exequatur. They are normally accorded the like administrative privileges and immunities as are accorded to consuls who have been accorded an exequatur. However, the legal status of these individuals has not been passed upon by the Courts and, having regard to the decision in the *Shebabo* case, it cannot be stated with any certainty that their jurisdictional immunity would be upheld in a case involving a private litigant." United Nations Legislative Series, *Laws and Regulations regarding Diplomatic and Consular Privileges and Immunities* (ST/LEG/SER.B/7), 174 at p. 177.

PART VIII

TREATIES

B—CONCLUSION AND OPERATION OF TREATIES

II.—Conditions of Validity of Treaties. Registration of Treaties

Treaties—Validity of—Treaties Inconsistent with Previous Treaty Obligations—Treaties Imposed by Force—Munich Agreement of September 29, 1938, between Germany, Great Britain, France and Italy and Treaty of November 21, 1938, between Germany and Czechoslovakia—Imposition of Nationality and Denial of Right of Option Contrary to Previous Treaty—Refusal to Recognize Nationality Thus Imposed—Non-recognition of German Nationality of Sudeten-Germans.

RATZ-LIENERT AND KLEIN *v.* NEDERLANDS BEHEERS-INSTITUUT.

Holland, Judicial Division of the Council for the Restoration of Legal Rights.

(Van der Pot C.J.; Kollewijn, Wery, Van Vrijberghe de Coningh and Wiarda JJ.)

June 29, 1956.

THE FACTS.— The appellant Mrs. Ratz-Lienert was the sister of and heir to Vinzenz Lienert who was born in 1864 at Schmiedeberg in Bohemia and who had lived for more than fifty years at Aussig, in Sudetenland. He was Austrian by birth, but acquired Czechoslovak nationality by virtue of the Treaty of St. Germain of 1919. During the Second World War he lived at Aussig, but he was forced to leave in 1946. He then settled in Bregenz (Austria) and acquired Austrian nationality in 1951. He died on Febuary 15, 1953. The appellant Klein was born in 1882 at Wächtersdorf in Moravia. He was "*heimatberechtigt*" (had his domicile of origin) at Lobositz in Bohemia. Like Lienert, he was Austrian by birth and acquired Czechoslovak nationality in the same manner. After having lived in London from 1933 till August 1939 and subsequently in Berlin, he settled at Lobositz in February 1945. He was forced to leave in June 1945 and fled to Germany.

The Judicial Division of the Council now had to decide whether Vinzenz Lienert and Josef Klein were to be deemed enemy aliens in the sense of the Netherlands legislation on enemy property, which regarded as enemy aliens *inter alios* individuals who were on May 10, 1940, or had been at any time between that date and July 26, 1951, nationals of an enemy State.

Held: that the appellants had never possessed enemy nationality and were not enemy aliens. The Treaties and enactments under which Ratz-Lienert and Klein were alleged to have acquired German nationality must be regarded for this purpose as void.

I (A) On the question whether the imposition of German nationality upon Sudeten-Germans by the Treaty of Berlin concluded on November 20, 1938, between Germany and Czechoslovakia, by the German " Gesetz über die Wiedervereiniggung der sudetendeutschen Gebiete mit dem deutschen Reich " (Law concerning the Reunion of the Sudeten German Districts with the German Reich) of November 21, 1938, and by the " Verordnung über die deutsche Staatsangehörigkeit in den sudetendeutschen Gebieten " (Decree concerning German nationality in the Sudeten German Districts) of February 12, 1939, was lawful and whether it was lawful to deny a right of option to Sudeten-Germans, the Judicial Division said:

" The German-Czechoslovak Treaty of Berlin (hereinafter called ' the Treaty ') provided in paragraph 1 of Article 1:

> " ' Those German nationals who on October 10, 1938, had their domicile in one of the communes united to the German Reich lose Czechoslovak nationality and acquire German nationality with effect from October 10, 1938, if they—
>
> ' (a) were born before January 1, 1910, in the territory united to the German Reich, . . .'

and in paragraph 2 of that Article:

> " ' German nationals of German race who on October 10, 1938, had their domicile outside the former Czechoslovak State territory lose Czechoslovak nationality and acquire German nationality as from October 10, 1938, if on October 10, 1938, they possessed the right to have their domicile (" *Heimatrecht* ") in one of the communes united to the German Reich.'

" Having regard to the life histories of Lienert and Klein, the definition of paragraph 1 of Article 1 applies to the former and that of paragraph 2 to the latter. The Treaty was consequential to the Munich Agreement of September 29, 1938, between Germany, Great Britain, France and Italy. The Czechoslovak Government accepted this Agreement, under protest, on the following day. The first part of paragraph 7 of the Agreement guaranteed a right of option to individuals belonging to the Sudeten regions which were to be transferred. It ran:

> " ' There will be a right of option into and out of the transferred territories.'

But in the Treaty no such right of option was granted to the majority of the population, those who either by residence or by ' *Heimatberechtigung* ' belonged to the Sudetenland. Such a right therefore was not granted either to Lienert or to Klein.

" Assuming that the Agreement and the Treaty came into being in a lawful manner, the reasons indicated above are sufficient for the rules on nationality questions as laid down in the Treaty to be regarded as unlawful and invalid, because they did not grant a right of option to the individuals concerned. Germany, as a party to the Agreement, and Czechoslovakia, who had declared to the French, British and Italian representatives that she accepted the Munich decisions, had no right to deviate from an express provision in the multilateral Agreement which had the purpose of guaranteeing a very important right to the population of the territory that was to be transferred to Germany.

" The second part of paragraph 7 of the Munich Agreement, which provided that

> " ' A German-Czechoslovak Commission shall determine the details of the option, consider ways of facilitating the transfer of population and settle questions of principle arising out of the said transfer '

cannot affect this conclusion. That provision required and authorized the German-Czechoslovak Commission to settle the details of the option. It did not authorize the Commission to restrict to a small portion of the population of the territories to be transferred the grant of the right of option promised by the first part of paragraph 7. Assuming that such a change would have been possible, an implied amendment of the Munich Agreement in this respect cannot be based on the mere ground that Great Britain, France and Italy refrained from protesting against this violation of paragraph 7 because, within six months after the signature of the Agreement, Germany brought the remaining part of Czechoslovakia under her control and therefore any option for Czechoslovak nationality was made impossible.

" The imposition of German nationality upon Lienert and Klein by the Treaty must therefore be regarded as void. The German Law of November 21, 1938, and the Decree of February 12, 1939, both of which ignored the right of option of the Sudeten-Germans, can therefore not have had the effect of causing Linert and Klein to acquire German nationality."

I (B) On the question of the effect of the duress exercised on Czechoslovakia at the time of the conclusion of the Treaty of Berlin, the Judicial Division said: " The validity of the Treaty as a whole cannot be accepted; it was concluded by Czechoslovakia under clear, inescapable and unlawful duress. Czechoslovakia adhered to the Treaty only after she had under protest consented to the transfer of the Sudetenland to Germany, who was threatening war if she did not. This German threat is a matter of common knowledge. It is sufficient to quote the words addressed to Mr. Chamberlain by Hitler on September 15, 1938, at Berchtesgaden and reported by the former: ' . . . the German Chancellor had made up his mind that the Sudeten Germans must have the right of self-determination and of returning, if they wished, to the Reich. If they could not achieve this by their own efforts, he said, he would assist them to do so, and he declared categorically that rather than wait he would be prepared to risk a world war.'

" Even if the Sudeten Germans were all of one mind, and even if their demands to return '*ins Reich*', with the territory they inhabited, can be regarded as lawful, the German threat of war was unlawful, as its purpose was to support the demands of subjects of a foreign State.

" It is also generally known that Great Britain and France, for the sake of peace and for her own sake, advised Czechoslovakia to accept Germany's demand for the transfer of the Sudetenland (British and French Note to the Czechoslovak Government of September 19, 1938). Further, it is known that Czechoslovakia, who had at first refused, acquiesced during the night of September 21/22 in the transfer of the Sudeten region after new *démarches* by the British and French Ministers at Prague had taken place in which they explained that if Czechoslovakia refused, and in the event of a German invasion, she could not expect British and French assistance. This made it possible for the four Great Powers to begin the Munich Agreement with the words: ' The four Powers . . . , taking into consideration the Agreement, which has already been reached in principle, for the cession to Germany of the Sudeten-German territory . . .' All acts performed thereafter by Czechoslovakia, *e.g.*, the formal acceptance of the Munich Agreement of September 30, 1938, the evacuation of the Sudeten region which was completed on October 10, and the acceptance of the Treaty of Berlin of November 20, 1938, were ineluctably linked with the unlawful German threat of war.

" Consequently, the transfer of the Sudetenland to Germany as well as the Treaty must be regarded as null and void, as they were brought about under unlawful duress exercised upon Czechoslovakia. This view is supported by the fact that shortly after the Second World War broke out the Czechoslovak, British and French Governments repeatedly declared that the Munich Agreement was without effect. The action taken on the occasion of the liberation of Czechoslovakia was in accordance with that view. Then, Czechoslovakia did not purport to annex the Sudetenland as German territory, but regarded it as being Czechoslovak territory temporarily occupied by Germany and liberated from German occupation.

" In the light of these facts it is not possible to recognize the Treaty of Berlin as being lawful because it was based on the assumption of a transfer of the Sudetenland to Germany. As this transfer must be regarded as null and void, German nationality of the

Sudeten-Germans cannot be based upon the German Law of November 21, 1938, or the Ordinance of February 12, 1939. That legislation is derived from ' die Wiedervereinigung der sudetendeutschen Gebiete mit dem deutschen Reiche ' [reunion of the Sudeten-German Districts with the German Reich]. Since this unlawful annexation, camouflaged by the euphemistic title of ' Wiedervereinigung ', cannot be accepted, so no recognition can be given to that legislation in so far as it forced upon the Sudeten-Germans German nationality without option."

II. On the question whether the unlawful imposing of German nationality could have been validated by the Constitutional Decree of the President of the Czechoslovak Republic of August 2, 1945, the Judicial Division said: " At present, international law has not yet been fully developed. There is no international judiciary which is always accessible. A statute of limitation, as known in private law, has not yet matured in international law. In these circumstances there is a possibility that legal situations created by a void treaty may be recognized as valid on the ground that they were confirmed by their continued existence and general acceptance. In this connection the Nederlands Beheers-Instituut has invoked the Presidential Decree of August 2, 1945 (No. 33/1945). It has been argued that by accepting as a fact the loss of the Czechoslovak nationality of the Sudeten-Germans this Decree accepted with retroactive effect the validity of the Agreement and the Treaty and the validity of the German legislation on the German nationality of the Sudeten-Germans. Should that be correct, all objections based upon international law against the German action in this matter would disappear.

" The German translation of Article 1 of the Decree [of August 2, 1945] runs as follows:

> " ' Tschechoslowakische Staatsangehörige deutschen oder ungarischen Vokstums, die entsprechend den Vorschriften einer fremden Besatzungsmacht die deutsche oder ungarische Staatsangehörigkeit erworben haben, haben mit dem Tage einer derartigen Erwerbung die tschechoslowakische Staatsangehörigkeit eingebüsst.'[1]

The basic principle of this Article apparently is that individuals of Czechoslovak nationality—including Sudeten Germans—to whom before or during the war such nationality legislation applied, all retained Czechoslovak nationality until the date on which the Decree entered into force. The Decree therefore proceeds from the nullity of the German legislation and of the Treaties of September 29 and November 20, 1938. As this legislation and these Treaties must be regarded as null and void, the fact that the Czechoslovak Republic rectroactively deprived the Sudeten-Germans, or at least the great

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[[1] German nationals of German or Hungarian nationality who under the directions of a foreign army of occupation have acquired German or Hungarian nationality have, as from the day of such acquisition, lost Czechoslovak nationality.]

majority of them, of Czechoslovak nationality, in no way removed the objections which exist under international law to imposing in 1938 German nationality upon these individuals. In the contrary view of the Nederlands Beheers-Instituut, the international wrong done by Germany to the Sudeten-Germans is to be regarded only as an injustice committed against the Czechoslovak State. This reasoning would imply that the injustice could be regarded as irrelevant because the Sudeten-Germans, as was stated by the German *Verfassungsgericht* [Federal Constitutional Court] (see *Re Czastka* and *Re Rubisch*: *Clunet*, 1954, pp. 848 and 850 respectively), 'were not again the subject of a claim' by that State. This view, however, overlooks the fact that, once the Czechoslovak State had abandoned the Sudeten-Germans and deprived them of Czechoslovak nationality, the injustice done to those *individuals* was not removed. For this reason the consequences of the unlawful measures of 1938 cannot be regarded as valid. That would only have been possible in so far as the Sudeten-Germans might have had the opportunity of accepting freely and in a lawful manner the German nationality imposed upon them in 1938 or in 1945. The argument that individual acceptance was a neccessary condition for an *ex post facto* recognition of the consequences of imposing nationality in 1938, gained support in Germany after and through the judgments of the *Bundesverfassungsgericht* in *Re Czastka* and *Re Rubisch*. That Court in both cases regarded as decisive the question whether the individual concerned 'had consistently made known the essential wish to be treated as a German national' or not. The German Legislature adopted this condition of individual acceptance, albeit in an attenuated form, in the so-called Law for the Unification of Collective Naturalization of February 22, 1955, thus following the lead set by those judgments. The finding of the Nederlands Beheers-Instituut that Vinzenz Lienert and Josef Klein must be regarded as having legally acquired German nationality simply on the basis of the Czechoslovak Decree of 1945 must therefore be rejected."

The Judicial Division further examined the question whether Lienert and Klein could have acquired German nationality under Article 116 of the West-German Constitution or under any other rule of German law which may have developed in German judicial or administrative practice during the period May 1945 to July 26, 1951. The Division answered this question in the negative.

[Reports: *Rechtsherstel*, No. 56/541, XI, p. 1345; *N.J.*, 1956, No. 471 (with a Note by Professor B. V. A. Röling); *Netherlands International Law Review*, IV (1957), p. 88 (with a Note by Judge Erades).

NOTE.—The judgment reported above constitutes one of the last stages in the controversy which arose between two chambers of the Judicial Division for the Restoration of Legal Rights as to the recognition of German nationality imposed upon the inhabitants of territories annexed by Germany before or during the Second World War, in particular the Sudeten-German region and the Free City of Danzig. Some chambers did and some did not recognize such German nationality. Since the judgment rendered with regard to Sudeten-Germans by a special Chamber of Revision of the Judicial Division on July 4, 1955, quashing an earlier judgment of the Division of May 27, 1953 (see *Weber and Weber* v. *Nederlands Beheers-Instituut, supra,* p. 431), the question has now been finally settled in favour of non-recognition.

Cf. also Professor Röling's comments in *Jahrbuch für internationales Recht,* 1959, pp. 277—289, "Zur Staatsangehörigkeit der Sudeten-Deutschen".

Treaties—Conditions of Validity of—Alleged Invalidity on Account of Violation of Fundamental Right of Property as Guaranteed by Constitution, by General International Law, and by the European Convention on Human Rights, 1950—Washington Agreement of May 25, 1946, on German Assets in Switzerland—Agreement between Germany and Switzerland of August 26, 1952, on German Assets in Switzerland—Expropriation of Property for General Purposes—Guarantees of International Agreement Concluded Subsequent to Expropriation—The Law of Germany.

German Assets in Switzerland Case.

German Federal Republic, Federal Constitutional Court.

March 21, 1957.

The Facts.—The appellant, a German citizen, was the owner of a house in Switzerland. In order to preserve his title to the house he paid a sum of money in accordance with an Agreement between Germany and Switzerland whereby German owners of property in the latter country were given the option either of paying certain sums of money related to the value of their property in Switzerland or of losing that property. The appellant contended that the Agreement between the two countries was invalid as violating the fundamental right of private property which formed part of general international law, of German constitutional law, and of the Protocol (signed on March 20, 1952, ratified by the German Federal Republic on December 20, 1956) to the European Convention on Human Rights, 1950.

Held: that the appeal must be dismissed. The Agreement was valid, and the payment made by the appellant accordingly not contrary to law. There was no violation of any alleged rule of general international law protecting private property which went beyond the rule of German constitutional law, according to which property could be expropriated for the common weal; and this was an expropriation for the common weal. As for any alleged violation of the Protocol to the European Convention on Human Rights, the events of which complaint was made had occurred before the ratification of the Protocol by the German Federal Republic, and the Protocol could accordingly not be applied in the present case.

The Court said: " The appellant, whose property in Germany has been totally destroyed by bombs, is the owner of a small house in Switzerland. In order to avoid the liquidation of his property in Switzerland, he has paid the requisite contribution of 3,786.90 Swiss francs. He asks for the three Agreements of March 17, 1953, and the Agreement of August 26, 1952, concerning German Assets in Switzerland to be declared invalid. He contends that these Agreements violate the guarantee of private property and the rule of equality laid down in the German Federal Constitution and the Swiss Federal Constitution, and also the general principles of international law on the protection of private property as well as the guarantee of private property laid down in the Protocol, dated March 20, 1952, to the European Convention on Human Rights. He alleges that German owners were given an alternative by virtue of the Agreement [of August 26, 1952] of either paying the requisite amount to prevent liquidation of their property—which is equal to a partial expropriation in favour of the German Federal Republic—or suffering liquidation of all their Swiss assets. He contends that the waiver provided for in Article 10 (1) of the Agreement is tantamount to expropriation, and that the Agreement was not in the public interest because Switzerland had in any event no longer the intention of carrying out the Washington Agreement. According to the contention put forward by the appellant there was, therefore, no longer any serious danger of German assets in Switzerland being liquidated. In view of this situation the German Federal Republic should have paid him compensation. The fact that he had been exempted from paying any contribution under the German Equalization Law was not equivalent to the payment of compensation because that Law was not applicable to foreign assets seized on the relevant date, and, as a person who had suffered a total loss [in Germany], he was in any event liable to pay only a very small contribution under the Equalization Law. Finally, he contends that the Agreement discriminated against the owners of German property in Switzerland by comparison with the owners of property situate in Germany, and that, therefore, it violates the principle of equality."

The Court then dealt with the question as to whether the appellant was entitled, under German law, to submit his appeal, as " a constitutional complaint ", to the Federal Constitutional Court and answered this question in the affirmative. The Court continued:

" The appellant is not entitled to rely on an alleged violation of the Human Rights Convention of the Council of Europe. It is true that Article 1 of the Additional Protocol to that Convention, which was ratified by the [German] Federal Republic on December

20, 1956, provides for a guarantee of private property, but as this provision is not retroactive it does not apply to events which took place before it came into force. Nor can we apply the Swiss Federal Constitution as a standard by which to measure this question, because this Court has merely to ascertain whether German constitutional law has been violated. The examination of the German-Swiss Agreement from the viewpoint of constitutional law and with reference to the question whether the guarantee of private property and the rule of equality have been violated, must be based on the legal position in which German owners of assets situate in Switzerland found themselves at the time when the Agreement was concluded. Anything that happened before that date was the result of action taken by foreign States by virtue of their sovereign power, which cannot be evaluated by reference to the German Constitution. This basic situation must be compared with the situation which was created by the Agreement. For the purpose of that comparison we cannot take into account only the possibility—selected by the appellant—that liquidation can be prevented by the payment of a contribution, but we must above all regard as relevant the liquidation itself, as being the more serious encroachment.

" The submission of the appellant that in 1952 there was no longer any serious danger of liquidation is not correct. According to a Federal resolution of February 16, 1945, German property in Switzerland was blocked and, from the date of the entry into force of the Washington Agreement, subject to the danger of liquidation, Switzerland had no objections of a constitutional or international legal character to the liquidation provided for in the Agreement, on condition that the full compensation of German owners was guaranteed. Switzerland only wanted to prevent measures being taken against owners of German nationality who were resident in Switzerland. The appellant is not such a person. Switzerland looked upon the conversion of German assets from the point of view of a forced clearing arrangement. Switzerland was determined to carry out the Washington Agreement as soon as the question of compensation had been satisfactorily resolved. Nor were the Allies at any time prepared to waive their rights resulting from the Agreement. As the Allies wished neither to compensate the owners of German property in Switzerland out of the occupation budget, nor to impose any duty upon the German Government to grant compensation, the carrying into effect of the Washington Agreement became for some time doubtful. This, however, does not mean that German owners can rely upon their property being released, because there was a tendency in Switzerland to continue the process of liquidation and to use the proceeds for the purpose of forced clearing in the event of there being no agreement between the States concerned. It is accordingly doubtful whether the Agreement of August 26, 1952, can be regarded as a consent by the German Federal Government to co-operate in the conversion of such property, or whether the liquidation was merely accepted as a measure from which there was no escape. It is further doubtful whether this liquidation can be regarded as an expropriation within the meaning of Article 14 of the German Constitution. Even if we assumed that it was, there would be no constitutional objection to the provision made in the German-Swiss Agreement because the requirements of Article 14 of the Constitution would in any event be satisfied. The Agreement was required in the interest of the common weal.[1]

" The German Federal Government achieved the release—free of all conditions—of all rights in industrial property and of property up to an amount of 10,000 Swiss francs. This was a considerable concession on the part of Switzerland with regard to claims arising from the clearing arrangements, and it enabled the owners of property up to a value of 10,000 Swiss francs to obtain the release of their seized assets, albeit by making certain sacrifices. The proceeds of liquidation must also be regarded as equitable compensation within the meaning of Article 14 (3) of the German Constitution because the procedure governing liquidation contains guarantees against the under-valuation of property which is to be liquidated. In so far as the proceeds of liquidation are subject to the payment of a special capital contribution, we are not concerned with a diminution of compensation but with the payment of a special contribution the liquidation of which remains unaffected by the guarantee of the right of private property laid down in the Constitution. Nor does the manner and amount of the capital contribution violate Article 3 (1) of the Constitution.[2] In so far as the capital contribution is higher than the equalization contribution to be made in respect of assets situate in Germany, such difference is in the nature of things justified. Property which is situate abroad is subject to special hazards and risks by comparison with property situate in Germany. Differential treatment within certain limits—which have not been exceeded in the present case—is, therefore, permissible. Thus the appellant's rights as laid down in Articles 3 and 14 of the Constitution would not even have been violated if he had risked the liquidation of his property. There is even less reason to assume a violation of his rights where he has availed himself of the right granted to him to prevent the liquidation of his property, by the payment of a contribution. As his land was worth less than 15,000 Swiss francs his contribution, having regard to the free limit of 10,000 Swiss francs, amounted to less than one-third of the value of the land.

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[1] " Expropriation for the common weal " is one of the forms of expropriation permitted by Article 14 of the Constitution.]

[2] Article 3 (1) of the Constitution provides that " all men are equal before the law ".]

"There remains the further contention of the appellant that Article 10 of the Agreement violates Article 14 of the Constitution, by depriving him of an acquired right. In so far as the German Federal Republic undertook in Article 10 (1) of the Agreement not to raise any objection to the liquidation of property already carried out or to be carried out in the future, it meant that the German Government would not grant diplomatic protection to the German owners of property situate in Switzerland. The fundamental rights of the appellant cannot be violated by such an undertaking because the Federal Republic has obviously not wantonly neglected its duty of protection but, on the contrary, has discharged that duty by concluding the Agreement. . . . If there is no violation of Article 14 of the Constitution, there cannot be any violation of the general rules of international law for the protection of private property, because there are no such general rules which would go further than the protection of private property guaranteed by the Constitution. The appeal must accordingly be dismissed."

[Report: B Verf GE, vol. 6, p. 290.]

Treaties—Conclusion and Validity of—Treaty Concluded under Duress—German-Czechoslovak Treaty of 1938.

See p. 435 (*Amato Narodni Podnik* v. *Julius Keilwerth Musikinstrumentenfabrik*).

III.—Parties to Treaties. Right to Conclude Treaties. Composite and Dependent States and Territories.

Treaties—Parties to—Position of Signatory States Prior to Ratification—Protocol to European Convention for Protection of Human Rights, 1950—European Commission of Human Rights—Individual Applications—Inadmissibility of Application.

Re APPLICATION NO. 62/55 (MRS. X. *v.* GERMAN FEDERAL REPUBLIC).

European Commission of Human Rights. September 23, 1955.

(Waldock, President; Eustathiades, Berg, Faber, Beaufort, Dominedo, Süsterhenn, Petren, Janssen-Pevtschin, Sørensen, Black, Jonassen, Akbay, Fuest.)

THE FACTS.—The applicant stated that she possessed in Switzerland capital to the amount of 29,000 Swiss francs. The Swiss Government, under an Agreement made on May 25, 1946, with the Allied Powers concerning German assets in Switzerland, sequestrated her capital. Under an arrangement made between the Swiss Government and the Government of the Federal Republic of Germany on

March 19, 1953, the lifting of the sequestration on German property in Switzerland was obtained from the Allied Governments, subject to the payment by Switzerland of 121,000,000 Swiss francs. The applicant complained that, the German Government having required from all Germans owning de-sequestrated property in Switzerland a contribution towards that sum, she had to pay the sum of 8,000 Swiss francs. She claimed that this measure was unjustified and she also claimed repayment of that sum.

Held: that the application must be rejected as the German Federal Republic, although a Signatory of the European Convention for the Protection of Human Rights and Fundamental Freedoms, 1950, had not yet ratified it.

The Commission said: " The applicant alleges a violation of the right of property, guaranteed by Article 1 of the Protocol to the European Convention on Human Rights.[1] That Protocol, however, only binds signatories who have ratified it, as appears from Article 6 thereof.[2] The Federal Republic of Germany has not yet deposited its instruments of ratification of the said Protocol. It follows from the foregoing that the applicant has at present no legal remedy and the application should accordingly be rejected."

[Report: *Documents et Décisions*, 1955–56–57, p. 180 (in French).]

[[1] Article 1 of the Protocol of 1952 provides as follows:

" Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.

" The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties."]

[[2] Article 6 of the Protocol provides:

" This Protocol shall be open for signature by the Members of the Council of Europe, who are the signatories of the Convention; it shall be ratified at the same time as or after the ratification [*sic.*; ? signature] of the Convention. It shall enter into force after the deposit of ten instruments of ratification. As regards any signatory ratifying subsequently, the Protocol shall enter into force at the date of the deposit of its instrument of ratification.

" The instruments of ratification shall be deposited with the Secretary-General of the Council of Europe, who will notify all Members of the names of those who have ratified."]

Treaties—Parties to—Position of Non-Signatories—Position of Signatories Prior to Ratification—European Convention for Protection of Human Rights, 1950—European Commission of Human Rights—Individual Applications—Lack of Competence.

Re APPLICATION NO. 88/55 (X. *v.* GERMAN FEDERAL REPUBLIC).

European Commission of Human Rights. May 29, 1956.

(Waldock, President; Eustathiades, Berg, Faber, Beaufort, Dominedo, Süsterhenn, Petren, Janssen-Pevtschin, Sørensen, Crosbie, Jonasson, Akbay, Fuest.)

THE FACTS.—The applicant complained that her house, situated at B. in the German Federal Republic, had been requisitioned in 1947 for the housing of an American officer. In 1950, at the termination of the requisition, she discovered that a large part of the furniture and other objects of value which had been in the house were missing. She maintained also that the expulsion from her home had affected her health, that she had not received sufficient compensation and that, on September 15, 1955, the *Oberfinanzdirektion* of C. unjustly refused her adequate reparation for the injury she had suffered.

Held: that the application must be rejected. On the one hand, the United States of America was not a party to the European Convention for the Protection of Human Rights and Fundamental Freedoms, 1950; on the other hand, although the facts complained of were covered by the Protocol to the Convention, the Federal Republic of Germany, which had ratified the Convention, had not ratified the Protocol.

The Commission said: " The application, in so far as it is directed against the forces of the United States of America stationed in Germany, is directed against a State which is not a party to the Convention. It should accordingly be rejected in accordance with Article 27, paragraph 2, of the Convention,[1] as incompatible with the provisions of the Convention.

" On the other hand, in so far as the application could be regarded as being directed against the Federal Republic of Germany, its subject-matter would fall within the field of application of the Protocol. Under the terms of Article 6 of the Protocol, it only binds signatories who have ratified it. The German Federal Republic has not yet ratified it. Consequently, as the application does not concern the violation of any of the rights set forth in the Convention, which alone has been ratified by the Federal Republic, it should be rejected on this ground also, in accordance with Article 27, paragraph 2, of the Convention, as incompatible with the provisions of the Convention."

[Report: *Documents et Décisions*, 1955–56–57, p. 180 (in French).]

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[1] See *supra*, p. 279, n. 2.

Treaties—Parties to—Position of Signatory States Prior to Ratification—European Convention for Protection of Human Rights and Fundamental Freedoms, 1950, and Protocol, 1952—European Commission of Human Rights—Lack of Competence.

See p. 355 (*Re Application No.* 150/56 (*X.* v. *German Federal Republic*)); p. 404 (*Re Application No.* 188/56 (*X.* v. *German Federal Republic*)); and p. 417 (*Re Application No.* 276/57 (*Mrs. X.* v. *German Federal Republic*)).

Treaties—Parties to—Position of Non-Signatory States—European Convention for Protection of Human Rights and Fundamental Freedoms, 1950—European Commission of Human Rights—Lack of Competence.

See p. 401 (*Re Application No.* 182/56 (*X.* v. *German Federal Republic*)) and p. 415 (*Re Application No.* 262/57 (*X.* v. *German Federal Republic*)).

Treaties—Parties to—Requirement of Full Sovereignty.

See p. 602 (*Franco-Ethiopian Railway Company Claim*), at p. 617.

IV.—Constitutional Limitations

Treaties—Conclusion and Operation of—Constitutional Limitations—Executive Agreement—NATO Status of Forces Agreement, 1951—As Source of Jurisdiction under Municipal Law—Requirement of Conformity with Constitution—The Law of the United States of America.

REID *v.* COVERT.

United States, Supreme Court. June 11, 1956, *and June* 10, 1957.

(Warren C.J.; Black, Frankfurter, Douglas, Burton, Clark, Harlan, and Brennan JJ.)

THE FACTS.—These proceedings involved two cases which were consolidated before the Supreme Court.

In the first, Mrs. Covert had been tried by a United States Air Force Court-martial for the murder of her husband, a sergeant in the United States Air Force, at an airbase in England. The Court-martial asserted jurisdiction over Mrs. Covert under Article 2 (11) of the Uniform Code of Military Justice (64 Stat. 109, 10 U.S.C. § 802 (11)), which provides:

> " The following persons are subject to this code:
>
> . . . .
>
> " (11) Subject to the provisions of any treaty or agreement to which the United States is or may be a party or to any accepted rule

> of international law, all persons serving with, employed by, or accompanying the armed forces without the continental limits of the United States . . ."

Mrs. Covert was found guilty of murder and was sentenced to life imprisonment. The judgment was affirmed by the Air Force Board of Review (16 C.M.R. 465 (1954)) but was reversed by the Court of Military Appeals (6 U.S.C.M.A. 48, 19 C.M.R. 174 (1955)) because of prejudicial errors concerning a defence of insanity. While Mrs. Covert was being held in the United States pending a proposed retrial by Court-martial, her counsel petitioned the District Court for a writ of habeas corpus on the ground that the Constitution forbade her trial by court-martial. The District Court ordered her to be released from custody, and the Government appealed directly to the Supreme Court.

In the second case, Mrs. Smith killed her husband, an Army officer, at a post in Japan where she was living with him. She was tried for murder and found guilty and sentenced to life imprisonment. The judgment was approved by the Army Board of Review (10 C.M.R. 350 (1953), 13 C.M.R. 307 (1953)) and by the Court of Military Appeals (5 U.S.C.M.A. 314, 17 C.M.R. 314 (1954)). She was confined in a penitentiary in the United States, and her father petitioned for habeas corpus in the District Court on the same ground as in the case of Mrs. Covert. The District Court refused to issue the writ (*United States ex rel. Krueger* v. *Kinsella*, 137 F. Supp. 806 (S.D.W.Va. 1956)), and while an appeal was pending in the Court of Appeals, the Supreme Court granted *certiorari*.

Held (*sub nom. Kinsella* v. *Krueger*; *Reid* v. *Covert*): that the petitions for habeas corpus must be denied. The military trial of civilian dependents accompanying the armed forces overseas was not unconstitutional. [Reports: 351 U.S. 470, 487, 100 L.Ed. 1342, 1352, 76 Sup.Ct. 880.]

The Supreme Court subsequently granted a petition for rehearing.

Held: that the petitions for habeas corpus must be granted. The trial by court-martial of civilian dependents accompanying the armed forces was unconstitutional. Treaties concluded by the United States and laws enacted pursuant to them must comply with the provisions of the United States Constitution, the protection of which extended to United States citizens outside the United States.

In the course of an opinion devoted in the main to the municipal law of the United States, the Court said (*per* Black J.):

"II.

"At the time of Mrs. Covert's alleged offense, an executive agreement was in effect between the United States and Great Britain which permitted United States' military courts to exercise exclusive jurisdiction over offenses committed in Great Britain by

American servicemen or their dependents.[1] For its part, the United States agreed that these military courts would be willing and able to try and to punish all offences against the laws of Great Britain by such persons. In all material respects, the same situation existed in Japan when Mrs. Smith killed her husband.[2] Even though a court-martial does not give an accused trial by jury and other Bill of Rights protections, the Government contends that Art. 2 (11) of the UCMJ, insofar as it provides for the military trial of dependents accompanying the armed forces in Great Britain and Japan, can be sustained as legislation which is necessary and proper to carry out the United States' obligations under the international agreements made with those countries. The obvious and decisive answer to this, of course, is that no agreement with a foreign nation can confer power on the Congress, or on any other branch of Government, which is free from the restraints of the Constitution.

"Article VI, the Supremacy Clause of the Constitution, declares:

> "'This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; . . .'

There is nothing in this language which intimates that treaties and laws enacted pursuant to them do not have to comply with the provisions of the Constitution. Nor is there anything in the debates which even suggest such a result. These debates as well as the history that surrounds the adoption of the treaty provision in Article VI make it clear that the reason treaties were not limited to those made in 'pursuance' of the Constitution was so that agreements made by the United States under the Articles of Confederation, including the important peace treaties which concluded the Revolutionary War, would remain in effect.[3] It would be manifestly contrary to the objectives of those who created the Constitution, as well as those who were responsible for the Bill of Rights—let alone alien to our entire constitutional history and tradition—to construe Article VI as permitting the United States to exercise power under an international agreement without observing constitutional prohibitions.[1] In effect, such construction would permit amendment of that document in a manner not sanctioned by Article V. The prohibitions of the Constitution were designed to apply to all branches of the National Government and they cannot be nullified by the Executive or by the Executive and the Senate combined.

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[1] Executive Agreement of July 27, 1942, 57 Stat. 1193. The arrangement now in effect in Great Britain and the other North Atlantic Treaty Organization nations, as well as in Japan, is the NATO Status of Forces Agreement, 4 U.S. Treaties and Other International Agreements 1792, T.I.A.S. 2846, which by its terms gives the foreign nation primary jurisdiction to try dependents accompanying American sevicemen for offenses which are violations of the law of both the foreign nation and the United States. Art. VII, §§ 1 (b), 3 (a). The foreign nation has exclusive criminal jurisdiction over dependents for offenses which only violate its laws. Art VII, § 2 (b). However, the Agreement contains provisions which require that the foreign nations provide procedural safeguards for our nationals tried under the terms of the Agreement in their courts. Art. VII, § 9. Generally, see Note, 70 Harv. L. Rev. 1043.

Apart from those persons subject to the Status of Forces and comparable agreements and certain other restricted classes of Americans, a foreign nation has plenary criminal jurisdiction, of course, over all Americans—tourists, residents, businessmen, government employees and so forth—who commit offenses against its laws within its territory.

[2] See Administrative Agreement, 3 U.S. Treaties and Other International Agreements 3341, T.I.A.S. 2492.

[3] See the references collected in 4 Farrand, Records of the Federal Convention (Rev. ed. 1937), 123.

“ There is nothing new or unique about what we say here. This Court has regularly and uniformly recognized the supremacy of the Constitution over a treaty.[2] For example, in *Geofroy* v. *Riggs*, 133 U.S. 258, 267, it declared:

> “ ‘The treaty power, as expressed in the Constitution, is in terms unlimited except by those restraints which are found in that instrument against the action of the government or of its departments, and those arising from the nature of the government itself and of that of the States. It would not be contended that it extends so far as to authorize what the Consitution forbids, or a change in the character of the government or in that of one of the States, or a cession of any portion of the territory of the latter, without its consent.’

“ This Court has also repeatedly taken the position that an Act of Congress, which must comply with the Constitution, is on a full parity with a treaty, and that when a statute which is subsequent in time is inconsistent with a treaty, the statute to the extent of conflict renders the treaty null.[3] It would be completely anomalous to say that a treaty need not comply with the Constitution when such an agreement can be overridden by a statute that must conform to that instrument.

“ There is nothing in *Missouri* v. *Holland*, 252 U.S. 416,[4] which is contrary to the position taken here. There the Court carefully noted that the treaty involved was not inconsistent with any specific provision of the Constitution. The Court was concerned with the Tenth Amendment which reserves to the States or the people all power not delegated to the National Government. To the extent that the United States can validly make treaties, the people and the States have delegated their power to the National Government and the Tenth Amendment is no barrier.[1]

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[1] See the discussion in the Virginia Convention on the adoption of the Constitution, 3 Elliot's Debates (1836 ed.) 500–519.

[2] *E.g.*, *United States* v. *Minnesota*, 270 U. S. 181, 207–208; *Holden* v. *Joy*, 17 Wall. 211, 242–243; *The Cherokee Tobacco*, 11 Wall. 616, 620–621; *Doe* v. *Braden*, 16 How. 635, 657. Cf. *Marbury* v. *Madison*, 1 Cranch 137, 176–180. We recognize that executive agreements are involved here but it cannot be contended that such an agreement rises to greater stature than a treaty.

[3] In *Whitney* v. *Robertson*, 124 U. S. 190, the Court stated, at p. 194: “ By the Constitution a treaty is placed on the same footing, and made of like obligation, with an act of legislation. Both are declared by that instrument to be the supreme law of the land, and no superior efficacy is given to either over the other. . . . [I]f the two are inconsistent, the one last in date will control the other . . .” *Head Money Cases*, 112 U. S. 580; *Botiller* v. *Dominguez*, 130 U. S. 238; *Chae Chan Ping* v. *United States*, 130 U. S. 581. See *Clark* v. *Allen*, 331 U. S. 503, 509–510 [*Annual Digest*, 1947, Case No. 82]; *Moser* v. *United States*, 341 U. S. 41, 45.

[[4] See *Annual Digest*, 1919–1922, Case No. 1.]

" In summary, we conclude that the Constitution in its entirety applied to the trials of Mrs. Smith and Mrs. Covert. Since their court-martial did not meet the requirements of Art III, § 2 or the Fifth and Sixth Amendments we are compelled to determine if there is anything *within* the Constitution which authorizes the military trial of dependents accompanying the armed forces overseas. . . ."

(The Court then dealt with other aspects of the constitutional law of the United States.)

(Frankfurter and Harlan JJ. filed separate opinions concurring in the result. Clark J., with whom Burton J. joined, dissented.)

[Reports: 354 U.S. 1, 1 L.Ed.2d 1148, 77 Sup.Ct. 1222.]

NOTE.—The above case is discussed by Mayhew, " Peacetime Jurisdiction of Courts-Martial Over Civilian Components of the Armed Services in Foreign Countries: The Smith and Covert Decisions", in *U.C.L.A. Law Review*, 3 (1956), p. 279, and is noted in *Boston University Law Review*, 37 (1957), p. 528; *Duke Bar Journal*, 7 (1958), p. 155; *Harvard Law Review*, 71 (1957–58), pp. 136 and 712; *Hastings Law Journal*, 9 (1957), p. 85; *Howard Law Journal*, 4 (1958), p. 92; *Iowa Law Review*, 43 (1958), p. 415; *Journal of Public Law*, 6 (1957), p. 540; *Louisiana Law Review*, 19 (1958), p. 190; *Maryland Law Review*, 17 (1957), p. 335; *Miami Law Quarterly*, 11 (1957), p. 425; *Michigan Law Review*, 56 (1957), p. 287; *Minnesota Law Review*, 42 (1958), pp. 490 and 825; *New York University Law Review*, 32 (1957), p. 594; *St. John's Law Review*, 32 (1957), p. 108; *Southwestern Law Journal*, 12 (1958), p. 230; *Syracuse Law Review*, 8 (1956), p. 98; *U.C.L.A. Law Review*, 5 (1958), p. 132; *Vanderbilt Law Review*, 11 (1957). p. 202; *Washington and Lee Law Review*, 15 (1958), p. 79; [1957] *Washington University Law Quarterly*, p. 384; and *West Virginia Law Review*, 60 (1957), p. 86.

Treaties—Operation and Enforcement of—Constitutional Limitations—Warsaw Convention of 1929 Relating to International Air Transport—Whether Consistent with Constitution of United States of America—Seventh Amendment to Constitution Relating to Trial by Jury.

PIERRE *v.* EASTERN AIR LINES, INC.; PIERRE *v.* FOXWORTH.

United States, District Court, District of New Jersey. June 27, 1957.

THE FACTS.—This was an action against an airline and one of its employees for damages for injuries sustained in the course of an international flight. The defendant airline and employee set up as affirmative defences Article 22 of the Convention for the Unification of Certain Rules regarding International Air Transport, signed at Warsaw on October 12, 1929 (49 Stat. 3000, T.S. No. 876, 137 L.N.T.S. 11) (the Warsaw Convention), which limits liability for death or injury to $8,300. The plaintiff moved to strike out the defence of the carrier on the ground that the limitation of liability violated the VIIth Amendment to the Constitution of the United States, which preserves the right of trial by jury. The Government of the United States intervened.

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[1] See *United States* v. *Darby*, 312 U. S. 100, 124–125, and the authorities collected there.

Held: that the motion to dismiss the case as to the defendant airline must be denied, but that the motion be granted as to the defendant employee. In view of the prevalence of statutes denying the jury the right to fix damages in wrongful death and personal injury actions, the limitation of liability in the Warsaw Convention did not contravene the VIIth Amendment to the Constitution of the United States. The Warsaw Convention did not, however, have any application to an action against an employee of an air carrier.

The Court said: " In considering this question, it is necessary to keep in mind Article VI of the Constitution which provides as follows: ' This constitution, and the laws of the United States which shall be made in pursuance thereof, and all treaties made, or which shall be made under the authority of the United States, shall be the supreme law of the land.' Article II, section 2, of the Constitution sets forth the method of making treaties, such power being placed in the President by and with the advice and consent of the Senate, provided two thirds of the senators present concur.

" The Warsaw Convention regulates and applies to all international transportation of persons, baggage, or goods performed by aircraft for hire. Its purpose is to unify rules for international air traffic and to facilitate such traffic. The United States is not a signatory to the Convention but has declared its adherence to the provisions thereof by a Declaration of Adherence, advised by the Senate, and deposited at Warsaw on July 31, 1934. With congressional implementation it entered into force for the United States on October 29, 1934. The Convention therefore, for all intents and purposes, has the general effect of a treaty. It may be well to state at this juncture that the Warsaw Convention provides that each passenger on an international flight (or in case of death, the personal representative of the passenger) shall receive provable damages against the carrier to the extent of an international gold standard of approximately $8,300, in case of ordinary negligence. The carrier must pay this without any showing of negligence or fault unless it (the carrier) can prove that it and its servants were free from all fault. In the event that the passenger can prove an exceptional or gross degree of negligence on the part of the carrier or its servants, the passenger may recover all provable damages without limitation.

" It is well settled that no article or term of a treaty may nullify any guarantee of a right preserved by constitutional provision to our citizens. No treaty may authorize what the Constitution forbids. *Geofroy* v. *Riggs*, 133 U.S. 258, 10 S.Ct. 295, 33 L.Ed. 642, See, also, *State of Missouri* v. *Holland*, 252 U.S. 416, 40 S.Ct. 382, 64 L.Ed. 641;[1] *United States* v. *Curtiss-Wright Export Corp.*, 299 U.S. 304, 57 S.Ct. 216, 81 L.Ed. 255[2]; *United States* v. *State of Minesota*, 270 U.S. 181, 46 S.Ct. 298, 70 L.Ed. 539; *United States* v. *Guy W. Capps, Inc.*, 348 U.S. 296, 75 S.Ct. 326, 99 L.Ed. 329.[3]

" The court is faced with two constitutional provisions and asked to determine whether there is conflict between the express pronouncement of one and an agreement entered into under authority of the other. If the limitation of damages under the Warsaw Convention is in contravention of the preservation of the right to trial by jury, as set forth in Amendment VII to the Constitution of the United States, it must yield to the specific declaration of the Bill of Rights.

" Just what is included in the general term ' trial by jury '? It includes the essential elements of a jury trial as they were recognized in this country and in England when the Constitution was adopted. The basic elements were that the jury should consist of twelve men, neigher more nor less; that the jury should be the trier of facts; that the trial should be in the presence of and under supervision of a judge, empowered to instruct jurors as to the law; and that the verdict be unanimous. So long as these elements are preserved, there is no violation of the constitutional right to trial by jury. The heart of the matter is to decide what constitutes the province of the jury as trier of the facts, and in the instant case whether the assessment of damages is an essential and inseparable function of the jury's right to try facts. Substantive causes of action, as they existed in the English common law, are not preserved by this constitutional guarantee, nor are the nature and extent of legal duties or remedies in causes of action so preserved. In civil actions within the contemplation of the Constitution, the fact of *liability* for damages was unquestionably within the sole province of the jury, and so long as the right of action existed, the question of fact of liability remained a jury question. There remains the inquiry as to whether the assessment of damages is inextricably involved in the determination of the fact of liability.

" In many instances, such as the limitation of liability in admiralty cases, the Longshoremen and Harbor Workers Compensation Act, 33 U.S.C.A. § 901 *et seq.*, and in construction of various State Workmen's Compensation Acts, it has been held that there was violation of neither the due process clause, Article V, nor the right to trial by jury, Article VII, of the Amendments to the Constitution. In all such modifications of legal practice, it would seem, analogically at least, that the assessment of damages is not to be considered an exclusive function of the jury. At common law the assessment of damages in a default, in tort and in contract, was not considered a function of the jury and stood upon a different footing from the trial of issues of fact. The measuring of damages by a jury, therefore, would seem to be a matter of practice rather than of right. If this be so, and the general trend of opinion seems so to indicate, then there is no violation of the constitutional guarantee of the right to trial by jury in the limitation of the amount of damages. The jury in this instant case may award damages in the provable amount up to, but not in excess of, the limitation imposed by the Warsaw Convention. A reasonable *quid pro quo* is provided in the alteration of the necessity for proof of negligence as it existed before the acceptance of the Warsaw Convention. The difficulty of such proof in a great many cases is easily apparent. In New Jersey it has been met by legislative enactment (N.J.S.A. 6:2–7) asserting absolute liability of owner of aircraft for injuries to persons or property, whether such owner was negligent or not, unless the injury was caused in whole or in part by the injured person. In some thirteen states recovery for wrongful death is limited to sums set forth statutorily. These are limitations on the pre-existent practice of allowing the jury to determine the amount of damages to be allowed, and even more significantly, changing the hitherto established requirement of determination of negligence on the part of the defendant by the jury before recovery may be had. The change in legal position results from the transformation that progress has wrought in so many fields. It is not only time that marches on, but also life and its complexities with the legal consequences therof.

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[1] [See *Annual Digest*, 1919–1922, Case No. 1.]
[2] [*Ibid.*, 1935–1937, Case No. 18.]
[3] [See *International Law Reports*, 1953, p. 412.]

" This court opines that there is no conflict between the provision of limitation of liability in the Warsaw Convention and the VIIth Amendment to the Constitution.

" The Government of the United States, in its intervening capacity, raised the further question as to whether the adherence of the United States to the Warsaw Convention did not create a new substantive right, inferentially abolishing other causes of action in the same circumstances, which right was unknown to the common law, and which would justify the provision for limitation of damages. This question the court deems it unnecessary to pass upon as it feels that its finding in the premises is dispositive of the motion.

"As for the case against the defendant Foxworth the situation is different. The Warsaw Convention at the time of the accident (1953) applied to the carrier only. Various efforts had been made to amend the terms of the Convention to include the servants and agents of the carrier in the provision of limitation of liability, but to no avail. Not until 1955 was the limitation so extended in Article

25 A of the Convention. Therefore the general practice and rules prevalent in the trial of negligence cases unaffected by the terms of the Warsaw Convention, will control the trial of the plaintiff against the defendant Foxworth."

[Reports: 152 F. Supp. 486, 5 Avi. 17, 515, 1957 U.S. & Can. Av. 431.]

Treaties—Conclusion and Operation of—Constitutional Limitations—Reservation Relating to Matter of Domestic Concern—Allocation of Waters Provided under Treaty—The Law of the United States of America.

See p. 557 (*Power Authority of the State of New York* v. *Federal Power Commission*).

V.—Reservations

Treaties—Conclusion and Operation of—Reservations—What Constitutes a Reservation—Purported " Reservation " Relating to Matter of Domestic Concern—Constitutional Limitations on—The Law of the United States of America.

POWER AUTHORITY OF THE STATE OF NEW YORK *v.* FEDERAL POWER COMMISSION.

United States, Court of Appeals, District of Columbia Circuit.

June 20, 1957.

Supreme Court. November 18, 1957.

THE FACTS.—The Power Authority, an agency of the State of New York, had applied to the Federal Power Commission for a licence to construct a power project to utilize all of the Niagara River water which was available for American exploitation under the Treaty between the United States and Canada Concerning Uses of the Waters of the Niagara River, signed at Washington on February 27, 1950 (1 U.S.T. 694, T.I.A.S. No. 2130, 132 U.N.T.S. 223).

In consenting to the ratification of the Treaty, the Senate of the United States had attached the following " reservation ":

" The United States on its part expressly reserves the right to provide by Act of Congress for redevelopment, for the public use and benefit, of the United States share of the waters of the Niagara River made available by the provisions of the treaty, and no project for redevelopment of the United States share of such waters shall be undertaken until it be specifically authorized by Act of Congress."

The Commission dismissed the Power Authority's application on November 30, 1956, in an opinion and order declaring:

" In the absence of the treaty reservation we would act on the Power Authority's application in accordance with the provisions of the Federal

Power Act [16 U.S.C.A. § 791a *et seq.*] But if we are to accept the injunction of the reservation as it stands, we would have no authority to consider the application of the Power Authority on its merits. . . .

" Since the reservation here was intended by the Senate as part of the treaty and was intended to prevent our jurisdiction attaching to the water made available by the treaty, it is entirely authoritative with us as the Supreme Law of the Land under Article VI of the Constitution. . . .

" We are without authority to issue a licence for the redevelopment (Project No. 2216) proposed by the Power Authority of the State of New York."

The Power Authority brought the present action for review of the order on the grounds that the " reservation " by the Senate could amend the Federal Power Act only if it was a valid exercise of the treaty-making power; that it could not be a valid exercise of this power because it related solely to a matter of domestic concern; and that the reservation was not in legal contemplation a part of the Treaty with Canada.

Held (by the Court of Appeals): that the order of the Federal Power Commission must be set aside and the case sent back to the Commission. The purported " reservation " was no more than an expression of the desires of the Senate and was not a part of the Niagara Waters Treaty. The instrument was not a reservation in that it did not make any change in the relationships between the United States and Canada under the Treaty and had nothing to do with the rights or duties of the parties. Failure to give effect to the " reservation " as part of the Treaty did not vitiate the consent of the Senate to the ratification of the Treaty. Although the Court of Appeals indicated that the constitutionality of a treaty provision changing the existing statutory law regarding the domestic utilization of water as provided under the Treaty would be open to grave doubt, it did not decide the constitutional question.

The Court said: " The parties agree that, if the reservation to the 1950 treaty is not ' Law of the Land ', the order should be set aside. Since the reservation did not have the concurrence of the House of Representatives, it is not ' Law of the Land ' by way of legislation.[1] The question is whether it became ' Law of the Land ' as part of the treaty.

" The Commission argues that the reservation is an effective part of the treaty because: (1) it was a condition of the Senate's consent to the ratification of the treaty; (2) the condition was sanctioned by the President, was ' accepted ' by Canada, and was included in the exchange of ratifications; and (3) it ' thus became a part of the Treaty.' Simple as this argument seems, we cannot agree with it.

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[1] *New York Indians* v. *United States*, 1898, 170 U.S. 1, 23, 18 S.Ct. 531, 42 L.Ed. 927; *Fourteen Diamond Rings* v. *United States*, 1901, 183, U.S. 176, 184, 22 S.Ct. 59, 46 L.Ed. 138, concurring opinion of Mr. Justice Brown.

"The treaty was signed on behalf of the United States and Canada on February 27, 1950. It defined the quantity of Niagara River water which was to be available for power purposes and provided that it 'shall be divided equally between the United States of America and Canada.' How each party was to exploit its share of the water was left for that party to decide.

"In transmitting the treaty to the Senate on May 2, 1950, the President pointed out that the treaty did not determine how the United States was to exploit its share of the water. He said:

"'. . . It is a question which we in the United States must settle under our own procedures and laws. It would not be appropriate either for this country or for Canada to require that an international agreement between them contain the solution of what is entirely a domestic problem.'[1]

The Foreign Relations Committee of the Senate agreed that the question was 'domestic in nature' and 'concerns the United States constitutional process alone.' It recommended the reservation because, without it, 'the redevelopment for power purposes would be governed by the Federal Power Act. The Committee intends by the reservation to retain that power in the hands of Congress.'[2] The Senate accepted the Committee's recommendation and consented to the ratification of the treaty with the reservation on August 9, 1950.[3]

"Meanwhile, the Canadian Parliament had approved the treaty as signed, without the reservation. In a note on August 17, 1950, the Legal Adviser of the Department of State called the attention of the Canadian Government to the Senate action, saying:

"'It appears that, while recognizing the subject matter of the reservation as domestic in nature and concerning the United States constitutional process alone, the Senate considered the reservation necessary in order to make certain that implementation of the treaty on the part of the United States would be made only by specifically authorized acts of Congress and would not be governed by the Federal Power Act.'

A week later, without waiting for Canadian reaction to the reservation, the President ratified the treaty subject to the reservation. On September 21, 1950, the Canadian Ambassador, replying to the State Department's note, advised that his government accepted the reservation and would indicate its acceptance 'by a statement to be included in the Protocol of exchange of ratifications.' Two weeks later, without resubmitting the treaty to Parliament for approval of the reservation, the Canadian Government ratified the treaty. In the Protocol, on October 10, 1950, Canada inserted the following statement:

'Canada accepts the above-mentioned reservation because its provisions relate only to the internal application of the Treaty within

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[1] Senate Executive N, 81st Cong., 2d Sess. 3.
[2] S.Exec.Rep. No. 11, 81st Cong., 2d Sess. 7.
[3] 96 Cong. Rec. 12095.

> the United States and do not affect Canada's rights or obligations under the Treaty.'

The Canadian view that the reservation was of purely domestic concern to the United States and of no concern to Canada was shared, as we have shown, by the President, the Department of State and the Senate.

" Unquestionably the Senate may condition its consent to a treaty upon a variation of its terms. The effect of such a ' consent ' by analogy to contract law, is to reject the offered treaty and to propose the variation as a counter-offer which will become a binding agreement only if accepted by the other party.[1] But, if what the Senate seeks to add was implicit in the original offer, the purported ' conditional acceptance ' is an acceptance and the contract arises without a further acceptance by the other party being required. Restatement, Contracts § 60, comment a (1932). The disposition of the United States share of the water covered by this treaty was, even apart from the reservation, something ' which we in the United States must settle under our own procedures and laws.' The reservation, therefore, made no change in the treaty. It was merely an expression of domestic policy which the Senate attached to its consent. It was not a counter-offer requiring Canadian acceptance before the treaty could become effective. That Canada did ' accept ' the reservation does not change its character. The Canadian acceptance, moreover, was not so much an acceptance as a disclaimer of interest. It is of some significance in this regard that the Canadian Government, although it had submitted the original treaty to the Parliament for its approval, found it unnecessary to resubmit the treaty to Parliament after the reservation was inserted. Also significant is the fact that the President ratified the treaty with the reservation without even waiting for Canada to ' accept.'

" A true reservation which becomes a part of a treaty is one which alters ' the effect of the treaty in so far as it may apply in the relations of [the] State with the other State or States which may be parties to the treaty.' Report of the Harvard Research in International Law, 29 *Am.J. Int'l L.* Supp. 843, 857 (1935). It creates ' a different relationship between ' the parties and varies ' the obligations of the party proposing it . . .' 2 Hyde, *International Law, Chiefly As Interpreted and Applied by the United States* (2d revised ed. 1945) 1435; International Law Commission, 2d Sess., Report on the Law of Treaties by J. N. Brierly, U.N. Doc. A/CN. 4/23, 14 April 1950, pp. 41, 42–43. The purported reservation to the 1950 treaty makes no change in the relationship between the United States and Canada under the treaty and has nothing at all to do with the rights or obligations of either party. To the extent here relevant, the treaty was wholly executed on its effective date. Each party became entitled to divert its half of the agreed quantum of water. Neither party had any interest in how the share of the other would be exploited, nor any obligation to the other as to how it would exploit its own share. The Senate could, of course, have attached to its consent a reservation to the effect that the rights and obligations of the signatory parties should not arise until the passage of an act of Congress. Such a reservation, if accepted by Canada, would have made the treaty executory. But the Senate did not seek to make the treaty executory. By the terms of its consent, the rights and obligations of both countries arose at once on the effective date of the treaty. All that the Senate sought to make executory was the purely municipal matter of how the American share of the water was to be exploited.

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[1] " A reservation is upon analysis the refusal of an offer and the making of a fresh offer." 1 Oppenheim, *International Law* (8th ed., Lauterpacht, 1955) 914.

" A party to a treaty may presumably attach to it a matter of purely municipal application, neither affecting nor intending to affect the other party. *But such matter does not become part of the treaty.* The Republic of New Granada, in 1857, attached such purely municipal matter to its ratification of a treaty with the United States. The President of the United States treated the added articles as being no part of the treaty. He ratified the treaty without resubmitting it to the Senate, stating in the Protocol of Exchange of Ratifications:

> ' . . . considering the said articles as in no way affecting the provisions of the said Treaty, but as being acts simply of domestic legislation[1] on the part of the Granadian Confederacy, and as implying no reciprocal obligation on the part of the United States, the said exchange has this day been effected in due form.' [Miller, *Reservations To Treaties* (1919) 27.]

" The constitutionality of the reservation as a treaty provision was extensively argued by the parties. The respondent merely suggests that ' there is no apparent limit ' to what may be done under the treaty power, citing *State of Missouri* v. *Holland*, 1920, 252 U.S. 416, 40 S.Ct. 382, 64 L.Ed. 641.[2] Intervenor Rochester Gas and Electric Corporation puts the proposition more baldly. It defends this reservation as an ' exercise of the treaty-making power to legislate in the domestic field . . .,' calling our attention to the fact that the Supreme Court has never held a treaty provision unconstitutional.[3] But it has been pointed out that the Court has never had occasion to consider a treaty provision which ' lacked an obvious connection with a matter of international concern.' 2 Hyde, *International Law, Chiefly As Interpreted and Applied By the United*

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[1] Under our Constitution, of course, such matter added to a treaty cannot be effective as legislation. *Supra*, . . . [p. 558, n. 1].

[[2] See *Annual Digest*, 1919–1922, Case No. 1.]

[3] But *cf. United States* v. *Guy W. Capps, Inc.*, 4 Cir., 1953, 204 F.2d 655, affirmed on other grounds, 1955, 348 U.S. 296, 75 S.Ct. 326, 99 L.Ed. 329 [*International Law Reports*, 1953, p. 412.]

States (2d revised ed. 1945) 1401. The instant reservation is *sui generis.* There is complete agreement by all concerned that it relates to a matter of *purely domestic* concern.

" In *State of Missouri* v. *Holland,* 252 U.S. at page 433, 40 S.Ct. at page 383, Mr. Justice Holmes questioned, but did not decide, whether there was any constitutional limitation on the treaty-making power other than the formal requirements prescribed for the making of treaties.[1] The treaty he sustained related to a ' national interest of very nearly the first magnitude ' which ' can be protected only by national action in concert with that of another power.' Id., 252 U.S. at page 435, 40 S.Ct. at page 384. And it conferred rights and imposed obligations upon both signatories. Id., 252 U.S. at page 431, 40 S.Ct. at page 383. The treaty power's relative freedom from constitutional restraint, so far as it attaches to ' any matter which is properly the subject of negotiation with a foreign country,' *Ware* v. *Hylton,* 1796, 3 Dall. 199, 1 L.Ed. 568, is a long-established fact. *Geofroy* v. *Riggs,* 1890, 133 U.S. 258, 10 S.Ct. 295, 33 L.Ed. 642. No court has ever said, however, that the treaty power can be exercised without limit to affect matters which are of purely domestic concern and do not pertain to our relations with other nations.

" Our present Secretary of State has said that the treaty power may be exercised with respect to a matter which ' reasonably and directly affects other nations in such a way that it is properly a subject for treaties which become contracts between nations as to how they should act '; and not with respect to matters ' which do not essentially affect the actions of nations in relation to international affairs, but are purely internal.'[2] He had earlier said:

> " ' . . . I do not believe that treaties should, or lawfully can, be used as a device to circumvent the constitutional procedures established in relation to what are essentially matters of domestic concern.[3]

" Charles Evans Hughes, just before he became Chief Justice and after he had been Secretary of State, addressing himself to the question whether there is any constitutional limitation of the treaty power, said:

> " ' . . . The Supreme Court has expressed a doubt whether there could be any such . . . But if there is a limitation to be implied, I should say it might be found in the *nature* of the treaty-making power.
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> " ' . . . The power is to deal with foreign nations with regard to matters of international concern. It is not a power intended to be exercised, it

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[1] The question raised by Mr. Justice Holmes was given an affirmative answer by Mr. Justice Black in *Reid* v. *Covert,* 77 S.Ct. 1222 [reported *supra,* p. 549].

[2] Hearings on S.J.Res. 1 Before a Sub-committee of the Senate Judiciary Committee, 84th Cong., 1st Sess. 183 (May 2, 1955).

[3] Hearings on S.J.Res. 1 and S.J.Res. 43 Before a Sub-committee of the Senate Judiciary Committee, 83d Cong., 1st Sess. 825 (April 6, 1953).

may be assumed, with respect to matters that have no relation to international concerns. . . . the nation has the power to make any agreement whatever in a constitutional manner that relates to the conduct of our international relations, unless there can be found some express prohibition in the Constitution, and I am not aware of any which would in any way detract from the power as I have defined it in connection with our relations with other governments. But if we attempted to use the treaty-making power to deal with matters which did not pertain to our external relations but to control matters which normally and appropriately were within the local jurisdiction of the States, then I again say there might be ground for implying a limitation upon the treaty-making power that it is intended for the purpose of having treaties made relating to foreign affairs and not to make laws for the people of the United States in their internal concerns through the exercise of the asserted treaty-making power.'[1]

" In the Dulles view this reservation, if part of the treaty, would be an invalid exercise of the treaty power. In the Hughes view, its constitutionality would be a matter of grave doubt. ' The path of constitutional concern in this situation is clear.' *United States* v. *Witkovich*, 1957, 353 U.S. 194, 77 S.Ct. 779, 783, 1 L.Ed.2d 765. We construe the reservation as an expression of the Senate's desires and not a part of the treaty. We do not decide the constitutional question.

" It is argued that, since the reservation was a condition to the Senate's consent to the treaty, to deny effect to the condition vitiates the consent and thus invalidates the whole treaty. That argument, we think, was disposed of by the Supreme Court in *New York Indians* v. *United States*, 1898, 170 U.S. 1, 18 S.Ct. 531, 42 L.Ed. 927. That case involved a treaty with certain Indian tribes. The Senate in its resolution of consent to the treaty, had attached certain amendments and declared that ' the treaty shall have no force or effect whatever, . . . nor shall it be understood that the senate have assented to any of the contracts connected with it until the same, with the amendments herein proposed, is submitted and fully and fairly explained by a commissioner of the United States to each of said tribes or bands, separately assembled in council, and they have given their free and voluntary assent thereto . . .' Id., 170 U.S. at pages 21–22, 18 S.Ct. at page 536. The amendments which the Senate attached to its resolution consenting to the treaty, as the Supreme Court recognized, were not communicated to the Indian tribes. The Court concluded that the amendments were not part of the treaty. It nevertheless treated the Senate's consent as effective to make the treaty valid and operative. Id., 170 U.S. at pages 22–24, 18 S.Ct. at page 536." [Report: 247 F.2d 538.]

Bastian, Circuit Judge, dissented on the grounds that the Senate would not have consented to the ratification of the Niagara Waters

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[1] *Proceedings of The American Society of International Law* (1929) 194, 196.

Treaty without the " reservation "; that although the subject-matter of the " reservation " was domestic in nature, it was nevertheless inspired by, an outgrowth of, and inextricably interconnected with matter which was a valid subject for a treaty; and that the " reservation " related to a proper matter for negotiation and agreement between sovereign States. In his dissenting opinion, he stated:

" There is no doubt that a treaty is not only a contract between sovereign nations but may contain provisions which affect local law within the nation. *State of Missouri* v. *Holland*, 1920, 252 U.S. 416, 40 S.Ct. 382, 64 L.Ed. 641.[1] The Senate, in connection with its treaty-making powers,[2] is not a mere rubber stamp for the executive. It is true that ordinarily it is the President who originates treaties and negotiates with a foreign nation but he is unable to conclude such treaties without the advice and consent of the Senate. The Senate has the duty of both ' advice ' and ' consent '. Both of these terms are important and were so deemed by our founding fathers. Consequently, the Senate has the right to advise reservations and amendments to a proposed treaty and has done so on many occasions. Thus, in the original United States-Canadian Boundary Waters Treaty of 1909 the Senate proposed, and there was adopted, an amendment of understanding. In fact, the Jay Treaty of 1794,[3] the first made by this country after the adoption of the Constitution, was not consented to by the Senate as originally proposed. Instead, the Senate advised and consented to ratification only after an amendment of the proposed terms of the treaty.

" The treaty involved here was, as usual, originally sent by the President to the Senate. The Senate advised and consented to ratification upon conditions set out in the reservation. Canada accepted the reservation and, thereafter, on August 24, 1950, the President ratified the treaty as conditioned by the Senate. Canada ratified on October 5, 1950, and the reservation was included in the protocol evidencing the exchange of ratification by the United States and Canada.

" I

" Petitioner argues, and the majority holds, that what was called a reservation by the Senate, the President, State Department officials, and the Canadian Government, was not truly a reservation, but merely a declaration of Senatorial policy which has no binding effect. The basis of this argument is that standing alone, without considering other factors, the reservation was a matter of domestic concern having no effect on the rights and duties of the sovereign parties to the treaty, whereas a valid reservation must alter the rights and duties of the parties under the treaty as originally proposed. No need exists for an esoteric discussion of whether the language in question conforms to the scholar's definition of treaty reservation. If the Senate conditioned its advice and consent to the treaty upon inclusion of the language in question and upon its being given an operative effect—if the Senate did so condition its consent—if the condition was a *sine qua non* to its consent and to ratification—if but for its condition being given effect the Senate would not have consented to the treaty —then regardless of what the language in question is called it must be given effect. Believing this to be the only proper approach to petitioner's contention, I would dispose of that contention by determining the intent of the Senate when it insisted upon inclusion of the language in question in the treaty.

"As will be shown in more detail later, the Senate was aware, at the time the treaty was submitted, of pending legislation relative to the development of

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[1 See *Annual Digest*, 1919–1922, Case No. 1.]

[2] U.S.Const. Art. II, § 2.

[3] 8 Stat. 116 (1794), 1 Malloy, *Treaties*, 590 (1910).

water-power resources of the Niagara River.[1] It was likewise aware that if the treaty was ratified as written the additional water power available for exploitation by this country would be developed pursuant to the Federal Power Act, supra.[2] Whether it should be developed pursuant to that Act or according to the terms of later legislation was a matter of considerable concern to the Senate. If the language of the reservation does not make this clear, and I think it does, then the report of the Senate Foreign Relations Committee does.[3] There is no reasonable construction of the plain language of the reservation or of its legislative history other than this: The Senate desired to consent to the proposed treaty, but not at the expense of foreclosing from the consideration and decision of the Congress at large the question of how the water power would be developed. We should not assume that this reservation, arising from due deliberation, was an idle gesture. Its language is straightforward and to the point. Its meaning is clear. I do not see how we can avoid giving effect to it according to its terms. Of course, if the reservation was beyond the constitutional power of the Senate, it cannot be given effect. If it is beyond the power of the Senate, then not just the reservation falls, but the entire treaty. How can it be otherwise when the Senate has made it abundantly clear that without the reservation it would not have consented to the treaty?[4]

" No authority can be found for holding a treaty valid while rendering a Senatorial reservation to it nugatory. *New York Indians* v. *United States*, 1898, 170 U.S. 1, 18 S.Ct. 531, 42 L.Ed. 927, referred to by petitioner, certainly does not do so and has no application to the case before us. In *New York Indians*, the Senate proviso was never incorporated in the text of the treaty; it was not contained in the original or published copy of the treaty; nor was it contained in the Presidential proclamation of the treaty. The Supreme Court indicated that it believed the Senate resolution in question was ' mainly directory ' and stated ' . . . it is difficult to see how it can be regarded as part of the treaty, or as limiting at all the terms of the grant.'[5] The Court also pointed out that there was no evidence that the Senate amendment of the proposed treaty had ever had the sanction or approval of the President.

" Even if the proviso in the Indian treaty were intended as a reservation, that case is clearly distinguishable in important particulars. There the United States sought to invoke the reservation to the detriment of the other parties to the treaty. Also, the United States was doing so despite the fact that the other parties had acted on the basis of the treaty as proclaimed and had no knowledge of the proviso. The Court said that to permit the United States to invoke the proviso ' shocks the conscience.'[6] This is the language of an estoppel. Upholding a treaty while declaring void a reservation such as this one, and upholding a treaty while estopping the government from asserting an uncommunicated reservation are entirely different situations. Certainly the latter is not authority for the propriety of the former.

" Enough has been said already to indicate my disagreement with a holding that the reservation is not a part of the treaty and that the treaty is effective without it.

" II.

" Before turning to petitioner's argument that the reservation in question is beyond the Senate's constitutional power it is important to carefully delineate what is *not* before the court in this case. Doing so should be an aid to a proper understanding of what is. First, the Senate has not by its reservation sought to extort as its price for ratifying the treaty that it be allowed, independently of the Congress at large, to determine the nature and status of domestic legislation or policy. It has not provided that its conditional ratification is to be regarded as withdrawn if the Federal Power Act *is ever applied* to the water in question. It has merely left the question as to whether that Act or some other should be applied open to determination of both houses of Congress and the President. It has not demanded its way. Its reservation is not self-serving, but purports to extend to the Congress and the President a voice in determining how the increased water supply will be developed. This then is a case where the Senate has not sought to limit the participation. of the Congress at large and the President in decisions regarding domestic policy. It is a case in which the Senate has sought to enlarge their participation.

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[1] Senate Executive Report No. 11, 81st Cong., 2d Sess. 6–7 (1950).
[2] *Id.* at 7.
[3] *Id.* at 6, 7.
[4] *Id.*
[5] 170 U.S. at page 23, 18 S.Ct. at page 536.
[6] *Ibid.*

" Secondly, this is not a case in which the Senate has exacted as a price for its ratification of a treaty that some new, nonexisting legislation become law. Nor is it a situation where ratification is conditioned on nonapplication of some general statute not germane to the subject matter of the treaty.[1]

" This is simply a case where the Senate has conditioned ratification upon the nonapplication of the Federal Power Act to the additional water supply made available by the treaty, and provided that decision as to how and by whom that resource is to be developed shall be held in abeyance.[2] These are matters directly germane to the subject matter of the treaty. This is the only case before this court. Those other situations can well await decision in cases where they are presented. The grave constitutional issues they present should not prejudice or cause us to pre-judge this case.

" I must disagree with the implication in the majority opinion that this reservation, if a part of the treaty, would be invalid. The majority say the reservation is not a part of the treaty. There is a definite suggestion that their conclusion is influenced, if not dictated, by a belief that if the reservation were construed as a part of the treaty, then the treaty would be unconstitutional. I can appreciate the majority's reluctance to hand down the first decision invalidating a treaty of the United States. But I cannot, as indicated above, agree that the reservation is not an essential part of the treaty. Nor can I agree that its being a part of the treaty renders the treaty invalid. We are told that the reservation is void because it is regarded as of 'purely domestic concern' and therefore not a valid subject matter for a treaty reservation. It is elementary law that treaties may and frequently do affect domestic concerns. Indeed, treaties may repeal previous municipal law passed by the Congress or by state legislatures.[3] Therefore, if this reservation is void, it is not because it affects domestic law to the extent that it requires that the Federal Power Act not apply to the additional water power made available by the treaty.

" If void, it must be because the reservation is not only of domestic concern, but is also remote from the valid subject matter of the treaty, and is not subject matter of the treaty, and is not inspired by consideration of or pertinent to international relations or policy. While it is true that the President and officials of the Department of State have referred to the question of how the water power made available by the treaty was to be exploited as a matter of domestic concern, certainly that question is not remote from but is germane to the subject matter of the treaty. At the time the treaty was submitted to the Senate for ratification, the question of how and by whom water-power resources of the Niagara River would be exploited was a controversial issue in the Congress. With this controversy in mind, the Senate Foreign Relations Committee, in its report on the treaty, pointed out that extensive public hearings on implementing legislation would probably be necessary. The Committee recognized that it would take considerable time to complete such hearings and to obtain final Congressional action on the pending legislation.[1] Yet the Committee and the Senate as a whole were reluctant to jeopardize the rights which this country would receive under the proposed treaty by delaying its ratification until after Congress had acted upon the pending legislation concerning Niagara River power development. Also, the Senate Committee report reflects a regard for our friendly relations with Canada and stated that prompt ratification of the treaty would ' constitute a gesture of good will toward our friendly neighbor, Canada.'[2] Another reason given by the Committee for its recommendation of prompt ratification with the suggested reservation was ' in order to relieve the acute power shortage in Canada '.[3]

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[1] For example, that the Taft-Hartley Act, 29 U.S.C.A. § 141 *et seq.* or the Walsh-Healy Act, 41 U.S.C.A. § 35 *et seq.* not be applied to employers and employees engaged in development of the water rights obtained pursuant to the treaty.

[2] Of course this would leave the Congress free to provide by legislation, if it chooses, that the Federal Power Act should apply.

[3] Cases recognizing this are: *Cook* v. *United States*, 1933, 288 U.S. 102, 103, 53 S.Ct. 305, 77 L.Ed. 641 [*Annual Digest*, 1931–1932, Case No. 1]; *Whitney* v. *Robertson*, 1888, 124 U.S. 190, 8 S.Ct. 456, 31 L.Ed. 386; *The Cherokee Tobacco*, 1870, 11 Wall. 616, 78 U.S. 616, 20 L.Ed. 227; *Foster* v. *Neilson*, 1829, 2 Pet. 253, 27 U.S. 253, 7 L.Ed. 415; *Ware* v. *Hylton* 1796, 3 Dall. 199, 3 U.S. 199, 1 L.Ed. 568.

" Because of the possibility that the Canadians might in the absence of the treaty be compelled to take some unilateral action in harnessing the Niagara power, because undue delay might prejudice our good relations with Canada, and in view of an asserted acute power shortage in Canada requiring speedy ratification, this reservation was intimately and inseparably bound up in international questions. In this context it is *not* purely a domestic concern. If the subject matter of the reservation is domestic in nature, *it was nonetheless inspired by, an outgrowth of, and inextricably connected with, an admittedly valid subject matter of a treaty*. It is not required as a condition to validity that the reservation be in and of itself, treated in artificial isolation or detachment, a domestic matter properly a subject of contract between sovereigns. It is sufficient if it is directly related to a general subject which is properly a matter for contract between sovereigns, and if international policies and considerations are the *raison d'être* of the reservation. As no properly negotiated and ratified treaty of the United States has ever been held invalid there can be no binding judicial authority in support of petitioner's argument for unconstitutionality. Nor is there support in the dicta and comments of the text writers cited by petitioner for the proposition that a reservation or treaty to be valid must have a subject matter which independent of all other considerations is a matter of international concern. Petitioner quotes from *Geofroy* v. *Riggs*, 1889, 133 U.S. 258, 267, 10 S.Ct. 295, 297, 33 L.Ed. 642: ' But, with these exceptions, [none of which are applicable here] it is not perceived that there is any limit to the questions which can be adjusted [by treaty] *touching any matter which is properly the subject of negotiation with a foreign country*.' [Emphasis supplied.] From another case[4] appellant quotes: ' The treaty-making power . . . extends to all proper subjects of negotiation with foreign governments.' *Asakura* v. *City of Seattle*, 1924, 265 U.S. 332, 341, 44 S.Ct. 515, 516, 68 L.Ed. 1041[5] is quoted as saying the treaty power extends ' . . . to all proper subjects of negotiation between our government and other nations '. Also quoted is language from *Santovincenzo* v. *Egan*, 1931, 284 U.S. 30, 40, 52 S.Ct. 81, 84, 76 L.Ed. 151,[6] where the Court said the treaty power ' . . . is broad enough to cover all subjects that properly *pertain* to our foreign relations . . .' (Emphasis supplied.) Other statements of like effect are quoted. In the first place each of these statements was written in emphasis of the extent of the treaty power, not in diminution of it. Furthermore, applying the criteria of these cases here does not dictate a conclusion that this reservation is invalid. Certainly in the language of *Geofroy* v. *Riggs, supra,* it '*touches*' a matter properly the subject of negotiation with a foreign government. Likewise it '*properly pertains*' to our foreign relations, to use the language of the *Santovincenzo* case.

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[1] See . . . *supra* [Senate Executive Report No. 11, 81st Cong., 2d Sess. 6–7 (1950)].
[2] Id. at 7.
[3] Id. at 6.
[4] *In re Ross*, 1891, 140 U.S. 453, 463, 11 S.Ct. 897, 900, 35 L.Ed. 581.
[[5] See *Annual Digest*, 1923–1924, Case No. 182.]
[[6] *Ibid.*, 1931–1932, Case No. 214.]

" Secretary of State Dulles is quoted by the majority as having stated that the treaty power may not be exercised with respect to matters ' . . . *which do not essentially affect* the actions of nations in relation to international affairs, but are purely internal.' [Emphasis supplied.]

> " ' . . . I do not believe that treaties should, or lawfully can, be used as a device to circumvent the constitutional procedures established in relation to what are essentially matters of domestic concern.'

"A former Secretary of State and Chief Justice, Charles Evans Hughes, is also quoted by the majority. That quotation in its essential part is:

> " 'It [the treaty power] is not a power intended to be exercised, it may be assumed, with respect to matters that have *no relation* to international concerns. . . .' [Emphasis supplied.]

" However true these statements, they should not be regarded as support for finding this reservation invalid. It does not circumvent our constitutional processes; it does affect our international relations; it is related to an international concern.

"As I believe this is the proper analysis of whether the reservation is valid, I can only conclude that it was a valid exercise of the Senate's power to consent to a treaty upon an express reservation being attached and given effect.

" III

" My view that a reservation is valid if it is inspired by, an outgrowth of, and inextricably connected with, an admittedly valid subject matter of a treaty is not without historical precedent. One precedent which is contrary to petitioner's narrow view of the treaty power is the Webster-Ashburton Treaty of 1842. That treaty settled the northeast boundary of the United States and Canada. The agreement settling the boundary dispute gave to Canada some territory claimed by Maine and Massachusetts. As compensation to those states for the loss of the territory they had claimed, the federal government agreed to pay them a fixed sum of money. The terms of this agreement with the state government was reflected in the language of the treaty in the following terms,

> " ' . . . the Government of the United States agree[s] with the States of Maine and Massachusetts, to pay them the further sum of three hundred thousand dollars, in equal moieties, on account of their assent to the line of boundary described in this treaty, and in consideration of the conditions and equivalents received therefor, from the Government of Her Britannic Majesty.'[1]

Lord Ashburton wrote to Daniel Webster that ' the introduction of terms of agreement between the general government and the States [of the United States] would have been irregular and inadmissible, if it had not been deemed expedient to bring the whole of these transactions within the purview of the treaty. There may not be wanting analogous cases to justify this proceeding; but it seems proper that I should have confirmed by you that my government incurs no responsibility for these engagements . . .'[2]

" Surely the agreement between the federal and state governments had in and of itself no bearing on the international rights and duties of the two contracting sovereigns. It in no way affected what the two nations gave or received as between themselves. Treated separately, in isolation from a matter which was a valid subject of a treaty, the provision referred to was entirely domestic and concerned our constitutional processes alone. Under petitioner's concept of the treaty powers, the quoted provision of the Webster-Ashburton Treaty would have been invalid and of no effect. Yet the Congress promptly appropriated the money obligated to Maine and Massachusetts without questioning the propriety of the treaty provision.[1]

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[1] 8 Stat. 572, (1848); 1 Malloy, *Treaties*, 650, 654 (1910).

[2] 6 Webster, *Works* 289 (1853).

" In the treaty with Spain transferring Puerto Rico to this country, it was provided: ' The civil rights and political status of the native inhabitants of the territories hereby ceded to the United States shall be determined by the Congress.'[2] Legally the political status of inhabitants of newly acquired territory is a question purely of domestic concern. It is a matter for our own constitutional processes. Any foreign interference in such matters would be grossly improper. When this treaty came before the Supreme Court in *Downes* v. *Bidwell*, 1901, 182 U.S. 244, 21 S.Ct. 770, 45 L.Ed. 1088, the issue was whether the Constitution imposed the same limitation on Congress in regard to Puerto Rico as it did to the states. The Court concerned itself with the power to incorporate new territories by treaty, and whether the terms of its incorporation could be fixed by treaty. In doing so the provision of the treaty quoted above was considered. Four justices questioned the power to establish the terms incorporating new territory by treaty alone, but specifically endorsed the provision in the treaty that the political status of the inhabitants of the new territory could be left by treaty to await later congressional enactment.[3] The opinion of Mr. Justice Brown, whose opinion was the judgment of the Court, recognized that a provision in a treaty governing the status of the inhabitants of the newly acquired territory was proper, and that a provision leaving the question of their status to later enactment was also valid.[4]

" The recital of these two precedents, which are contrary to petitioner's narrow and conceptionalistic ' contract ' theory of the treaty power, should not be taken to imply a lack of other historical precedents, for such is not the case.

" My colleagues recognize that the Senate could have made the treaty executory by providing in its consent that the rights and obligations of both signatory parties take effect only after passage of an act of Congress. They say, however, that the Senate did not do so. While I agree with this, I cannot agree that the Senate has no power to make the treaty executory as to this country alone.

" There are many instances where the Senate has extended to the House of Representatives a voice in determining how treaties will be implemented. The Senate has on many occasions done this by insisting that a treaty not be effective until approved or implemented by an act of Congress. This is particularly so as regards treaties affecting revenues. 1 Willoughby, *The Constitutional Law of the United States*, 558–560 (2d ed. 1929). It is also worthy of note that denial of House participation in domestic legislation effectuated by treaty has been one of the most common causes of controversy over the treaty power.

" It is my view that recognition of the Senate's power to condition its consent to a treaty upon its remaining executory on both sides until Congress passes legislation to give the treaty operative effect carries with it recognition that the Senate may condition its consent upon the treaty not having an operative effect in this country alone until Congress acts. In either event the treaty rights and duties are the same. In one instance both parties are bound to await an act of Congress before exercising their rights under the treaty, whereas in the second instance, which is the case here, only this country is bound to await an act of Congress before availing itself of the rights allotted by the treaty. Why cannot the Senate make the reduction to use of the treaty rights by the United States await an act of Congress? The Senate had no desire to delay Canadian implementation of the treaty; indeed, it recognized that good relations with Canada required that this country not postpone Canadian power development. I see no reason why the Senate must delay our Canadian friends in order to make reduction to use of our water rights under the treaty await congressional enactment.

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[1] 5 Stat. 623 (1850).

[2] 30 Stat. 1754, 1759 (1899); 2 Malloy, *Treaties* 1688, 1693 (1910).

[3] 182 U.S. at page 312, 21 S.Ct. at page 796.

[4] Id., 182 U.S. at pages 279–280, 21 S.Ct. at page 784.

" For compelling practical reasons, based upon international considerations requiring that Canadian execution of the treaty not be delayed, the Senate consented to the treaty on condition that it remain executory until Congress at large had acted. The Senate has, in the only way it could under the circumstances, sought to insure full legislative determination of a serious domestic issue. I can conceive of no practical objection to this, nor has any been pointed out to me.

" While I do not agree with petitioner's narrow contract theory, even if it is correct I nonetheless do not believe it would make this reservation invalid. Petitioner maintains that to be a valid subject matter of a treaty the subject must, standing alone, be a matter of concern to the sovereign parties, and be a proper subject of contract between the parties. I regard this reservation as within that narrow classification. This can be demonstrated with the aid of a realistic assumption of fact.

" The text of the treaty indicates the great concern of Canada and our country for not diminishing the scenic beauty of Niagara Falls.[1] This concern was the impetus of this and the earlier treaty concerning Niagara River water power.[2] Assume there was no Federal Power Act or that by that Act's terms it was inapplicable to the Niagara River. Having a legitimate interest in the scenic attraction of Niagara Falls, Canada might well be unwilling to agree to making more water power available if it feared unregulated, irresponsible exploitation of the water resources of the river. Such exploitation might very well be regarded as a menace to the economic and aesthetic interest of Canada in Niagara Falls. Under this assumption, how the water power made available to the United States would be developed would be a matter of prime importance to Canada. That concern might, in the situation assumed, induce Canada to insist upon our share of the water being harnessed subject to regulations protective of the scenic beauty of Niagara Falls. If it be conceded, as I think it must be, that how we develop water-power resources obtained by treaty may be a matter of concern to Canada and not purely a domestic concern, then the reservation in question is within the narrow confines of the treaty power as petitioner views it.

" That the Senate and not Canada proposed this reservation does not change the subject matter, but that is the test petitioner proposes. The identity of the party making a proposal cannot change its nature or subject matter. It is still the same proposal. That there is a Federal Power Act and that, but for the reservation, it would apply does not alter the subject matter of the reservation. The existence or nonexistence of domestic legislation is clearly not a test of the treaty power. Nor does it change the subject matter of a reservation.

" Thus, under a simple and realistic assumption, the reservation can be established as a proper matter for negotiation and contract between sovereigns. Then, even under petitioner's view, it is valid. There is a further basis for attributing to Canada an interest in the reservation. Every party to a proposed treaty which it has negotiated has an interest in that treaty being ratified. If it believes that inclusion of certain terms will win ratification, and non-inclusion would bar ratification by the other party, then those terms are of concern to it. Here Canada did not for these reasons propose the terms of the reservation in question; but it has the same interest in this reservation as if it had done so. This is merely because without the reservation Canada would have had no treaty.

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[1] Articles II and IV of the treaty.

[2] See Senate Executive Report No. 11, 81st Cong., 2d Sess. 3 and 5 (1950).

" To say that this reasoning is incorrect because Canada did not propose the terms of the reservation is to say that certain terms proposed by a foreign government are the valid subject matter of a treaty, and may affect domestic law, while the same terms included at the insistence of the Senate are invalid because they do not have a valid subject matter. Is not the subject matter the same regardless of who proposed it? Is not the effect on domestic law the same? Is there any basis for achieving a different result except perhaps for theoretical, abstruse or academic reasons? I do not believe the constitutional power to make treaties should be restricted for such reason when every practical, realistic consideration favors the power to do what the Senate and the President have done here.

" Conclusion

" It may well be that, no matter how broad the power to make treaties, it is not without limits; and that, like any other power, it can be abused. This case, however, does not pose an abuse of the treaty power. The reservation in question is an instance of self-denial, not usurpation. It does not subvert our constitutional system. It was motivated by a desire that the treaty power should not be used in a manner which would exclude the Congress at large and the President from playing their normal roles in making domestic law.

" Unless it can be said that petitioner has a right to have the Senate not make treaties executory in their internal operation, no one is legally injured. Whether treaties should be thus executory seems strictly a political question. Clearly, it is as political a matter as whether the President chose to negotiate a treaty or whether the Senate chose to consent to a treaty negotiated. It would seem that it would be time enough to describe the limits of the treaty power when a case arises where our constitutional scheme of government is subverted, or where there is some usurpation of power, or where what is done under the treaty power is adverse to a legal right of some person or entity.[1]

" If petitioner's narrow view of the treaty power is approved by the courts, it would constitute an unfortunate limitation on that power. If the language of the Constitution, the nature of the governmental system it contemplates, or binding judicial authority supported petitioner's theory, its validity would have to be recognized and its effects endured. But there is no support for that theory in our charter of government, nor does it find support in the nature of our political system. There are no judicial authorities favoring that theory.

" These reasons being absent, I cannot, on the basis of theory, dicta and textbook definitions, narrowly circumscribe the signally important power to make treaties."

On petition for writ of *certiorari*;

Held (by the Supreme Court, *sub. nom. American Public Power Association et Al.* v. *Power Authority of The State of New York*): that the petition for writ of *certiorari* must be granted; that the judgment of the Court of Appeals must be vacated; and that the case must be sent back to that Court with directions to dismiss the petition on the ground that the cause was moot.

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[1] See " The Treaty Makers and The Law Makers: The Niagara Reservation ", an excellent and cogently reasoned discussion, by Louis Henkin, a member of the Columbia Law School faculty. 56 Columbia L.R. 1151.

[Reports: 355 U.S. 64, 78 Sup.Ct. 141, 2 L.Ed. 2d 107.]

NOTE.—The case was rendered moot by the Act of August 21, 1957 (71 Stat. 401, 16 U.S.C. § 836), which authorized the Federal Power Commission to issue a licence to the Power Authority of New York permitting the Power Authority to utilize the Niagara River water, subject to certain limitations.

The case for the Power Authority is learnedly presented in an opinion rendered by Professor Philip C. Jessup (subsequently of Counsel for the Power Authority) and Professor Oliver Lissitzyn to the Power Authority of the State of New York and published by the Authority in December 1955. The validity of the " reservation " is supported in Henkin, " The Treaty Makers and the Law Makers: The Niagara Reservation ", in *Columbia Law Review*, 56 (1956), p. 1151.

The above case is noted in *Cornell Law Quarterly*, 44 (1958), p. 158; *Fordham Law Review*, 27 (1958), p. 132; *Harvard Law Review*, 71 (1957), p. 368; *Indiana Law Journal*, 34 (1958), p. 57; *Michigan Law Review*, 56 (1958), p. 456; *New York University Law Review*, 33 (1958), p. 244; *Texas Law Review*, 36 (1958), p. 519.

VI.—Ratification of Treaties. Entry into Force

Treaties—Operation of—Entry into Force—Application to Prior Events—European Convention for Protection of Human Rights, 1950.

Re APPLICATION NO. 33/55 (X. *v.* SWEDEN).

European Commission of Human Rights. September 23, 1955.

(Waldock, President; Eustathiades, Berg, Faber, Beaufort, Dominedo, Süsterhenn, Petren, Janssen-Pevtschin, Sørensen, Black, Jonasson, Akbay, Fuest.)

THE FACTS.—The applicant, who was an employee in the Highways Department of the town of Z. in Sweden, alleged that he had been the object of defamatory statements, particularly concerning his mental state and his professional capabilities, made by A., his superior. He instituted proceedings against the latter and also against the Swedish Federation of Municipal Workers. The case was dismissed by the Tribunal of first instance of Z. on January 17, 1952. His appeal to the Court of Appeal of Z. was dismissed on May 24, 1952, and his further appeal to the Swedish Supreme Court was also dismissed later in the same year. The applicant further stated that he had been wrongfully accused by B. and C., his superiors, of the theft of certain firewood. He sued B. and C. for slander, although the witnesses for the prosecution withdrew their depositions. The

Tribunal of first instance of Z. dismissed the action on March 18, 1954. His appeal against that judgment was dismissed by the Court of Appeal of Z. on December 21, 1954, and his further appeal to the Supreme Court was dismissed in 1955.

He now alleged that the decisions of the Courts in question were discriminatory and unjustly favoured the defendants, having regard to their superior rank. The applicant claimed damages for the wrong which he had suffered.

Held: that the application must be rejected. The complaints against private individuals were not covered by the European Convention for the Protection of Human Rights and Fundamental Freedoms, 1950. As to the judicial proceedings, some of them took place before the Convention came into force; the others did not involve any violation of the Convention.

The Commission said: " With regard to the facts alleged against A., B., C. and the Swedish Federation of Municipal Workers, in so far as the application concerns those facts it is in fact directed against private individuals. Under the terms of Article 19 of the Convention,[1] the European Commission of Human Rights has as its sole task that of ensuring the observance by the High Contracting Parties of the engagements undertaken by them in the Convention. Consequently, the object of the application has no connection with the purpose of the Convention.

" With regard to the judicial proceedings taken by the applicant, some of these proceedings relate to a period prior to September 3, 1953, the date of the entry into force of the Convention in respect of Sweden. According to generally recognized principles of international law, the Convention does not govern facts prior to its entry into force in respect of the Contracting Party against which an application is brought. Moreover, in so far as the case might fall within the field of application of Article 6 of the Convention[2] for the period subsequent to September 3, 1953, an examination of the application does not reveal any violation of the Convention. It follows from the foregoing that the application should be declared inadmissible *ratione temporis*, and, under Article 27, paragraph 2, of the Convention,[3] incompatible with the provisions of the Convention and manifestly ill-founded. "

[Report: *Documents et Décisions;* 1955–56–57, p. 154 (in French).]

NOTE.—See also the following decisions of the Commission: *Re Application No.* 115/55 (*X.* v. *German Federal Republic*), *Re Application No.* 181/56 (*X.* v. *German Federal Republic*), *Re Application No.* 226/56 (*X.* v. *German Federal Republic*), *Re Application No.* 232/56 (*X.* v. *German Federal Republic*), and *Re Application No.* 289/57 (*X.* v. *German Federal*

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[1] See *supra*, pp. 333, n. 1.]
[2] See *supra*, pp. 342-3, n. 1.]
[3] See *supra*, p. 279, n. 2.]

Republic)—reported *supra*, pp. 275–291; *Re Application No.* 92/55 (*X.* v. *Belgium*), *Re Application No.* 95/55 (*X.* v. *Belgium*), *Re Application No.* 172/56 (*X.* v. *Sweden*), *Re Application No.* 238/56 (*Mrs. X.* v. *Denmark*), and *Re Application No.* 288/57 (*X.* v. *German Federal Republic*)—reported *supra*, pp. 321–346; *Re Application No.* 94/55 (*X.* v. *German Federal Republic*)—reported *supra*, p. 352; *Re Application No.* 134/55 (*X.* v. *German Federal Republic*), *Re Application No.* 180/56 (*Mrs. X.* v. *German Federal Republic*), *Re Application No.* 268/57 (*X.* v. *Belgium*), and *Re Application No.* 323/57 (*X.* v. *Denmark*)—reported *supra*, pp. 369–380; *Re Application No.* 188/56 (*X.* v. *German Federal Republic*), *Re Application No.* 256/57 (*Mrs. X.* v. *German Federal Republic*), and *Re Application No.* 276/57 (*Mrs. X.* v. *German Federal Republic*)—reported *supra*, pp. 404–417.

Treaties—Operation of—Entry into Force—Application to Prior Events—European Convention for Protection of Human Rights, 1950.

Re APPLICATION NO. 60/55 (X. *v.* IRELAND).

European Commission of Human Rights. September 23, 1955.

(Waldock, President; Eustathiades, Berg, Faber, Beaûfort, Dominedo, Süsterhenn, Petren, Janssen-Pevtschin, Sørensen, Black, Jonasson, Akbay, Fuest.)

THE FACTS.—The applicant stated that the Irish Land Commission had in 1927 given his father two parcels of land to farm and that he had inherited the land on the death of his father. After the creation of the Irish Free State, annual payments due to the British Government from Irish farmers in a similar situation were discharged in a lump-sum payment by the Irish Government of £10,000,000, of which sum the applicant duly paid his share. In 1939, the applicant sub-let part of his land, including a gravel pit, to the Y. Z. Company, which, in contravention of the terms of the sub-lease, sold gravel to third parties from March 1944 onwards. The applicant engaged in May 1944 A., a solicitor, to protect his interests. The solicitor delayed matters until September 22, 1944, on which date the applicant learned by chance that the solicitor was acting in collaboration with his opponents. The applicant then obtained the services of another solicitor, B., who gave him false information. In March 1950, the applicant complained about him to the Ministry of Justice, but without success. He made every effort to take the case to court, but all the persons whose assistance he sought refused to help him or to provide him with the necessary information. He submitted that in view of this, all available domestic remedies had been exhausted. In October 1946, he was evicted by order of the Tribunal of C. and two years later the two parcels of land were disposed of to other persons. The applicant claimed compensation for the loss suffered by him.

Held: that the application must be rejected. The facts complained of had occurred before the European Convention for the Protection of Human Rights and Fundamental Freedoms, 1950, came into force.

The Commission said: " The facts alleged relate to a period prior to September 3, 1953, the date of the entry into force of the Convention in respect of Ireland. According to generally recognized rules of international law, the Convention does not govern facts prior to its entry into force in respect of the Contracting Party concerned. It follows from the foregoing that the application refers to facts which occurred too long ago and it should accordingly be rejected as inadmissible *ratione temporis*, without stopping to consider whether in fact it is aimed at private individuals and not at the Republic of Ireland, and whether domestic remedies have been exhausted."

[Report: *Documents et Décisions*, 1955–56–57, p. 155 (in French).]

Treaties—Operation of—Entry into Force—Application to Prior Events—European Convention for Protection of Human Rights, 1950, and Protocol, 1952.

Re APPLICATION NO. 220/56 (X. *v.* GERMAN FEDERAL REPUBLIC).

European Commission of Human Rights. July 15, 1957.

(Waldock, President; Eustathiades, Berg, Faber, Beaufort, Dominedo, Süsterhenn, Petren, Janssen-Pevtschin, Sørensen, Crosbie, Skarphedinsson, Erim.)

THE FACTS.—The applicant, a General in the French Army, now in retirement, complained that the Federal Republic of Germany had not paid him compensation for the theft of certain *objets d'art* belonging to him by units of the German forces of occupation on June 26, 1944, at B. in France. It appeared that these units were acting not under any military necessity but in support of an official specialized organization called " Service Rosenburg-Sud " and in furtherance of an operation minutely and systematically planned. The loss so caused to the applicant amounted, according to an expert valuation made on November 21, 1944, to some 20 million francs. After the war, the applicant submitted his case to various French authorities, but it appeared from documents in the file that, in the opinion of these authorities, neither French war damage legislation nor agreements made between France and the Federal Republic of Germany at that time enabled the applicant to receive satisfaction of his claim. The applicant also stated that he had submitted his claim to all the administrative authorities of the Federal Republic with a view to obtaining restitution of the objects taken from him, or, if not restitution, then adequate compensation. In particular, he wrote in June 1953 to Herr Adenauer, Chancellor of the Federal Republic, who replied that he had instructed the competent authorities to make further searches.

In 1955, X. wrote a second letter to the Chancellor, and in reply the Secretary of State to the Federal Chancellor informed him that the Convention on the Settlement of Matters arising out of the War and the Occupation, signed at Bonn on May 26, 1952, by France, Great Britain, the United States and the Federal Republic of Germany, as amended by Annex IV to the Protocol on the Termination of the Occupation Régime in the Federal Republic of Germany, signed at Paris on October 23, 1954, by the same Powers, provided for the setting up of a body in the Federal Republic entrusted with the duty, amongst other things, of searching for *objets d'art* taken during the occupation by the German authorities and of restoring them to their owners or, if that were not possible, of compensating the owners. The applicant interpreted this reply as a clear moral undertaking to make reparation. However, he eventually received from the Federal Office for External Restitution a letter stating that, at the request of the French Government, it would proceed with all necessary searches, in conformity with Articles 1 and 2 of Chapter V of the above-mentioned Convention. But the Office added that, if the searches were unsuccessful, the applicant could not make a request for compensation, seeing that the Convention provided for the presentation of such a request only when the objects in question had been identified in Germany but could not be returned because they had been destroyed or lost after identification. The applicant then wrote for a third time to the Chancellor, and the Secretary of State to the Federal Chancellery replied to the same effect as the Federal Office for External Restitution, drawing his attention also to the fact that the Convention on the Settlement of Matters arising out of the War and the Occupation reserved to Governments the right of intervention. The applicant complained that no restitution had ever been made, nor had he received any compensation and he claimed that his right should be recognized and that he be paid compensation for the loss he had suffered.

Held: that the application must be rejected. Many of the matters mentioned by the applicant occurred before the coming into force of the European Convention for the Protection of Human Rights and Fundamental Freedoms, 1950; the others did not comprise violations of the rights protected by the Convention.

The Commission said: "The primary facts in this case and certain of the steps taken by the applicant relate to a period prior to September 3, 1953, the date of the entry into force of the Convention in respect of the German Federal Republic. According to generally recognized principles of international law, the Convention governs, for each Contracting Party, only facts subsequent to its entry into force in respect of that Party. The application should accordingly be rejected on this ground as inadmissible *ratione temporis*.

"On the other hand, the steps taken subsequent to September 3, 1953, both in themselves and in their outcome, do not raise the question of a violation of any of the rights and freedoms set forth in the Convention. The right of every person to the peaceful enjoyment of his possessions—the alleged violation of which right constitutes the essential ground of the applicant's complaint—is guaranteed in Article 1 of the Protocol to the Convention. The attack on the applicant's right of property relates, however, to a period prior to February 13, 1957, the date of the entry into force of the Protocol in respect of the German Federal Republic. According to generally recognized principles of international law, the Protocol governs, for each Contracting Party, only facts subsequent to its entry into force with regard to that Party. The application should therefore be rejected on this ground, as inadmissible *ratione temporis*."

[Report: *Documents et Décisions*, 1955–56–57, p. 157 (in French).]

Treaties—Ratification of—Protocol to European Convention for Protection of Human Rights, 1950—Non-ratification of.

See p. 355 (*Re Application No.* 150/56 (*X.* v. *German Federal Republic*)).

Treaties—Ratification of—Subsequent Enactment of Municipal Law—Municipal Law Contrary to Terms of Treaty—Whether Treaty or Municipal Law Applies in Country of Forum—The Law of Italy.

See p. 12 (*Ente Nazionale per la Cellulosa e per la Carta* v. *Cartiera Italiana et Al.*).

VII.—Operation and Enforcement of Treaties. Necessity for Municipal Legislation

[*See also* PART I, INTERNATIONAL LAW IN GENERAL: IV, Relation to Municipal Law; *and* PART VI, THE INDIVIDUAL IN INTERNATIONAL LAW: A, In General.]

Treaties—Operation of—Effect in Municipal Law of Subsequently Enacted Statute — Treaty Merchant — Deportation of — Under Statute Inconsistent with Prior Treaty—The Law of the United States of America.

YEE SI *v.* BOYD.

United States, Court of Appeals, Ninth Circuit. April 10, 1957.

THE FACTS.—Yee Si, a native of China, entered the United States in 1947. After a hearing under an immigration warrant of arrest issued in 1949, he was ordered to be deported in 1952 on the ground that he had remained in the United States for a longer time than permitted under the provisions of Section 14 of the Immigration Act of 1924 (43 Stat. 162). The deportation order was affirmed by the Board of Immigration Appeals. The day before he was to be deported, Yee Si filed a complaint in the United States District Court, alleging that he was entitled to remain in the United States under Article II of the Treaty between the United States and China concerning Immigration, signed at Peking on November 17, 1880 (22 Stat. 826, T.S. No. 49), the text of which is quoted in the opinion of the Court of Appeals (see *Held*, below]. The District Court sustained the administrative order of deportation on the ground that the Treaty " did not operate to permit [Yee Si] to remain in the United States for a longer period than set forth in the terms of his admission under the provisions of the Immigration Act of 1924, and that by reason of the same [Yee Si] is subject to deportation " under that Act. The plaintiff appealed.

Held: that the judgment of the Court below must be affirmed. Article II of the Treaty with China had been superseded by the inconsistent provisions of the Immigration Act of 1924. A treaty could be modified by a subsequent act of Congress.

The Court said: " The appellant contends that at the time of his admission on July 3, 1947, ' he was qualified to enter this country as a member of the exempt class, either as a visitor or a merchant, with the privileges of remaining as long as desired, in accordance with Art. II of the Treaty,' *supra.*

" Article II reads as follows:

> " ' Chinese subjects, whether proceeding to the United States as teachers, students, merchants or from curiosity, together with their body and household servants, and Chinese laborers who are now in the United States shall be allowed to go and come of their own free will and accord, and shall be accorded all the rights, privileges, immunities, and exemptions which are accorded to the citizens and subjects of the most favored nation.'

" This Court has specifically held that the Treaty is not self-executing. In *Weedin* v. *Wong Tat Hing*, 9 Cir., 1925, 6 F.2d 201, 202, Judge Rudkin said:

> " ' The Treaty between the United States and China (22 Stat. 826) consists of four brief articles *and is not self executing.* Article IV provides that, whenever the government of the United States shall adopt legislative measures in accordance therewith, such measures will be communicated to the government of China, and the acts of 1882 and 1884 were passed for the express purpose of executing the stipulations of that treaty. *If these acts have been abrogated, there is now no law to execute the stipulations of the treaty* because the three lines of clause 6 can hardly be considered as such a law.' [Emphasis supplied.]

" ' Clause 6 ' referred to above, applied to ' an alien entitled to enter the United States solely to carry on trade under and in pursuance of the provisions of a present existing treaty of commerce and navigation.' As we have seen, however, the appellant was admitted as a 'temporary visitor for business' under Section 3 (2) of the Act of 1924, 8 U.S.C.A. § 203 (2), which at that time read as follows:

> " 'When used in this chapter the term "immigrant" means any alien departing from any place outside the United States destined for the United States, except—
>
> ' . . . (2) an alien visiting the United States temporarily as a tourist or temporarily for business or pleasure, . . .'

" Adverting again to the treaty itself, we find that it was indeed 'executed' or implemented by two statutes—the Act of May 6, 1822, 22 Stat. 58, c. 126, and the Act of July 5, 1884, 23 Stat.115, c. 220. Both of these statutes, however, were repealed by an Act passed on December 17, 1943, 57 Stat. 600, c. 344, P.L. 199, or nearly four years before the appellant was admitted as a 'temporary visitor for business'. In other words, when the appellant arrived in the United States, the treaty was once again an unexecuted pronouncement, which could be modified by a subsequent act of Congress.

" In *Hing Lowe* v. *United States*, 9 Cir., 1956, 230 F.2d 664, 665–666,[1] this Court said:

> " 'Chinese merchants prior to the effective date of the Act of 1924 [supra], under the terms of this Treaty, are in the United States for permanent residence. [Cases cited.]
>
> 'The Immigration Act of 1924, § 15, 8 U.S.C.A. § 215, however, modified the status of Chinese who came as treaty merchants after the Act of 1924, from that of entry for permanent residence to that of temporary residence. [Case cited.] Section 15 of the Act provides that a treaty merchant entering the United States was subject to regulations as to time of stay and as to the giving of bond: ' . . . to insure that, at the expiration of such time or upon failure to maintain the status under which admitted, he will depart from the United States'.
>
> . . . .
>
> '*There is no doubt that a treaty may be modified by a subsequent act of Congress.* [Many cases cited.]'

" While in the above case we were referring to Subsection 3 (6) of the act, the decision is equally applicable to aliens who, like the appellant herein, have entered as 'temporary visitors for business' under Subsection 3 (2), supra.

" In a word, if the unexecuted treaty provides for unrestricted entry and departure for Chinese citizens, and the Act of 1924 authorizes admission for limited periods only, the unexecuted treaty has been superseded to that extent.

" It should not require an extended citation of authorities to demonstrate that the appellant, who entered the United States for

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[1 See *International Law Reports*, 1956, p. 453.]

a limited time and then exceeded his stay, has no right to remain. We need refer to but one or two decisions of this Court.

" In *Ex parte Wong Gar Wah*, 9 Cir., 1927, 18 F.2d 250, 251, *certiorari* denied, 1927, 275 U.S. 529, 48 S.Ct. 21, 72 L.Ed. 409, the Chinese ' traveler ' was admitted for one year, which had long since expired. Of such a situation, we said:

" ' From the foregoing statement it seems quite apparent that the appellant is in the country without right. As a merchant, the certificate is made the sole evidence of his right to enter or remain, and he has no such certificate. On the other hand, such temporary rights as he acquired by the traveler certificate have long since expired by lapse of time *and he is subject to deportation under the express provisions of section 14 of the Immigration Act of 1924.*

' *On the argument there was some discussion of treaty rights, but when a treaty comes in direct conflict with a later act of Congress, the latter will prevail.* [Case cited.] ' [Emphasis supplied.]

" In a recent case, *United States* v. *Kwan Shun Yue*, 9 Cir., 1952, 194 F.2d 225, 227, Judge Stephens said:

" ' The authorities are in agreement that treaty merchants entering subsequent to the Naturalization and Immigration Act of 1924 are limited in their privileges while here by the terms of that Act. They also show that the courts, in subsequent decisions, do not regard the Weedin case supra, as holding that the treaties between China and the United States preclude Congressional action limiting the privileges of a treaty merchant who enters subsequently to such enactments. They also clearly show that Congressional enactments supersede treaty provisions inconsistent with them. [Many cases cited.] '

(The Court then disposed of certain contentions of the plaintiff based on the municipal law of the United States.)

[Report: 243 F.2d 203.]

Treaties—Operation of—Warsaw Convention of 1929 on International Air Transport—Whether Convention of Itself Creates Right of Action.

NOEL *ET AL.* v. LINEA AEROPOSTAL VENEZOLANA.

United States, District Court, Southern District, New York.

August 22 *and November* 29, 1956.

Court of Appeals, Second Circuit. *August* 9, 1957.

THE FACTS.—The executors of the decedent Noel brought this action for damages arising out of the death of Noel while a passenger on an aircraft of the defendant, a corporation owned by the United States of Venezuela. When the plane was over the Atlantic Ocean approximately thirty miles off New Jersey, Noel was killed, allegedly because of " wrongful acts, neglect, default, and wilful misconduct " of the defendant. In their original complaint, the plaintiffs alleged that the plane crashed into the sea and that Noel died in the water. The action was based on the Convention for the Unification of Certain Rules regarding International Air Transport, opened for signature at Warsaw on October 12, 1929 (49 Stat. 3000; T.S. No. 876; 137 L.N.T.S. 11) (the Warsaw Convention), and the Federal Death on the High Seas Act. The plaintiffs demanded a jury trial.

Held (by the District Court): that the defendant's motion to dismiss the complaint on the ground that the Court did not have jurisdiction of the subject matter of the suit as a civil action, must be granted. The Warsaw Convention did not create a new cause of action which could be brought on the civil side of the Court. As a matter of the domestic law of the United States, an action under the Death on the High Seas Act must be brought on the admiralty side of the Court. [Reports: 144 F. Supp. 359, 1956 U.S. & Can. Av. 314.]

The plaintiffs then amended their complaint to allege that Noel had died while on board the defendant's aircraft while it remained in the air. The plaintiffs contended that this allegation placed the case outside the admiralty jurisdiction of the Court and gave them the right to bring the case on the civil side under the Warsaw Convention.

Held (by the District Court): that the defendant's motion to dismiss the complaint must be granted. The fulfilment of the jurisdictional requirements of the Death on the High Seas Act was not " to be governed by the determination of such an elusive fact as whether a person died above or in the sea ". [Reports: 154 F. Supp. 162, 5 Avi. 17, 125, 1956 U.S. & Can. Av. 381.]

On appeal,

Held (by the Court of Appeals): that the decision of the District Court must be affirmed. The Warsaw Convention did not create a new right of action, but only a presumption of liability; it left it to local law to create the right of action. Claims based on the Federal Death on the High Seas Act were cognizable only in admiralty.

The Court said:

" 1. *The Warsaw Convention.*

" Plaintiffs allege first that under New York law, Article 17 of the Warsaw Convention creates an independent right of action[1] and since this complaint alleges diversity jurisdiction, under *Klaxon Co.* v. *Stentor Electric Mfg. Co.*, 1941, 313 U.S. 487, 61 S.Ct. 1020, 85 L. Ed. 1477, we must follow the law of New York and also hold that the Warsaw Convention provides an independent right of action. We do not agree.

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[1] *Article 17*

" The carrier shall be liable for damages sustained in the event of the death or wounding of a passenger or any other bodily injury suffered by a passenger, if the accident which caused the damage so sustained took place on board the aircraft or in the course of any of the operations of embarking or disembarking."

" Although jurisdiction of the first count under the Warsaw Convention is allegedly based on diversity, the law to be applied in this case is not state law but a federal treaty. It is applied in the state courts not because it expresses a state policy which a federal court must follow, but because it expresses federal policy which a state court must follow. And in interpreting a federal treaty, the federal courts are certainly not bound by state court interpretations.[1]

" In any event, we agree with our prior decision in *Komlos* v. *Compagnie Nationale Air France*, 2 Cir., 1953, 209 F.2d 436, 438,[2] which impliedly agreed with Judge Leibell's decision, *Komlos* v. *Compagnie Nationale Air France*, D.C.S.D.N.Y.1952, 111 F.Supp. 393, that the Convention did not create an independent right of action. As Judge Leibell pointed out, Secretary of State Hull's letter to President Roosevelt, dated March 31, 1934, indicated that the effect of Article 17 on which plaintiffs rely for their argument was only to create a presumption of liability, leaving it for local law to grant the right of action.[3] As one authority has stated, the purpose of the Convention was only ' to effect a uniformity of procedure and remedies.' Orr, ' The Warsaw Convention,' 31 Va.L. Rev. 423 (1945); see also Comment, ' Air Passenger Deaths,' 41 Corn.L.Q. 243, 255–60 (1956); Fixel, *The Law of Aviation*, § 23 (1948).

" Plaintiffs, relying on a dictum in Judge Leibell's opinion in *Komlos*, 111 F.Supp. at page 393, argue that where the law of the place of the injury provides no right of action or where there is no law of the place of injury the Warsaw Convention provides one. They then argue that the Federal Death on the High Seas Act does not grant them a right of action, for that does not apply to deaths in the airspace.

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[1] As a matter of fact, New York law does not favor the plaintiffs. Although *Salamon* v. *Koninklijke Luchtvaart Maatschappij*, Sup.1951, 107 N.Y.S.2d 768, affirmed, 1st Dept.1953, 281 App.Div. 965, 120 N.Y.S.2d 917 does hold that the Warsaw Convention creates a right of action, *Wyman* v. *Pan American Airways*, 1943, 181 Misc. 963, 43 N.Y.S.2d 420, affirmed, 1st Dept.1944, 267 App. Div. 947, 48 N.Y.S.2d. 459 holds to the contrary and the latter decision was affirmed by the New York Court of Appeals, 293 N.Y. 878, 59 N.E.2d 875, certiorari denied, 1944, 324 U.S. 882, 65 S.Ct. 1029, 89 L.Ed. 1432.

[[2] See *International Law Reports*, 1953, p. 417.]

[3] " The effect of article 17 (ch. III) of the Convention is to create a presumption of liability against the aerial carrier on the mere happening of an accident occasioning injury or death of a passenger subject to certain defenses allowed under the Convention to the aerial carrier. The burden is upon the carrier to show that the injury or death has not been the result of negligence on the part of the carrier or his agents. . . ." 1934 U.S.Av.Rep. 240, 243."

"We see no justification for such a reading of the Convention. The language of Article 17 does not indicate any difference between situations where the law of the place of injury does grant a right of action and where it does not. See Comment, 41 Corn.L.Q. at 256. Nor does the history of the Convention support this dictum. Thus, regardless of whether the Federal Death on the High Seas Act provides a remedy, Article 17 does not.

"2. *The Federal Death on the High Seas Act.*

"Plaintiffs' second count is under the Federal Death on the High Seas Act. They argue in the alternative that the Federal Death on the High Seas Act does grant them a right of action and that it may be brought on the civil side. See *Choy* v. *Pan American Airways Co.*, D.C.S.D.N.Y., 1941 A.M.C. 483. We do not find it necessary to pass on the question of whether the Act grants a right of action for deaths in the airspace,[1] for we conclude that any rights created by that Act are cognizable only in admiralty and hence the action was correctly dismissed from the civil side.

"To summarize: the first count fails to state a cause of action under New York law; the second count, under the Federal Death on the High Seas Act, cannot be brought on the civil side of the District Court; the third count fails to state a cause of action as the Warsaw Convention created no right of action. Accordingly we affirm the dismissal of the complaint but without prejudice to plaintiff's right to transfer the case to the admiralty side of the court for the adjudication of the second count of the amended complaint. We express no opinion as to whether the Death on the High Seas Act grants a right of action in admiralty for death in the airspace. . . ."

[Reports: 247 F. 2d 677, 5 Avi. 17,544, 1957 U.S. & Can. Av. 274, 66 A.L.R. 2d 997; *certiorari* denied, 355 U.S. 907, 2 L.Ed.2d 262, 78 Sup. Ct. 334 (1957).]

NOTE.—The above case is noted in *New York Law Forum*, 4 (1958), p. 361; *Villanova Law Review*, 3 (1958), p. 571; and *American Law Reports Annotated, Second Series*, 66 (1959), p. 1002.

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[1] That problem raises grave constitutional questions as to the permissible scope of admiralty jurisdiction. See Comment, 55 Col.L.Rev. at 917 n. 85, 920 n. 80; Bogert, "Problems of Aviation Law," 6 Corn.L.Q. 271, 303–05 (1921); Veeder, "Legal Relations between Admiralty and Aviation," 2 Air L.Rev. 29 (1931); cf. *Wilson* v. *Transocean Airlines*, D.C.N.D. Cal.1954, 121 F.Supp. 85.

Treaties—Operation of—Necessity for Municipal Legislation—Self-Executing Treaties—Treaty Binding Directly Upon Individuals—Self-Executing Nature of Provisional Agreement—Netherlands-French Commercial Treaty of 1935—The Law of Holland.

INSTITUT NATIONAL DES APPELLATIONS D'ORIGINE DES VINS ET EAUX-DE-VIE *v.* METTES.

Holland, Court of Appeal of The Hague. June 15, 1955.

Supreme Court. June 1, 1956.

THE FACTS.—This was a continuation of proceedings in which the Supreme Court gave judgment on December 10, 1954, remitting the case to the Court of Appeal of The Hague for further consideration.[1]

The plaintiff Institute originally applied for an order by the District Court of The Hague declaring, among other things, the unlawfulness of the introduction by Mettes into commerce, under the name of "cognac", of alcoholic beverages not produced in France. The claim was based on Article 11 of the French-Netherlands Commercial Treaty of May 28, 1935, which was provisionally brought into operation under a separate, informal, agreement between the Parties in anticipation of the ratification of the Treaty proper. The District Court, on June 19, 1952, dismissed the claim on the ground that, the informal Agreement not having been approved by the States-General or formally ratified, it was not binding upon the State of the Netherlands and that, even if it were binding upon the State, it would not be binding upon its subjects. This judgment was upheld, on similar grounds, by the Court of Appeal on January 13, 1954, but on December 10, 1954, it was reversed by the Supreme Court and remitted to the Court of Appeal of The Hague for reconsideration,

Held (by the Court of Appeal of The Hague): that the original judgment of the District Court must be reversed and the application must succeed.

The Court said: "The first question to be answered is whether the Netherlands-French Agreement of May 28, 1935, is an 'other agreement' within the meaning of the last paragraph of Article 58 of the Constitution of 1922.[2] The answer to this question must be in the affirmative for the following reasons. In the Agreement the Netherlands and French Governments agreed that the provisions of the Netherlands-French Commercial Treaty of 1935 would provisionally be applied as from May 31, 1935. The Agreement was not intended to bring into force the Treaty as such, but it was to be regarded as incorporating the provisions of the Treaty. In these circumstances the Agreement must be held to be an independent 'other agreement' within the meaning of the last paragraph of Article 58 of the Constitution. It follows from such independence that the Agreement could provide for the Netherlands-French Commercial Treaty of 1935 (and therefore also Article 11) being provisionally operative as from another date than the date mentioned in the Protocol of Signature of the Treaty itself.

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[1] See *International Law Reports*, 1954, p. 166.

[2] Article 58 of the Constitution of 1922 provided as follows:

"The King shall conclude and ratify all treaties with foreign Powers.

"Unless the King shall have reserved to himself by law the right to ratify a treaty, that treaty shall not be ratified until it shall have received the approval of the States-General.

"Adherence to and denunciation of treaties shall be effected by the King solely by virtue of laws.

"Other agreements with foreign Powers shall be communicated to the States-General as soon as possible."]

"A further question to be answered is whether Article 11 of the Netherlands-French Commercial Treaty of 1935,[1] as incorporated in such 'other agreement', is binding upon Netherlands subjects without the requirement of any further implementing legislation. This question also must be answered in the affirmative. Article 11 lays down legal obligations and can be understood as directly affecting individuals. It must therefore be held to be directly binding upon them. The Article contains in its third and fifth sections very precise provisions of a prohibitive nature, and these provisions are addressed to all the world. Their aim is to prevent the abuse of geographical denominations of origin. In case of infringement of these prohibitive provisions, such infringement will constitute a tort. There will be a violation of legal obligations by the party committing such infringement. The party indicated by the fourth section of Article 11 as the interested party has an action in tort under Article 1401 of the Netherlands Civil Code[2] as against the infringing party. The interested party will find adequate legal protection in the latter provision and therefore further implementing legislation is unnecessary.

"A third question to be answered is, what is the date from which Article 11 of the Treaty was binding upon the defendant? The plaintiff Institute has in the course of the proceedings limited its claim to the acts committed by the defendant after the date of publication of the 'other agreement' in the *Tractatenblad* (*Official Collection of Treaties*), which was January 14, 1953. It will therefore be sufficient to examine whether the defendant was bound by Article 11 of the Netherlands-French Commercial Treaty after that date. The question must be answered in the affirmative. Publication in the *Tractatenblad* must be regarded as being sufficient for presuming that the defendant knew, or could have known, of the 'other agreement '. This ' other agreement ' being neither an Act nor a Royal Decree, it did not require ' promulgation ' in the sense of the then obtaining Article 74 of the Constitution. The term ' cognac ' as the denomination for a product of French viticulture has been communicated by the French Government to the Netherlands Government by virtue of Article 11, section 2. This communication has been published by the Netherlands Government. In France, the denomination ' cognac ' is being protected in the sense of Article 11, section 2."

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[1] [For the text of Article 11 see *infra*, pp. 586-7.]

[2] [Article 1401 of the Civil Code provides as follows: "Every unlawful act as a result of which damage is caused to some other person puts the person by whose fault such damage was caused under the obligation to make restitution."]

Mettes again appealed to the Supreme Court. One of his grounds of appeal was: "The decisive question is not whether Article 11 can be understood as being directly binding upon [Netherlands] citizens, but whether that Article is by its very wording directly binding upon them. The latter question must be answered in the negative on the basis of the content and the scope of the Article read with the other Treaty provisions. The Article creates obligations only for the High Contracting Parties and has, contrary to what the Court of Appeal found, no provisions of a prohibitive nature which are addressed to all the world. It speaks only of provisions which the Parties will enact. No such legislation has so far been enacted by the Netherlands Government."

Held (by the Supreme Court): that the judgment of the Court of Appeal must be reversed and the original judgment of the District Court of June 19, 1952, affirmed.

The Supreme Court said: "In this appeal the view has been advanced that the decisive question is not whether, as the Court of Appeal said, Article 11 is in itself directly binding upon Netherlands subjects but whether the Article according to its express terms can in fact be directly applied to them. The Court of Appeal had in mind no other question than the one mentioned in this ground of appeal. In the view of this Supreme Court, the Court of Appeal has misinterpreted the content and the scope of Article 11, the text of which is as follows:

> " ' 1. Each of the High Contracting Parties binds itself to guarantee in an effective manner natural or manufactured products originating in the territory of the other High Contracting Party against unfair competition in commercial transactions, in particular by prohibiting or restricting—by seizure or any other appropriate sanction—the importation and exportation as well as dealing in, warehousing, sale and offering for sale, of all products designated by marks, names, inscriptions or any other means appearing either on the goods themselves, their make up or their external wrappings, or in invoices, forwarding documents, bills of lading, advertising matter or other commercial papers and bearing, directly or indirectly, false information as to the origin, kind, nature or specific characteristics of the products in question.

> ' 2. Each of the High Contracting Parties binds itself to introduce or to maintain in force all necessary measures for repressing, on its territory, abusive use of geographical descriptions of origin of all products of the other Party, including wine products and dairy produce, so far as such descriptions have been notified to it and they are duly protected in the producing country. Notification must refer to the official marks or documents accompanying the goods despatched and which will prove their right to the appellations in question.
>
> ' 3. In particular, there shall be prohibited and restricted under penalty of seizure and any other appropriate sanction the import and export, warehousing, manufacture, dealing in, sale or offering for sale of the above-mentioned products whenever there appear, whether on the goods themselves, on casks, bottles, wrappings or containers, or in invoices, despatch notes, bills of lading, advertising matter or other commercial papers referring thereto, any marks, names or inscriptions whatsoever which contain false indications of origin.
>
> ' 4. The measures referred to above shall be applied on the territory of each of the High Contracting Parties at the instance of the administrative authorities or at the request of the Public Prosecutor in conformity with the respective legislation of each Party or at the instance of an interested party, private individual, or association being a national of one of the High Contracting Parties.
>
> ' 5. The prohibition against making use of an indication of origin to describe products other than those which are strictly entitled to such description holds good even when the true origin of the goods is indicated or when the false description is accompanied by an expression such as " kind ", " type ", " sort ", " rival " and so on or by an additional regional description, whether specific or general.'

Sections 1 and 2 of this Article mention obligations which the High Contracting Parties took upon themselves mutually in order to prohibit and to prevent certain acts. They did not, however, at the same time state that in the territory of the Netherlands an obligation for everyone to abstain from such acts would exist as soon as Article 11 entered into force. The Institute argued that the expression in the second section, 'to maintain in force', would refer, as far as the Netherlands is concerned, to Article 1401 of the Civil Code. A mere indication as embodied in Article 11, however, cannot constitute the elements of a tort.

" Neither do the other sections of Article 11 make it clear that on the entry into force of that Article a situation would arise in which there would be such an obligation for everyone as is referred to above. On the contrary, these sections, which in their terms are in accordance with sections 1 and 2, must be understood in the sense of merely indicating to what further elaboration the High Contracting Parties are bound as a consequence of accepting the obligation laid down by sections 1 and 2. The fact that the Netherlands Government did not publish Article 11 before 1953 is an indication that they did not agree with the opinion of the Institute that the Article was binding upon all the world. The content and scope of Article 11 do not admit of the interpretation which the Court of Appeal gave it. The appeal succeeds on this ground. Other questions need not therefore be examined."

[Report: *N.J.*, 1958, No. 424, with a Note by Veegens.]

NOTE.—I. Dr. Veegens in his Note appended to the judgment observes that the Supreme Court has now, in dealing with Article 11, followed a method of interpretation which is different from that which it adopted in the case of other treaties which it regarded as self-executing. He supposes that the Supreme Court is now less inclined to accept the direct binding force of international agreements because such acceptance would make it necessary for the Court to review, under Article 66 of the Constitution, national legislation which conflicted with such treaties. He further points out that an effect of interpreting international agreements restrictively will be to tend to deprive them of practical significance.

II. See also the commentary on this case by Professor W. Wengler, "Entscheidung des Obersten Holländischen Gerichts (Hoge Raad) vom 1. 6. 1956", in *Internationales Recht und Diplomatie*, 1956, pp. 346-350.

Treaties—Operation of—Presumption of Conformity of National Legislation with Treaty Obligations—Brussels Convention of 1910 for Unification of Law Concerning Collisions at Sea (Article 7) and Netherlands Commercial Code (Article 742)—Divergence between Official Language of Text of Treaty and Translation Thereof—The Law of Holland.

ROYAL HOLLAND LLOYD *v.* DAMPSKIBSSELSKABET TORM A.S.

Holland, Court of Appeal of The Hague. March 27, 1957.

THE FACTS.—This was an appeal against a decision of the District Court of Rotterdam given on June 24, 1955, between the same parties (see *International Law Reports*, 1955, p. 634, where the facts of the case are set out).

Held: that the judgment of the District Court must be reversed.

The Court said: "The collision between the Netherlands vessel *Salland* and the Danish vessel *Herdis* is governed by the provisions of the Brussels Convention of 1910 for the Unification of Certain Rules of Law with respect to Collisions at Sea (hereafter called 'the Convention') to which the Netherlands and Denmark had adhered and which Convention was approved in the Netherlands by the Act of January 11, 1913 (*Staatsblad* No. 26).

"The present appeal deals only with the question whether the right of the appellant to bring an action arising out of the collision was or was not barred by lapse of time.

"Article 7 of the Convention[1] lays down certain rules relating to the barring by prescription of claims for damages. Paragraph 1 provides a term of prescription of two years after the event. According to the authentic French text of paragraph 6 of the Article, the High Contracting Parties reserved to themselves the right to incorporate in their national legislation, as a ground for extending the term of prescription, the fact that the defendant vessel could not be seized within the territorial waters of the State in which the plaintiff was domiciled. The Dutch text of paragraph 4 has not been correctly translated as this fact is called an 'opschortingsgrond' [ground for suspension] with regard to the term of prescription laid down by paragraph 1. This incorrect translation apparently served as a basis for the subsequent enactment of paragraph 3 of Article 742 of the Netherlands Commercial Code.[1] So far, this Court is in agreement with the reasoning of the Court below.

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[1] The text of the relevant parts of Article 7 of the Convention is set out in *International Law Reports*, 1955, at p. 635.]

"In the judgment of the Court below, the plea that the right to bring an action had lapsed was upheld on the ground that Article 742, para. 3, of the Code is contrary to Article 7, para. 4, of the Convention and therefore Article 65 (now Article 66) of the Constitution[2] does not apply, so that the present right of action under Article 7, para. 1, of the Convention lapsed two years after the collision. Since, therefore, the appellant had not served a writ of summons within that time, his action was barred.

"The appellant has contested the ruling of the Court below on the ground that Article 65 (66) of the Constitution envisages only such provisions of international agreements as are directly binding on individuals and that this is not the case as far as Article 7, para. 4, of the Convention is concerned. That provision of the Convention merely permits the Legislature, under specified conditions, to extend the term of prescription as defined by Article 7, para. 1. It cannot, therefore, be considered as binding on all persons in the sense of Article 65 (66) of the Constitution. Even if the Netherlands Legislature, in enacting Article 742, para. 3, of the Commercial Code, failed to use the power given to it by paragraph 4 of Article 7 of the Convention, the former provision did not become inoperative by virtue of Article 65 (66) of the Constitution.

"The question must be examined whether Article 742, para. 3, is incompatible with any self-executing provision of the Convention relating to prescription, as, for example, paragraphs 1 and 3 of Article 7. As to the grounds for suspension of prescription, paragraph 3 [of Article 7 of the Convention] refers to the law of the Court before which proceedings are taken, which is in this case Netherlands law.

[[1] Article 742, para. 3, provides: "If the claimant is domiciled in the Netherlands or if the principal seat of his business is situated there the prescription will not begin until he has an opportunity to attach the ship in the Netherlands for the purpose of securing his claim."]

[[2] For Articles 65 and 66 of the Constitution see *International Law Reports*, 1955, p. 637, n. 1.]

"Provisions dealing with suspension of prescription are Articles 2023 and following of the Civil Code. But the matter has not been regulated only there, since there is no reason why Article 7, para. 3, should not equally refer to grounds for suspension incorporated in national legislation after the Convention had entered into force. Article 742, para. 3, constitutes such a ground. This being so, paragraph 3 of Article 742 [of the Commercial Code] is not contrary to paragraph 3—nor, *a fortiori*, to paragraph 1—of Article 7 [of the Convention]. While being desirous of implementing the Convention, the Netherlands Legislature may have had the intention of extending the two years' period of prescription by a second period in cases where the opportunity to attach the ship in the Netherlands arises after that period has expired—and Article 7, para. 4, fully meets this case. That being so, it must be deemed to have complied with the Convention by enacting Article 742, para. 3, which does achieve such an extension of time by suspending the beginning of the period of prescription in the given case. Nothing in the Convention is contrary to such a provision, since it does not bind the national Legislature either as regards the duration of the normal period of prescription as laid down in Article 7, para. 1, or as regards the way in which it desires to achieve this extension. If the Legislature must be deemed to have intended to prolong the normal period of prescription until the lapse of a reasonable time after seizure of the vessel in Netherlands territorial waters has become possible, but has failed to delimit such an extension of that period by enacting Article 742, para. 3, it would nevertheless be a reasonable application of the law to hold that a defence of prescription cannot be raised against a plaintiff who serves his writ of summons within such reasonable period."

[Report: *N.J.*, 1957, No. 576.]

The decision of the Court of Appeal reported above was upheld in cassation by the Supreme Court on April 11, 1958 (*N.J.*, 1958, No. 454).

Treaties—Operation of—Necessity for Municipal Legislation—Superiority of Treaty over Statute—Cases in Which Treaty Confers Upon State Power to Issue Regulations—Propriety of Applying Legislation Thus Issued—Geneva Convention on Road Traffic, 1949, as Compared with Netherlands Traffic Legislation.

PUBLIC PROSECUTOR *v.* A.J.D.

Holland, District Court of Breda. January 19, 1956.

THE FACTS.—The appellant, a Belgian national, was convicted by the Cantonal Court at Tilburg for a road traffic offence. While riding a motor-cycle on May 15, 1954, and overtaking a motor-car moving in the same direction, he had crossed over the centre line of the road although he was approaching a road junction. This was an offence against Article 23, paragraph 4 (*a*), of the Netherlands Road Traffic Regulations. On appeal to the District Court, the appellant pleaded that on the date in question he had driven from Belgium into the Netherlands and that, therefore, he had taken part in international road traffic in the sense of the Geneva Convention of 1949 on Road Traffic. Accordingly, he considered himself as being subject only to the rules of that Convention and could not, he contended, be convicted under Article 23, paragraph 4 (*a*), of the Regulations, which contains a rule not provided for in the Convention.

Held: that the conviction must be upheld and the appeal dismissed.

The Court said: " Article 2 of the Netherlands Criminal Code enacts that Netherlands criminal law applies to everyone committing a punishable act on Netherlands territory. This rule may not be applicable if a conflicting, but recognized, rule of international law, for example, a treaty, governs the situation. As a matter of principle, Netherlands traffic legislation which is enforced by the sanctions of the criminal law and which is at variance with the Geneva Convention on Road Traffic, cannot be applied to individuals taking part in international road traffic within the meaning of the Convention on Netherlands territory. That is not the case, however, in the present instance, for the following reasons: Article 6, which is the first provision of Chapter II of the Geneva Convention, imposes upon the Contracting States an obligation to take appropriate measures to ensure the observance of the rules set out in Chapter II. These measures need not be confined to legislation providing for punishment for non-observance of these rules. They may also consist in measures which purport to specify and to elaborate the rules laid down in Chapter II. In Article 1 of the Geneva Convention each Contracting State reserved to itself jurisdiction with regard to the use of its own roads. Chapter II of the Convention does no more than lay down some general principles concerning traffic regulation. It is clear, therefore, that the Contracting States, which are obliged to incorporate these principles in their national legislation and to frame that legislation in accordance with them, are free to enact such legislation as they deem necessary in elaboration or determination of the rules set out in Chapter II. Individuals taking part in international road traffic cannot claim, on the basis of the Geneva Convention, that such legislation does not bind them. Article 23, paragraph 4 (*a*), [of the Netherlands Road Traffic Regulations] is legislation elaborating the rules set out in Chapter II of the Geneva Convention. It is applicable, therefore, to the offence committed by the appellant."

[Report: *N.J.*, 1956, No. 393.]

NOTE.—In recent years the Netherlands courts have frequently had occasion to decide on the relation of the Geneva Convention to municipal road traffic legislation in cases where only Netherlands nationals were involved. For reports of these cases see *Netherlands International Law Review*, I (1953–1954), pp. 328 and 329; II (1955), pp. 208 and 209. The case reported above concerned a national of another State, and may be regarded as a development of the views expressed on an earlier occasion by the Supreme Court (Judgment of December 13, 1953, reported *ibid.*, vol. I, p. 329).

Treaties—Operation of—Treaty Concluded by Federal State—Concordat between Holy See and Germany—Alleged Violation of Provisions of Concordat by One of German *Länder*—Whether German Federal Republic Can Compel *Land* to Comply with Terms of Concordat—The Constitutional Law of Germany.

CONCORDAT (GERMANY) CASE.

German Federal Republic, Federal Constitutional Court.

March 26, 1957.

THE FACTS.—In March 1955, the Government of the German Federal Republic lodged a constitutional complaint against the *Land* of Niedersachsen on the ground that the *Land* had enacted certain legislation which the Federal Government alleged to be incompatible with the Concordat concluded on July 20, 1933, between the Holy See and the former German Reich.[1] Before the Court could deal with the principal contention of the Federal Government, namely, that the *Land* of Niedersachsen, which was one of the constituent States of the Federal Republic, had violated its constitutional duties by enacting legislation which made it impossible for the Federal Republic to carry out its own obligations to the Holy See under the terms of the Concordat, certain preliminary questions had to be determined. The first of these was whether the Concordat had been validly concluded in accordance with the constitutional requirements laid down in the relevant German Law in force in July 1933; the second, whether the Concordat continued to be binding on the Federal Republic as successor in title of the former German Reich.

Held: that the two preliminary questions must be answered in the affirmative.

The Court then dealt with the contention that it lacked jurisdiction to determine the dispute between the Federal Republic and the *Land* of Niedersachsen on the ground that the adjudication of a constitutional dispute between the Federal Republic and one of its constituent States would presume to determine the validity of an international agreement between two sovereign Contracting Parties. This, it was argued, was beyond the province of the Court. In dealing with this contention the Court said (at pp. 326–327):

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[1] It was alleged that the legislation enacted by the *Land* of Niedersachsen did not make adequate provision for facilities to be provided for school children of the Catholic faith, as required by the Concordat.

" While the Federal Constitutional Court is not entitled to determine the question of the validity of the Concordat as between the Contracting Parties, it is not prevented from adjudicating upon the validity of an international agreement as between the parties to the present constitutional dispute, *viz.*, from adjudicating upon such an agreement with valid effect in the municipal sphere, where such adjudication is relevant to the determination of a preliminary question preceding the determination of the constitutional dispute. . . . The findings of the Court concerning the validity of international agreements do not limit the freedom of action of the Federal Government *in its international intercourse*."

The contention of the Federal Government that the *Land* of Niedersachsen had failed in its constitutional duty in that it had made it impossible for the Federal Republic to comply with its own international obligations was rejected, on the ground that the Constitution did not confer power on the Federal Republic to compel its constituent States so to frame their legislation in cultural matters as to make it accord with the international obligations of the Federal Republic. In dealing with this contention the Court said (at pp. 365–367):

" The view has been expressed in the doctrine of international law that a federal State cannot rely, as against the other Contracting Party, on the fact that its Constitution does not enable it to take measures against its constituent States in the event of the latter's conduct making it impossible for the federal State to carry out its own international obligations. According to the prevailing opinion in the matter, a federal State is under an obligation, according to international law, to provide itself with the requisite constitutional powers to enable it to carry out the duties which it has undertaken. This doctrine of international law can have no immediate application to the present case. It contemplates primarily instances in which a federal State has undertaken contractual duties within its competence which, according to its own municipal law, it is unable to discharge. The Concordat concluded by the Reich, however, is not such a case. While it is true that this international treaty was concluded by the Reich within the sphere of its competence, the obligations deriving from it were not taken over by the German Federal Republic but were vested in it by reason of the fact that the Federal Republic, as a result of its identity with the German Reich, must fulfil the treaties concluded by the latter. The Constitution of the Federal Republic has not put any means at the disposal of the latter which enable it to discharge the obligations of the Concordat of its own accord or to secure their discharge [by the

Länder]. If the doctrine of international law here referred to could be applied to the Federal Republic so far as concerns the Concordat, it would only create a presumption that the Constitution of the Federal Republic intended to ensure, as far as possible, the discharge of obligations deriving from the Treaty. This presumption, however, cannot apply where—as here—it is clear that the Legislature was not prepared to endow the Federal Republic with the requisite means to ensure the discharge of the educational obligations provided for in the Concordat. Legal obligations deriving from an international treaty which is binding upon a federal State can create legal duties for its constituent States only in accordance with the provisions of constitutional law. This municipal relationship cannot be judged in accordance with international law, but exclusively in accordance with the internal legal order of the federal State.

" We need not consider the question whether the German Federal Republic is liable to the Holy See for the acts of a *Land* which are contrary to the provisions of the Concordat. Even the liability of the Federal Republic under international law could not alter the constitutional position *vis-à-vis* the *Land*. The claim of the Federal Government is [therefore] not well founded. Even if the educational law of the *Land* of Niedersachsen were contrary to the educational provisions of the Concordat, there would be no violation of the rights of the Federal Republic *vis-à-vis* the *Land*. Accordingly, it is unnecessary to enquire whether or not the educational law of the *Land* of Niedersachsen is compatible with the provisions of the Concordat."

[Reports: B Verf GE, vol. 6, p. 309; NJW, 10 (1957), p. 705.]

Treaties—Operation of—Absence of Enabling Municipal Legislation—Absence of Publication—Interpretation of Treaty in Conformity with Meaning Attached in National Legislation of Contracting Parties to Terms of Treaty—The Law of Belgium.

JADIN *v.* TRUYENS.

Belgium, Court of Cassation. November 15, 1957.

THE FACTS.—On July 10, 1956, the appellant, then a member of the Belgian forces stationed in Germany, was responsible for a road accident causing fatal injuries. On November 23, 1956, the Military Court convicted him of involuntary homicide and violations of the Highway Code. At the instance of the respondent, a civil action for damages was joined to the public prosecution and by a judgment of February 18, 1957, the Military Court ordered the appellant to pay damages to the respondent. The appellant now contended that that judgment constituted a violation of the Law of April 16, 1955, giving effect to the Belgian accession to the Convention on the

Presence of Foreign Armed Forces on the Territory of the Federal Republic of Germany, signed at Paris on October 23, 1954. That Convention made applicable, in so far as they concerned Belgium, the provisions of the Protocol concerning the Termination of the Occupation Régime in the Federal Republic of Germany, signed on the same date, and of the Agreements to which that Protocol referred and which it modified, in particular the Convention concerning the Rights and Obligations of Foreign Armed Forces on the Territory of the Federal Republic of Germany, which was published, as so modified, in the *Moniteur Belge* of February 2, 1956. Article 8 of the Protocol and Articles 6 and 9 of the Convention concerning the Rights and Obligations of Foreign Armed Forces on the Territory of the Federal Republic of Germany vested in the German courts jurisdiction over all matters other than penal.

Held: that the appeal must be rejected.

The Court said: " In so far as it relies on the violation of Article 8 of the Protocol concerning the Termination of the Occupation Régime in the German Federal Republic, signed at Paris on October 23, 1954, the appeal is irreceivable, seeing that that Article was never published in the *Moniteur Belge.*

"Article 6, para. 1, of the Convention on the Rights and Obligations of Foreign Armed Forces in the Territory of the Federal Republic of Germany, signed at Bonn on May 26, 1952, and modified in conformity with the Protocol on the Termination of the Occupation Régime in the Federal Republic of Germany signed at Paris on October 23, 1954, provides that, except in so far as the Convention stipulates otherwise, the authorities of the armed forces are exclusively competent to exercise penal jurisdiction over the members of such forces. Article 9, para. 1, provides that German Courts and German authorities have jurisdiction over members of the armed forces in respect of all matters other than penal, subject to the provisions of the Convention and other applicable Agreements. The expression ' penal jurisdiction ' in the first of these Articles must be given the meaning which it has in the national legislation of each of the States to whose authorities the Article refers. In Belgian law ' penal jurisdiction ' includes the authority to hear civil actions joined to the public prosecution."

[Report: *Pasicrisie Belge,* 1958, Part I, p. 290.]

Treaties—Operation of—Application by Municipal Courts—Exclusive Reliance on Municipal Statute Enacted in Pursuance of Treaty—The Law of Mexico.

Re Destilería Francesa, S.R.L.

Mexico, Supreme Court. August 5, 1957.

The Facts.—Destilería Francesa, S.R.L., a foreign company, applied for registration of a trade-mark in Mexico, which the administrative authorities in Mexico examined technically and found to resemble too closely one already registered. According to the Mexican Law on Industrial Property, the Company had a certain period of time in which to make necessary alterations or adjustments, which it failed to do, and the application was therefore deemed to be abandoned, without need for an express official declaration to that effect. The Company protested against the application of municipal law instead of the provisions of the international Convention in this field (International Union for the Protection of Industrial Property, 1883, as revised at London in 1934[1]), to which Mexico was a party.

Held (on appeal from the decision of the District Court): that Mexico had complied with the international Convention (Article 10 A) by enacting its Law on Industrial Property pursuant to its commitments under the Convention. The administrative authorities were correct in considering the application in the light of the domestic law rather than international law.

The Court said: " In accordance with Article 127 of the Law on Industrial Property, the application for registration of a trade-mark is to be considered as abandoned and its priority date lost when the applicant fails to show that he has complied by modifying the mark within the term referred to in Article 124 of that Law. In such circumstances, the application ceases to have legal existence, since its abandonment is effective automatically without the need for an express declaration by a competent authority in a final decree.

" A reading of the Law of Industrial Property permits one to note that the right to use a trade-mark arises specifically from its national registration and not from foreign registration.

" To be valid, the subjective criterion of the administrative authorities, with respect to the similarity in the marks, even though that similarity is a technical rather than a legal question, must be based on logical reasoning. If this were not so, under the pretext of applying those subjective criteria orders would be made capriciously, contrary to our constitutional system which sets express limits to the powers of the [executive] authorities.

" Our country had observed the provisions of Article 10 A of the Convention of the Union of Paris by enacting the Law on Industrial

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[1] *L.N.T.S.*, vol. 192, p. 17.

Property, and the duty of the District Judges is not to observe the Convention but merely to examine the complaint that in the application of that Law constitutional guarantees have been infringed."

[Report: *Semanario Judicial*, vol. 2, Part 3 (August 1947), p. 79.]

Treaties—Operation of—Treaty Incorporated *in toto* into Municipal Law upon Ratification—Whether Operative as Municipal Law if in Foreign Language and Indeterminate in Wording—The Law of Italy.

See p. 11 (*Re Masini*).

Treaties—Operation and Enforcement of—Violation of Treaty—Right of Individual to Invoke Treaty—Treaty of Extradition—Alleged Abduction from Foreign State—Informal Expulsion—Whether Constituting Violation of Treaty—The Law of the United States of America.

See p. 256 (*United States* v. *Sobell*).

Treaties—Operation and Enforcement of—In Municipal Law—Statute Prevailing over Prior Inconsistent Treaty—Commercial Treaty—Import Quota—General Agreement on Tariffs and Trade—The Law of the United States of America.

See p. 677 (*Tennant, Sons & Co. of New York* v. *Dill*).

Treaties—Operation of—Relation between Treaty and National Legislation Implementing Treaty.

See p. 638 (*Van Galen* v. *Breigoederenfabriek Achiel Cockelbergh*).

Treaties—Operation of—Relation to Municipal Law—Treaty as "Superior Law" Bringing Municipal Law into Operation.

See p. 94 (*Public Prosecutor* v. *L.A.O.*).

Treaties—Operation of—In Dependent Territories—Whether Separate Promulgation in Dependent Territories Required—Chicago Convention on International Civil Aviation of December 7, 1944—Convention Promulgated in France—Absence of Promulgation in French West Africa—Whether Convention Operative in French West Africa.

See p. 54 (*Public Prosecutor and Customs Administration* v. *Schreiber and Air-France*).

Treaties—Operation of—Whether to be Applied in Accordance with Municipal Law or Provisions of Treaty—Treaty of Friendship between United States of America and Germany—Expropriation of United States Property for Town and Country Planning Purposes—Compensation Payable to Owner—Compensation Payable under Treaty Higher than under German Law—Whether American Owner Entitled to Higher Compensation—The Law of Germany.

See p. 8 (*Town and Country Planning* (*United States Citizen in Germany*) *Case*).

Treaties—Operation of—Expropriation of Property for General Purposes—Guarantees of International Agreement Concluded Subsequent to Expropriation.

See p. 542 (*German Assets in Switzerland Case*).

Treaties—Operation of—Continuity of States—Application in Holland of Treaties Concluded by Russia Prior to the Revolution of 1917—Applicability of Hague Convention of 1905 on Civil Procedure to Citizens of U.S.S.R.

See p. 52 (*In re Petition of S.*).

VIII.—Effect of Treaties on Third Parties

Treaties—Operation of—Effect on Third Parties—Potsdam Agreement of August 2, 1945—Rights of Poland to Eastern Territories of Germany.

See p. 77 (*L. and J. J.* v. *Polish State Railways*).

C—TERMINATION OF TREATIES

II.—By Act of Party

iii.—Unilateral Denunciation. Result of Non-performance by the Other Party

Treaties—Termination of—Unlawful Denunciation of Rhine Navigation Convention by Germany in 1936—Factual Effects of.

See p. 99 (*In re Petition of Nederlandsche Rijnvaart-Vereeniging and Others*).

D—INTERPRETATION OF TREATIES

I.—Agencies of Interpretation

Treaties—Interpretation of—Agencies of Interpretation—Treaty Conferring Reciprocal Pension Benefits on Citizens of Contracting Parties—Claim by Citizen of One Contracting Party to Pension in Territory of Other Contracting Party—Competence to Interpret Treaty in Determining Claim—The Law of France.

Di Piero Rosa *v.* Caisse Régionale d'Allocations Vieillesse de Paris.

France, Court of Cassation. October 23, 1957.

The Facts.—A Franco-Italian Agreement, the Protocol of March 31, 1948, provided that Italian citizens of retiring age who had worked and been resident in France for an uninterrupted period of at least fifteen years were entitled to an old-age pension in France. The applicant had worked in France for over fifteen years, but before claiming her pension had been away from France for about two years. The pensions tribunal rejected her claim on the ground that she had not been resident in France for an uninterrupted period of fifteen years prior to claiming a pension.

Held: that only the Government was entitled to interpret the Franco-Italian Protocol and that as the tribunal, in purporting to put its own interpretation on it, had exceeded its powers, its decision must be quashed.

The Court said: " The Laws of August 16, 1790, and the Decree of 16th Fructidor of the Year III provide for the separation of powers. The Franco-Italian Protocol of March 31, 1948, relating to old-age pensions for workers of retiring age was made executory by Decree No. 49–1232 of September 4, 1949, which contained the Franco-Italian Convention on Social Security. International conventions are instruments on Government level ('*actes de haute administration*') which can only be interpreted—when occasion arises—by the Powers between which they have been concluded. The above-mentioned Protocol provides as follows:

> 'The pension . . . will be granted . . . to all salaried workers of retiring age who on the date of application have been resident in France for an uninterrupted period of at least 15 years.'

The Regional Appeal Committee refused the applicant the benefit of a pension on the ground that, although she had been working in France for more than fifteen years, she had been away for almost two years a few months prior to making her application, and that the period of residence in France must be reckoned from the date of application and not from some other date during the period of residence. In so holding, the Committee did not confine itself to applying the Protocol, but proceeded to an interpretation of it, and in thus exceeding its powers it violated the rule and the provisions referred to above. For these reasons the decision of the Committee is quashed."

[Report: *Revue générale de Droit international public*, 1958, p. 271.]

Treaties—Interpretation of—Agencies of Interpretation—Statement of Executive Department—The Law of France.

Re BALSEIRO.

France, Court of Cassation. November 26, 1957.

THE FACTS.—By virtue of the Franco-Spanish Treaty of January 7, 1862, Spanish nationals were entitled to carry on a trade in France on the same conditions as French nationals, identical rights being accorded to French nationals in Spain. The appellant, a Spanish national, was convicted of an offence against the Decree of November 12, 1938, which provided that no alien was entitled to carry on a trade in France unless he was in possession of a trader's permit issued for the purpose by the competent French authorities. On appeal against his conviction, he contended that the Treaty took precedence over the Decree of November 12, 1938, and that he was therefore entitled to carry on a trade without a permit.

Held: that the appeal against conviction must be dismissed. The interpretation of the Treaty was a matter for the Executive. The Ministry for Foreign Affairs had expressed the view that the enjoyment of equal rights under the Franco-Spanish Treaty was subject to the condition that the person concerned had complied with the requirements of the Decree of November 12, 1938. The question of whether or not the Spanish authorities required French nationals in Spain to be in possession of a similar permit was immaterial, because the Treaty provided for national treatment and not for reciprocity.

The Court said: " It is contended that the Franco-Spanish Consular Treaty provides for complete equality between French and Spanish citizens and that, as a matter of principle, treaties take precedence over municipal law. Reliance is placed on an interpretation of the Treaty, which properly falls within the competence of the Minister for Foreign Affairs. The appellant, a joiner of Spanish nationality, was prosecuted for having engaged in commercial activities in France without being in possession of a special identity card issued by the authorities and bearing the inscription ' trader ', an offence which is punishable under the Decree of November 12, 1938. The Court of Appeal of Angers reversed the judgment of the

Magistrates' Court of Marennes which acquitted the defendant, and instead imposed a fine of 20,000 francs.

As a result of previous judgments of the Criminal Chamber of the Court of Cassation, the Minister for Foreign Affairs, in a letter dated April 15, 1957, gave the following interpretation of the Franco-Spanish Consular Treaty of January 7, 1862: (1) The duty of a Spanish trader to be in possession of a special identity card does not affect the enjoyment of the rights to which he is entitled under the Treaty, but only the conditions under which he is entitled to exercise those rights; in fact, an alien, though on a basis of equality with French citizens as far as his relationship with the French authorities is concerned, nevertheless remains an alien, and he must therefore be able to prove, notwithstanding his status as an equal, that he is entitled, in this particular respect, to the privileges of a French citizen; (2) there is no need to ascertain whether French citizens residing in Spain enjoy the right, in the latter country, to carry on business without a permit, because the criterion for which Article 1 of the Treaty provides is equality with nationals, and not reciprocity. In view of this interpretation, and having regard to the facts found, the judgment under appeal is correct. The appeal is accordingly dismissed."

[Report: *Bulletin des Arrêts de la Cour de Cassation, Chambre Criminelle*, 1957, No. 768, p. 1390.]

Treaties—Interpretation of—Agencies of Interpretation—Exchange of Notes between Foreign Ministries.

See p. 497 (*Re Kelinski*).

II.—Principles and Rules of Interpretation

Treaties—Interpretation of—Principles and Rules of—Interpretation by Reference to Other Parts of Same Treaty—By Reference to Treaty as a Whole—By Reference to Authoritative Writings—By Reference to Practice of International Courts—By Reference to Preparatory Work—Arguments *a contrario* and *a fortiori*—Meaning of Expression " ceded territory "—" Technical or proper meaning " of Expressions—Extent of Presumption that Words Used Consistently Throughout Instrument—Intention of the Parties—Interpretation in Good Faith—Principle of Effectiveness—Nature of Treaty of Peace—Parties to a Treaty—Requirement of Full Sovereignty.

Re INTERPRETATION OF ARTICLE 78, PARAGRAPH 7, OF THE PEACE TREATY WITH ITALY, 1947 (FRANCO-ETHIOPIAN RAILWAY COMPANY CLAIM).

Franco-Italian Conciliation Commission. March 16, 1956.

(Perier de Feral, Sorrentino, Bolla.)

THE FACTS.—This claim was presented on June 2, 1949, by the French Government to the Italian Government under Article 78 of the Treaty of Peace with Italy of February 10, 1947 (hereinafter called " the Treaty ") on behalf of the Franco-Ethiopian Railway Company in respect of damage sustained by that Company in Ethiopian territory between June 10, 1940 (the date of the declaration of war by Italy on France), and May 1, 1941 (the date of the complete liberation of Ethiopia), as a result of the war or as a result of measures taken in regard to the Company by the Italian military authorities. Article 78, paragraph 7, of the Treaty provides:

> "7. Notwithstanding the territorial transfers provided in the present Treaty, Italy shall continue to be responsible for loss or damage sustained during the war by property in ceded territory or in the Free Territory of Trieste belonging to United Nations nationals. The obligations contained in paragraphs 3, 4, 5 and 6 of this Article shall also rest on the Italian Government in regard to property in ceded territory and in the Free Territory of Trieste of United Nations nationals except in so far as this would conflict with the provisions of paragraph 14 of Annex X and paragraph 14 of Annex XIV of the present Treaty."

The claim was presented on the ground that the effect of paragraph 7 of Article 78 of the Treaty was to make the provisions of Article 78 applicable to the territories dealt with in the Treaty, that is, the transfer of which it effects or confirms, and, especially, that the expressions " territorial transfers " and " ceded territory " referred not only to territory ceded under Articles 1 to 14 of the Treaty[1] but also, in particular, to Ethiopian territory.

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[1] Part I—" Territorial Clauses ".

On March 20, 1950, the Italian Ministry of Foreign Affairs by a *note verbale* rejected the claim as inadmissible without examining the merits; the Italian Government did not consider that the provisions of Article 78, paragraph 7, of the Treaty were applicable to damage sustained, as a result of the war, by French nationals (*ressortissants*) in Ethiopia.

The French Government submitted the dispute which had arisen with the Italian Government to the Tribunal with a request for a decision " that the provisions of paragraph 7 of Article 78 of the Treaty are applicable to Ethiopian territory ".

The following contentions were advanced on behalf of the French Government:

Those who drew up the Treaty, having laid down in Article 78 the general principle of *restitutio in integrum*, the basis of which is referred to in the Preamble of the Treaty, had to determine the territorial limits of the principle. They could have specified in paragraph 1 the territories in which the provisions of Article 78 are applicable. They preferred to determine at the onset the modalities of the application of those provisions as regards property situated in Italy and to reserve to paragraph 7 the extension of certain of the provisions (those having as their object the apportionment of compensation, in regard to which the place where the property is situated is of little importance) to territories other than Italian. When interpreting paragraph 7, account must be taken of the central idea expressed in the Preamble to the Treaty, rather than of one or other of its technical and special provisions. There was no doubt that by " ceded territories " the authors of the Treaty meant, at first, to refer to the territories ceded by Italy in Europe, whether to France (Article 6), to the People's Federal Republic of Yugoslavia (Article 11) or to Greece (Article 14); the free Territory of Trieste was expressly mentioned in paragraph 7. But it would be too strict a literal interpretation to limit the scope of the expression "ceded territories " to those territories. Such an interpretation could only be based on Annex XIV of the Treaty,[1] which gives no definition of ceded territory and which concerned problems of quite a different kind. Moreover, the terminology used in paragraph 7 linked the idea of cession with that of transfer, which clearly covered hypotheses other than a cession in the strict sense of that word. An examination of the Treaty as a whole showed that under different terminology, three categories of territory were transferred by Italy to other Powers or international authorities, whether or not named: (i) territories ceded to France, to Yugoslavia and to Greece (Articles 6, 11 and 14); (ii) Italian territorial possessions in Africa, to which Italy renounced her right and title (Article 23); (iii) the territory of the Ethiopian State (Article 33) and that of Albania (Article 27). Ethiopian territory had, after the war of 1935, been placed under the domination of Italy, who had on May 9, 1936, annexed the country. Ethiopia had then ceased to exist as a sovereign independent State. This transfer of sovereignty had been recognized by France and England *de jure* in 1938. That recognition had not conferred any rights on the international plane; it merely took note of a matter of fact. The denunciation of that recognition shortly after Italy entered the Second World War could have no effect on Italian sovereignty. When in 1941 the Italian forces in East Africa were defeated, Italian sovereignty ceased to be exercised *de facto* in favour of a Government which entered into agreements with the French and British Governments pending the *de jure* transfer of sovereignty by the Treaty. Ethiopian territory having passed from one State—Italy—to another—Ethiopia—it was the object of a transfer effected by the Treaty. Even though Ethiopia recovered its international sovereignty before the intervention of the Treaty, yet that restoration was confirmed, especially with regard to Italy, and Ethiopian territory was made the object of a transfer *de jure* confirmed by the United Nations (*cf.* para. 4 of Annex XIV[1]). Otherwise, it was difficult to see how, in regard to Italian responsibility for damage to Allied property caused by the war, the draftsmen of the Treaty could have accorded to United Nations nationals established in Ethiopia treatment less favourable than, or even merely different from, that accorded to Allied nationals in regard to their property in Italy or in European territory ceded by Italy. If Italy were not responsible, then Allied nationals resident in Ethiopa would be deprived of any right to compensation, contrary to international law. The rule was that a belligerent who caused damage to enemy property by acts which were contrary to international law must make compensation. This rule was not limited to damage caused on the metropolitan territory of the belligerent responsible. Even damage caused by legitimate acts of warfare must be made good if the acts were committed during an illegal war. The same conclusion was reached in another way. It was generally admitted that liability for debts contracted for the benefit of ceded territory passed to the successor State (*cf.* Annex XIV of the Treaty); but debts contracted by the ceding State for the purpose of making war or of increasing the amount of territory previously annexed and subsequently liberated, could not bind the successor (or restored) State. Ethiopia could not be charged with Italian expenditure towards establishing her domination over Ethiopian territory. Still less could the burden of Italian responsibility for measures of war taken in Ethiopia against United Nations nationals, other than Ethiopian, be transferred with the liberated territory to the Ethiopian Government. The $25,000,000 fixed by the Treaty[1] as due from Italy to Ethiopia as reparations for war damage caused in Ethiopia could cover only damage sustained by the Ethiopian State and its nationals, and not that sustained by nationals of the other United Nations.

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[1] " Economic and Financial Provisions relating to Ceded Territories ".

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[1] Annex XIV, para. 4, provides as follows:

"4. The Italian Government shall transfer to the Successor State all objects of artistic, historical or archaeological value belonging to the cultural heritage of the ceded territory, which, while that territory was under Italian control, were removed therefrom without payment and are held by the Italian Government or by Italian public institutions."

The following contentions were advanced, on behalf of the Italian Government:

Article 78, paragraph 7, of the Treaty was exceptional in character, as was emphasized by the care with which, at the end of the paragraph, its scope was limited by express reference to paragraph 14 of Annexes X and XIV. Following the rule *exceptio est strictissimae applicationis*, the expression "ceded territories" had a precise and well defined meaning in the Treaty. Articles 1 to 5 defined the new frontiers between Italy and France and Yugoslavia, and also the Free Territory of Trieste. Although that might have sufficed for the legal transfer of title to the territorial zone lying between the old and the new frontier, the Treaty in two Articles solemnly confirmed the territorial cession in favour of France (Article 6) and Yugoslavia (Article 11). On the other hand, there was no such solemn confirmation of the cession of Trieste; on the contrary, Article 21, paragraph 4, provided that "The Free Territory of Trieste shall not be considered as ceded territory within the meaning of Article 19 and Annex XIV of the present Treaty." Moreover, when the Treaty intended to accord to Trieste treatment analogous to that of the ceded territories, it did so either expressly—as in Article 78, paragraph 7[2]—or by a series of juridical provisions having essentially the same content as those relating to the ceded territories (*cf.* Annexes X[3] and XIV[4]). As regards Greece, which had no land frontier with Italy, there were no frontier provisions: the formal cession of the Dodecanese Islands was set out in Article 14. In the Treaty, therefore, only geographical areas which were the object of a territorial cession could be regarded as ceded territories. The exceptional provision of Article 78, paragraph 7, applied only because there was also the transfer of territory in the Treaty. That was so for the territories ceded to France, Yugoslavia and Greece, and also for the Free Territory of Trieste. The territory of Ethiopia received by the Treaty neither a cession nor a transfer. By Article 33 of the Treaty "Italy recognises and undertakes to respect the sovereignty and independence of the State of Ethiopia." There was no reference to a bilateral act such as cession involving legitimacy of title to acquisition, but only to a unilateral act requiring formal recognition, transforming a *de facto* into a *de jure* situation, and no title to acquisition was involved. There was no cession: when a cession was hypothetically possible, there was none to whom cession could be made; and when it became practicable, cession could no longer take place. Ethiopia ceased *de facto* to exist as an independent State when it was annexed by Italy in 1936. The Powers recognized the transfer of sovereignty; the ex-Emperor of Ethiopia and his entourage could no longer be regarded as a legitimate Government-in-exile; and they could not therefore take cession of a territory. Their ability to do so revived with the progressive re-occupation of territories once in the hands of Italy and the constitution of an Ethiopian Government, first *de facto*, then *de jure*, but before the date of the Treaty. Although the constitution of an Ethiopian Government was subject to the re-occupation of territory, that Government could not make itself grantee by cession of that territory. The Treaty of Peace, which was signed by Ethiopia, then one of the Allied and Associated Powers, logically distinguished three cases: (i) annexation of zones of Italian territory by existing States (France, Yugoslavia, Greece) having an independent international juridical capacity to acquire part of Italian territory—here the Treaty spoke of " cessions "; (ii) a new subject of international law created by the Treaty itself (Free Territory of Trieste)—this was dealt with in territorial clauses and there was no mention of " cession " or " ceded territory "; (iii) a restoration already accomplished, by unilateral act, of a State entity, confirmed within its own frontiers—this was dealt with not in cessions or territorial clauses but in the political clauses: there was neither cession nor transfer of territory by Italy, only her recognition of the new situation and the obligation to respect it.

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[1] Article 74, Part B, para. 1.

[2] " . . . loss or damage sustained during the war by property in ceded territory or in the Free Territory of Trieste . . ." etc.

[3] " Economic and Financial Provisions relating to the Free Territory of Trieste."

[4] " Economic and Financial Provisions relating to Ceded Territories ".

The French claim could be admitted only by applying to Ethiopian territory—which was not, and could not be, ceded—the provisions of the Treaty concerning ceded territories. But argument from analogy did not apply; paragraph 7 was exceptional, not only in its wording but also because the Treaty was based on two principles: (i) Italy was not bound to compensate *individually* United Nations nationals for damage sustained by them on the territory of one of the United Nations and outside Italian territory—such damage was the object of *reparations* made by Italy to the Allied and Associated Powers, not compensation to United Nations nationals (see Articles 78 and 80[1]); (ii) the validity of claims for restoration of property removed from the territory of one of the United Nations was determined irrespective of the nationality of the claimant—only the State from whose territory the property had been taken, and not the State of which the owner of the property was a national, had the *legitimatio ad petendum* (Article 75,[1] which derogates from Article 80). The only exception to this principle was Article 78, paragraph 7, of the Treaty, but the scope of that paragraph was limited to ceded territories and the Free Territory of Trieste. There was no *eadem ratio* for Ethiopia and Albania. It was possible that paragraph 7 of Article 78 was based on the fact that, when the Treaty was drafted, the Powers to whom territory was ceded were not yet in possession of that territory and hence could not know how much war damage had been caused there or the probable cost of reconstruction. Thus, Greece and Yugoslavia could not take account of that cost in determining the amount of reparations (see Article 74 (B) of the Treaty[2]); still less could France, to whom Article 79,[3] and not Article 74, applied. This reasoning could not be applied to Ethiopia, which, having before the drafting of the Treaty resumed its juridical existence on territory which had been entirely Italian, could, and did, set out in Article 74 all its claims for war damage caused on its territory to property whether Ethiopian or non-Ethiopian. The reference in the Preamble of the Treaty to the responsibility of Italy as an aggressor State was not sufficient to identify the object and scope of the obligations which flow from that cause; that object and scope were fixed only by the provisions of the Treaty.

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[1] Article 78, para. 4 (*a*), provides: " . . . In cases . . . where, as a result of the war, a United Nations national has suffered a loss by reason of injury or damage to property in Italy, he shall receive from the Italian Government compensation in lire to the extent of two-thirds of the sum necessary, at the date of payment, to purchase similar property or to make good the loss suffered. . . ."

Article 80 provides: " The Allied and Associated Powers declare that the rights attributed to them under Articles 74 and 79 of the present Treaty cover all their claims and those of their nationals for loss or damage due to acts of war, including measures due to the occupation of their territory, attributable to Italy and having occurred outside Italian territory, with the exception of claims based on Articles 75 and 78."

Held: that the claim must fail. The provisions of paragraph 7 of Article 78 did not apply to Ethiopia and any attempt to interpret the Treaty in such a way as to make it so apply must be rejected.

The Tribunal said: " 1. Article 78 of the Treaty propounds, in paragraph 1, the principle that ' Italy shall restore all legal rights and interests in Italy of the United Nations and their nationals as

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[1] Article 75 provides, in part:

" 1. Italy accepts the principles of the United Nations Declaration of January 5, 1943, and shall return, in the shortest possible time, property removed from the territory of any of the United Nations.

" 2. The obligation to make restitution applies to all identifiable property at present in Italy which was removed by force or duress by any of the Axis Powers from the territory of any of the United Nations, irrespective of any subsequent transactions by which the present holder of any such property has secured possession."

[2] Article 74, Part B, provides, in part:

" B. *Reparation for Albania, Ethiopia, Greece and Yugoslavia*

" 1. Italy shall pay reparation to the following States:

. . . .

Ethiopia in the amount of	$25,000,000
Greece in the amount of	$105,000,000
Yugoslavia in the amount of ..	$125,000,000 "

[3] Article 79 constitutes Section II of the Treaty, which is headed: " Italian Property in the Territory of Allied and Associated Powers ".

they existed on June 10, 1940, and shall return all property in Italy of the United Nations and their nationals as it now exists.' The subsequent paragraphs draw a number of corollaries from that principle and specify them, by definition, as being obligations of the Italian Government to restore, to invalidate measures or transfers, to exempt from taxation. The territorial scope of Article 78 results from the principle propounded by paragraph 1: the restoration applies to all legal rights and interests *in Italy* and has as its object all property *in Italy* of the United Nations and their nationals. Article 78, moreover, is in Part VII, 'Property, Rights and Interests', Section I, 'United Nations Property *in Italy*'. The word 'Italy' in the latter heading and in Article 78 means Italian territory in the understanding which the Treaty itself accords it.

"Paragraph 7 of Article 78 seeks to extend a part of the obligations imposed by that Article on Italy to property of United Nations nationals in certain territories other than Italian territory as determined by the Treaty but formerly belonging to Italy.

"There can obviously be no question of extending to property situate in those territories the obligations relative to restoration (see the *Collas and Michel* decision of January 21, 1953[1]); Italy, having lost her sovereignty over the territories in question, was no longer in a position to effect the restoration of property there. Similarly, Annex XIV, as regards the ceded territories (para. 14), and Annex X, as regards the Free Territory of Trieste (para. 14), provide that property in the ceded territory or in the Free Territory of Trieste of any of the United Nations and their nationals, if not already freed from Italian measures of sequestration or control and returned to its owner, shall be returned in the condition 'in which it now exists'; that is an obligation imposed on the State which was to enjoy sovereignty over the territory in question under the terms of the Treaty.

"Paragraph 7 of Article 78 clearly enumerates by reference to other paragraphs of that Article the obligations which are imposed on Italy in regard to the property of nationals of the United Nations which is on territories which thenceforth were to lie outside its frontiers and which are mentioned in paragraph 7—to wit, the obligation to invalidate transfers resulting from force or duress exerted by Axis Governments or their agencies during the war (para. 3), the obligation to compensate the owner in a case where the property cannot be returned or has been lost or damaged (para. 4), the obligation to pay all reasonable expenses incurred in establishing claims (para. 5), and that of exemption from taxes (para. 6).

"As regards the territories to which those obligations extend (more precisely, as regards the property there situate), paragraph 7 defines them twice—first, in its opening sentence, which deals in general terms with the responsibility of the Italian Government for loss or damage sustained during the war, and then, in its second sentence, which refers expressly to paragraphs 3, 4, 5 and 6, subject to the provisions of paragraph 14 of Annex X and XIV respectively. Both sentences concern ' property in ceded territory or in the Free Territory of Trieste belonging to United Nations nationals '. In the first sentence the affirmation of the principle that ' Italy shall continue to be responsible for loss or damage sustained during the war by property in ceded territory or in the Free Territory of Trieste ' is preceded by the words: ' Notwithstanding the territorial transfers provided in the present Treaty '. The prepositive expression ' Notwithstanding ' [*en dépit*], which is synonymous with ' despite ' [*malgré*], has an adversative character and means that, but for the provisions of paragraph 7, the transfers of territory provided by the Treaty would result in relieving the Italian Government of responsibility for loss and damage caused during the war to property in the transferred territories belonging to United Nations nationals; it declares at the same time an exception to the rule of non-responsibility; but it is not the phrase ' Notwithstanding the territorial transfers provided in the present Treaty ' which fixes the limits of the exception—those limits being, on the contrary, expressly defined by the words found later in the sentence: ' in ceded territory or in the Free Territory of Trieste '. Only if that last precise delimitation were not there could one speak of an exception extending to all the transferred territories. All that can be deduced from the opening words of paragraph 7—' Notwithstanding . . .', etc.—is that the draftsmen of the Treaty considered that there had been a transfer of territory in respect of the ceded territories and of the Free Territory of Trieste. One cannot, on the other hand, deduce from it either that those were the transfers of territory provided by the Treaty or that—assuming that there were others—the rule of paragraph 7 alone would be applicable to them also.

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[1] [See *International Law Reports*, 1953, p. 628.]

" The result of this case thus depends on the interpretation which is to be given to the words ' in ceded territory or [and] in the Free Territory of Trieste ' which occur twice in paragraph 7 of Article 78.

" 2. It is a universally recognized principle of interpretation that the provisions of a treaty must be interpreted in their context (*cf.* Lauterpacht on the interpretation of treaties, revised Draft Resolutions [etc.] at the Siena meeting of the Institute of International Law, p. 1, Article 1, para. 2). Rousseau, *Principes généraux du Droit international Public*, vol. I, No. 436, pp. 714 *et seq.*, reviews in the following manner conclusions of writers and international practice on this point:

> " ' Reference to context—that is to say, the interpretation of a part of a Treaty by reference to the content of the treaty as a whole—has been commended by all writers as a particularly efficacious method of determining the intention of the parties, from Wolf, Puffendorf and Vattel to Oppenheim. It is that method which Professor Anzilotti has in mind

when he writes that " in the interpretation of a norm, account must be taken of the relationship of that norm with others with which it has a connection." '

Diplomatic practice in this respect is clearly settled. The practice of the courts of all nations is not less clear: they have applied this method to both bilateral treaties and multilateral conventions (*traités-lois*). The Permanent Court of International Justice has rightly insisted on the importance of this technical process. This can be seen from its Advisory Opinion No. 11, concerning the *Polish Postal Service in Danzig* (Interpretation of the Polish-Danzig Agreement of October 24, 1921):

" ' It is a cardinal principle of interpretation that words must be used in the sense which they would normally have in their context unless such interpretation would lead to something unreasonable or absurd.'[1]

The practice of courts has, moreover, increasingly extended the process, as the context can be constituted either by the sentence in which the word to be interpreted occurs, or by the text as a whole, or, indeed, by the texts of several interconnected or interdependent treaties. As examples of reference to a treaty as a whole, Rousseau (*op. cit.*, p. 717) cites the Advisory Opinion of August 12, 1922, on the *Competence of the International Labour Organisation*,[2] that of May 16, 1925, concerning the *Polish Postal Service in Danzig* [*supra*], that of November 21, 1925, concerning the *Frontier between Turkey and Iraq* (*Mosul Case*),[3] and the Judgment of August 11, 1932, concerning the *Interpretation of the Statute of Memel*.[4]

" The Treaty deals, in a whole series of Articles, with the fate of territories which had, at some time, come to be placed under Italian sovereignty (indirectly in the case of Albania, where Italy had installed ' authorities '—see Article 31 of the Treaty) and which, under the terms of the Treaty, were there no longer, the Treaty itself confirming, effecting or providing for their transfer to another sovereignty.

" The Treaty begins, in Part I ' Territorial Clauses ', Section I ' Frontiers ', by determining the frontiers of Italy. They are to be those which existed on January 1, 1938, subject to the modifications indicated in Articles 2, 3, 4, 11 and 22. Article 2 sets out the modifications of the frontier between Italy and France; Article 3 determines the new land frontier between Italy and Yugoslavia; Article 4 fixes the frontier between Italy and the Free Territory of Trieste; Article 11 provides that Italy cedes to Yugoslavia, in full sovereignty, not only ' the territory situate between the new frontiers of Yugoslavia as defined in Articles 3 and 22 and the Italo-Yugoslav frontier as it existed on January 1, 1938' but also the commune of Zara and all islands and adjacent islets lying in areas which the Treaty defines by reference to parallels [of latitude] and meridians [of longitude]; finally, Article 22 fixes the frontier between Yugoslavia and the Free Territory of Trieste. Article 11 is in Part I, 'Territorial Clauses', but in Section IV, 'People's Federal Republic of Yugoslavia (Special Clauses)'. Article 22, on the other hand, is in Part II, 'Political Clauses', Section III, 'Free Territory of Trieste'.

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[1] *P.C.I.J.*, Series B, No. 11, p. 39; *Annual Digest*, 1925–1926, Case No. 275, at p. 365.]

[2] *P.C.I.J.*, Series B, No. 2; *Annual Digest*, 1919–1922, Case No. 251.]

[3] *P.C.I.J.*, Series B, No. 12; *Annual Digest*, 1925–1926, Case No. 6.]

[4] *P.C.I.J.*, Series A/B, No. 49; *Annual Digest*, 1931–1932, Case No. 7.]

"The Treaty, after defining the new land frontiers between, on the one part, Italy and, on the other part, those of the United and Associated Nations [*sic.*] which were and remain for Italy bordering States, that is, France (Article 2) and Yugoslavia (Article 3), expressly provides for the cession to these two States in full sovereignty of areas situated on the French or Yugoslav side of the said frontiers. For France, territorial cession is the object of Article 6: 'Italy hereby cedes to France in full sovereignty the former Italian territory situate on the French side of the Franco-Italian frontier defined in Article 2.' The corresponding provision for Yugoslavia is in Article 11, the text of which is somewhat complex by reason not only of the creation, on territory previously Italian, of the Free Territory of Trieste, henceforth a neighbour of both Yugoslavia and Italy, but also of the passing under Yugoslav sovereignty of the former enclave of Zara and a whole series of islets; but Article 11 also speaks of cession: '1. Italy hereby cedes to Yugoslavia in full sovereignty the territory . . .' and '2. Italy hereby cedes to Yugoslavia in full sovereignty the island of Pelagosa and the adjacent islets.'

"On the other hand, as regards the Free Territory of Trieste, after fixing in Article 4 the frontier between Italy and the Free Territory of Trieste, the Treaty does not speak of the cession by Italy of the territory, previously Italian, transferred to the latter but, in Part II, 'Political Clauses', Section III, 'Free Territory of Trieste', provides in Article 21 (1) that by virtue of that Article 'There is . . . constituted the Free Territory of Trieste, consisting of the area lying between the Adriatic Sea and the boundaries defined in Articles 4 and 22 of the present Treaty' (Article 4, frontiers with Italy; Article 22, frontier with Yugoslavia). In Article 22 (2) the Treaty adds: 'Italian sovereignty over the area constituting the Free Territory of Trieste, as above defined, shall be terminated upon the coming into force of the present Treaty.' Paragraph 4 of the same Article provides: 'The Free Territory of Trieste shall not be considered as ceded territory within the meaning of Article 19 and Annex XIV of the present Treaty.' The Treaty expressly mentions the Free Territory of Trieste along with the ceded territories in Article 78, paragraph 7—the provision which we have to interpret—and in Article 79, paragraph 6 (*g*).

" In Part I, ' Territorial Clauses ', the Treaty does not merely determine, in Section I, ' Frontiers ', the new land frontiers between Italy on the one part and, on the other part, France and Yugoslavia, States bordering on Italy; it also deals, in Section V ' Greece (Special Clauses) ', with Greece, which is not a neighbour of Italy. It provides in Article 14 for the cession to Greece of the Dodecanese:

> " ' 1. Italy hereby cedes to Greece in full sovereignty the Dodecanese Islands . . .' [and]
>
> ' 3. The procedure and the technical conditions governing the transfer of these islands to Greece . . .'

" The fate of other territories which were formerly (and until different dates) Italian and in respect of which the Treaty does not purport to recognize Italian sovereignty, is governed by provisions which are not in Part I, ' Territorial Clauses ', but in Part II, ' Political Clauses ', under the same head as Article 21, which concerns the Free Territory of Trieste. Thus:

> "Article 23, constituting Section IV, ' Italian Colonies ', according to which ' 1. Italy renounces all right and title to the Italian territorial possessions in Africa, *i.e.* Libya, Eritrea and Italian Somaliland. 2. Pending their final disposal, the said possessions shall continue under their present administration.'
>
> "Article 27, under Section VI, ' Albania ': Italy recognises and undertakes to respect the sovereignty and independence of the State of Albania."
>
> "Article 33, under Section VII, ' Ethiopia ': ' Italy recognises and undertakes to respect the sovereignty and independence of the State of Ethiopia. '

" On behalf of the French Government, it was nevertheless said that a definition of ceded territories comprising solely the territories dealt with in Articles 6, 11 and 14 of the Treaty would not apply to all the provisions of the Treaty; one ought rather to enquire what the draftsmen meant by those words in relation to each Article in which ceded territories are dealt with, having regard to the object and purpose of the provision to be interpreted.

" It is, naturally, not unknown for a treaty to use one and the same expression in different parts, or in different articles or paragraphs, while not giving it the same meaning throughout. It was pointed out in this regard that the Treaty was prepared by several committees, each engaged on one part of the instrument, and there was not, in the end, time to proceed with the thorough work of coordination and editing which was required and in the course of which it would have been possible to adopt a uniform terminology and do away with inconsistencies. It does indeed appear from the intervention of the delegate from Belgium, the text of which is annexed (Annex II) to the abstract of the decisions taken at the 12th Session (October 5, 1946) of the Juridical and Editorial Commission, that the latter, during the Conference of Paris, had not been enabled to work in as efficacious a manner as might have been desired, ' neither as regards the juridical structure of the provisions of the Peace Treaties nor as regards the composition of those provisions ' (*Recueil des Documents de la Conferénce de Paris*, Palais du Luxembourg, 29 July–15 October 1946, vol. III, p. 429).

" These general considerations do not, however, suffice to hold that the draftsmen of the Treaty, contrary to every sound rule of composition, did not intend to refer only to the territories dealt with by Articles 6, 11 and 14 when in other provisions they used the expression ' ceded territories '. It would still be necessary that other considerations, drawn from the text of the Treaty, permit the conclusion that the intention of the parties was to give, in one or other provision, to the idea of ' ceded territories ' a meaning different from that which results from Articles 6, 11 and 14.

" (*a*) In Article 78 (7), which this Conciliation Commission is called upon to interpret, the Treaty puts the Free Territory of Trieste on the same footing as the ceded territories. It is permissible to conclude from that that the Free Territory of Trieste is not regarded, in the sense of that provision, as being itself a ceded territory, because it would then not have been necessary to mention it expressly. Once it was desired to apply the norm of paragraph 7 to the Free Territory of Trieste, it would not be necessary to mention it beside the ceded territories if it did not form part of the latter in the view of the draftsmen of the Treaty. It appears from this that the latter confined themselves, in Article 78, paragraph 7, to the technical or proper meaning of 'ceded territories ', comprising only those dealt with by Articles 6, 11 and 14. That being so, the draftsmen ought to have enumerated expressly in paragraph 7, besides the Free Territory of Trieste, also the former Italian colonies in Africa, Albania and Ethiopia, if it was the intention to apply the same rules to them. The interpretation put forward on behalf of France presupposes that the draftsmen of the Treaty not only had not employed in paragraph 7 the expression ' ceded territories ' in the technical or proper meaning which results from Articles 6, 11 and 14 of the Treaty, but, moreover, that they did not use it in the meaning of territories which, under the Treaty, were no longer under Italian sovereignty, after having been so in some respect and at some time. For the Free Territory of Trieste would also come within a definition of this kind and it cannot be seen what could have been the criterion of distinction if the idea of ' ceded territories ' comprised, besides the territories dealt with by Articles 6, 11 and 14, the Italian colonies in Africa, Ethiopia and Albania, but not the Free Territory of Trieste.

" (*b*) Ceded territories are also mentioned in other parts of the Treaty.

"After having, in Part I, under the heading ' Territorial Clauses ', dealt with the territorial changes resulting from cessions to France

(Article 6), to Yugoslavia (Article 11) and to Greece (Article 14), the Treaty is concerned with their direct influence on the position of the inhabitants. This problem is resolved in Part II, ' Political Clauses ', Section II, ' Nationality. Civil and Political Rights ' (Articles 19 and 20). Article 19 deals, in a general way, with the question of change of nationality of ' 1. Italian citizens who were domiciled on June 10, 1940, in territory transferred by [*cédé par*] Italy to another State under the present Treaty, . . .' Paragraphs 2 and 3 impose certain obligations in this regard on ' The Government of the State to which the territory is transferred ', and paragraph 3 confers a right on ' The State to which the territory is ceded '. Article 20 deals with the special case of territories ceded to Yugoslavia.

"Already, from the point of view of formal logic, it can be admitted that in speaking of ' territory transferred by [*cédé par*] Italy to another State under the present Treaty ', Article 19 is referring to the cessions provided for in the previous Articles 6, 11 and 14. Only subsequently, and without using the term ' cession ', does the Treaty deal with the constitution of the Free Territory of Trieste (Article 21), with the renunciation by Italy of all her right and title to the Italian territorial possessions in Africa (Article 23), with the recognition of the sovereignty and independence of the State of Albania (Article 27) and of the State of Ethiopia (Article 33) and with her undertaking to respect them (*ibid.*). But also, from the material point of view, it appears clearly that the draftsmen of the Treaty did not intend the rules of Article 19 to apply to the Italian possessions in Africa, to Albania or to Ethiopia.

"Under the Treaty, Ethiopians who were domiciled on June 10, 1940, in Ethiopia will not again become Ethiopians, after having been Italians and entitled to opt for Italian citizenship, if their customary language is Italian (Article 19); according to the Treaty, Ethiopians who were domiciled in Ethiopia on October 3, 1935—the date when Italian troops entered Ethiopia—never ceased *de jure* to be Ethiopian (Articles 35 and 38[1]); they can therefore neither again become Ethiopian nor be entitled to opt for Italian citizenship, even if their customary language is Italian. When it speaks of ' Italian nationals in Ethiopia ' and ensures for them the enjoyment of ' the same juridical status as other foreign nationals ' (Article 36), the Treaty is referring to an Italian nationality other than that granted to the Ethiopians by the Italian annexation of May 9, 1936. If the first of those provisions were applicable to Ethiopia, there

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[[1] Article 35 provides: " Italy recognises the legality of all measures which the Government of Ethiopia has taken or may hereafter take in order to annul Italian measures respecting Ethiopia taken after October 3, 1935, and the effects of such measures."

Article 38 provides: " The date from which the provisions of the present Treaty shall become applicable as regards all measures and acts of any kind whatsoever entailing the responsibility of Italy or of Italian nationals towards Ethiopia, shall be held to be October 3, 1935."]

would be an inconsistency. Moreover, the date of June 10, 1940, which is one of the bases of Article 19, would have no meaning for the Ethiopians (see Articles 35 and 38, which are based on October 3, 1935, as regards Ethiopia).

"Similarly with Albanians domiciled in Albania (Articles 31 and 32), save that here inconsistency would exist between Article 19 and Article 30, and the date of June 10, 1940, on which Article 19 is based, would have no meaning, as the Treaty places the restoration *de jure* of the sovereignty of the State of Albania at April 7, 1939, the date of Italy's 'aggression' against Albania (Articles 29 and 31).[1]

"As regards the Italian possessions in Africa, the Treaty could not provide in Article 19 for the consequences of the changes which affect the status of the inhabitants, since it does not deal with the definitive disposal of those territories (Article 23 (2)).[2] The determination of those consequences had necessarily to be left to the arrangements which were to be made to deal with the disposal of the territories in question; that, moreover, is what Annex XIV, paragraph 19, provides expressly in regard to 'economic and financial provisions'.[3]

[[1] Article 29 reads:

"Italy formally renounces in favour of Albania all property (apart from normal diplomatic or consular premises), rights, concessions, interests and advantages of all kinds in Albania, belonging to the Italian State or Italian para-statal institutions. Italy likewise renounces all claims to special interests or influence in Albania, acquired as a result of the aggression of April 7, 1939, or under treaties or agreements concluded before that date.

"The economic clauses of the present Treaty, applicable to the Allied and Associated Powers, shall apply to other Italian property and other economic relations between Albania and Italy."

Article 30 provides: "Italian nationals in Albania will enjoy the same juridical status as other foreign nationals, but Italy recognises the legality of all Albanian measures annulling or modifying concessions or special rights granted to Italian nationals provided that such measures are taken within a year from the coming into force of the present Treaty."

Article 31 reads: "Italy recognises that all agreements and arrangements made between Italy and the authorities installed in Albania by Italy from April 7, 1939, to September 3, 1943, are null and void."

Article 32 provides: "Italy recognises the legality of any measures which Albania may consider necessary to take in order to confirm or give effect to the preceding provisions."]

[[2] Article 23 provides:

"1. Italy renounces all right and title to the Italian territorial possessions in Africa, *i.e.*, Libya, Eritrea and Italian Somaliland.

"2. Pending their final disposal, the said possessions shall continue under their present administration.

"3. The final disposal of these possessions shall be determined jointly by the Government of the Soviet Union, of the United Kingdom, of the United States of America, and of France within one year from the coming into force of the present Treaty, in the manner laid down in the joint declaration of February 10, 1947, issued by the said Governments, which is reproduced in Annex XI."]

[[3] Paragraph 19 of Annex XIV reads: "The provisions of this Annex shall not apply to the former Italian Colonies. The economic and financial provisions to be applied therein will form part of the arrangements for the final disposal of these territories pursuant to Article 23 of the present Treaty."]

" In these circumstances, although Article 21, paragraph 4, provides *expressis verbis* that ' The Free Territory of Trieste shall not be considered as ceded territory within the meaning of Article 19 . . .' it supports, not an argument *a contrario*, that is, the argument that Ethiopia, Albania and the former Italian possessions in Africa should be considered as ceded territories, but rather an argument *a fortiori*: if the Free Territory of Trieste is not to be considered as ceded territory, there is stronger reason for not so considering Ethiopia, Albania and the Italian territorial possessions in Africa.

" It should, indeed, be recalled that the technical or precise notion of cession of territory in the Treaty corresponds fairly exactly with the meaning given to those words by public international law. Modern doctrine, in fact, normally divides the operation of cession into two successive acts: the abandonment by the ceding State of its territorial jurisdiction being followed by the establishing of that of the annexing or receiving State. (Rousseau, *Droit international public*, p. 247.) The two acts are seen in the cessions provided for in Articles 6, 11 and 14 of the Treaty. The second act, in any event, does not appear in the following instances:

> "As regards Albania, in Article 27. It is true that Italy recognizes the sovereignty and the independence of the State of Albania and undertakes to respect them, but if that implies the abandonment of its territorial jurisdiction by Italy, that abandonment is not followed in Articles 27–32 by the establishing by the State of Albania of its sovereignty. The Treaty, needless to say, cannot annul the historic fact of the influence exercised by Italy on Albanian territory following the aggression of April 7, 1939, and until September 3, 1943, but *de jure* its purpose is to restore [retrospectively] the sovereignty of the State of Albania as at April 7, 1939, by recognizing as null and void ' all agreements and arrangements made between Italy and the authorities installed in Albania by Italy from April 7, 1939, to September 3, 1943 ' (Article 31; see also Article 32[1]). Albanian sovereignty is thus envisaged by the Treaty as existing before the abandonment by Italy of her claims.
>
> "As regards Ethiopia, in Article 31. Here, too, there is lacking in every particular (Articles 33–38) the second of the acts which characterize cession, that is, the establishment by Ethiopia of its sovereignty consequentially on the Italian abandonment implicit in its recognition of the sovereignty and of the independence of Ethiopia and in the undertaking to respect it. It is true that the Treaty cannot avoid the historic fact of the sovereignty exercised by Italy on the territory of Ethiopia after the

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[[1] Article 32 provides: " Italy recognises the legality of any measures which Albania may consider necessary to take in order to confirm or give effect to the preceding provisions."]

annexation of May 9, 1936, and until the liberation of Ethiopia by British forces in May 1941—well before the date of the Treaty—but its purpose is to restore *de jure*, retroactively, the sovereignty of the Ethiopian State not only to May 9, 1936, but to October 3, 1935, the date of the entry of Italian forces into Ethiopia, by making Italy recognize ' the legality of all measures which the Government of Ethiopia has taken or may hereafter take in order to annul Italian measures respecting Ethiopia taken after October 3, 1935, and the effects of such measures ' (Article 36; see also Article 38). Ethiopia would not have been able to be a party to the Treaty as one of the Allied and Associated Powers if the Treaty itself had not started from the idea that the State of Ethiopia had, well before February 10, 1947, recovered, *de facto* and *de jure*, its sovereignty, on the liberation of its territory by British forces in May 1941, followed immediately by the return of the Emperor Haile Selassie II to his throne (see *Enciclopedia Italiana*, Appendix I, pp. 763 and 766; Appendix II, vol. I, pp. 85 and 882); so also Article 35 speaks of the validity of measures *already taken* by the Ethiopian Government.

"As regards the Italian territorial possessions in Africa (Libya, Eritrea and Italian Somaliland), in Article 23.[1] There, there is the renunciation by Italy of all right and title, but no establishing of territorial jurisdiction by another State, the final disposal of the Italian colonies in Africa being put back to be determined in accordance with a procedure laid down in the Treaty; before the conclusion of that procedure, there was not and could not be a grantee or annexing State.

" Only in regard to the Free Territory of Trieste can there be any doubt; the abandonment by Italy of its territorial jurisdiction over this territory is contained in Article 21, paragraph 2, and is followed immediately in point of time by the establishing of the sovereignty of the Free Territory of Trieste, which is recognized by the Allied and Associated Powers and by Italy, who agree that its integrity and independence shall be assured by the Security Council of the United Nations (Article 22, para. 1). The only difference between that and the cessions of territory in the technical or proper sense consists in this, that the successor State did not exist before the Treaty but was set up by virtue of the Treaty. To avoid any doubt in the interpretation of the Treaty, and since the question of citizenship for the Free Territory of Trieste was expressly governed by Article 6 of Annex VI, ' Permenent Statute of the Free Territory of Trieste ', the draftsman felt bound to include in Article 21 a paragraph 4 excluding the application of Article 19 to the Free Territory of Trieste. That was not strictly necessary; it was rather a repetitious, a pleonastic, elucidation, which cannot in any event serve as a basis for an argument *a contrario*.

[[1] See *supra*, p. 615, n.2.]

" (*c*) Article 74, in Part VII, ' Claims Arising Out of the War ', Section I, ' Reparation ', determines A, ' Reparation for the Union of Soviet Socialist Republics ', B, ' Reparation for Albania, Ethiopia, Greece and Yugoslavia ', and D, ' Reparation for other States ". Paragraph 1 of part D lays down the principle that

> " ' Claims of the other Allied and Associated Powers shall be satisfied out of the Italian assets subject to their respective jurisdictions under Article 79 of the present Treaty '

and paragraph 2 adds:

> " ' The claims of any State which is receiving territories under the present Treaty and which is not mentioned in part B of this Article shall also be satisfied by the transfer to the said State, without payment, of the industrial installations and equipment situated in the ceded territories . . .'

This provision cannot be used to support the argument that the expression ' ceded territories ' is employed by the Treaty in a sense other than the technical and proper; in part B, Greece and Yugoslavia are, indeed, mentioned, as States benefiting, under the Treaty, from cessions of territory in the technical or proper meaning of the expression. It would be otherwise if paragraph 2 of part D spoke of ' claims of any State which is receiving cessions of territory under the present Treaty and which is not mentioned in part B ' and if part B mentioned only the States not referred to in Articles 6, 11 and 14. It is true that part B does not mention, along with Albania and Ethiopia, the Italian territorial possessions in Africa, but paragraph 2 of part D does not in any event apply to them, because no State has received with regard to them territories under the present Treaty (see Article 23, paras. 2 and 3).

" (*d*) Article 79 determines the disposal of Italian property in the territory of Allied and Associated Powers. In principle, the Allied or Associated Power on whose territory such property is, has the right to liquidate it to satisfy its claims or those of its nationals against Italy or Italian nationals. Paragraph 6 of Article 79 enumerates in sub-paragraphs (*a*) to (*g*) a number of kinds of property which are not subject to such liquidation. Under (*f*), ' Property in ceded territories of Italian nationals to which the provisions of Annex XIV apply ' escapes liquidation, as also under (*g*):

> ' (*g*) With the exception of the assets indicated in Article 74, part A, paragraph 2 (*b*) and part D, paragraph 1, property of natural persons residing in ceded territories or in the Free Territory of Trieste who do not opt for Italian nationality under the present Treaty, and property of corporations or associations having *siège social* in ceded territories or in the Free Territory of Trieste, provided that such corporations or associations are not owned or controlled by persons in Italy. In the cases provided under Article 74, part A, paragraph 2 (*b*) and part D, paragraph 1, the question of compensation will be dealt with under Article 74, part E."

" In other words, sub-paragraph (*f*) exempts from liquidation the property of Italian nationals situate in the ceded territories. Such property is governed by paragraph 9 of Annex XIV, which distinguishes between cases in which (a) the owner is permenantly resident in the ceded territories at the coming into force of the Treaty, and (b) the owner is not permanently resident in the ceded territories at the coming into force of the Treaty or is an Italian juridical person. In case (a), the property is to be respected on a basis of equality with the rights of nationals of the successor State, provided that it has been lawfully acquired. In case (b), the property, provided that it has been lawfully acquired, is to be subject only to such legislation as may be enacted from time to time regarding the property of foreign nationals and juridical persons generally.

" Sub-paragraph (*g*) exempts from liquidation the property of those who do not opt for Italian nationality and who reside in ceded territories or in the Free Territory of Trieste (see Article 19, para. 2[1]), as well as property of corporations or associations having *siège social* in ceded territories or in the Free Territory of Trieste provided that they are not owned or controlled by persons in Italy. This exemption is itself subject to an exception: property of the persons, corporations and associations mentioned in Article 79, paragraph 6 (*g*), which is situated in Roumania, Bulgaria and Hungary is subject to liquidation for the purpose of paying the reparations due from Italy to the U.S.S.R. (Article 74 A (2) (*b*) of the Treaty) as well as the property of such persons which is situate in the ' other States ' mentioned in Article 74 D (1) of the Treaty and which is to be liquidated for the purpose of satisfying the claims of the Allied or Associated Power on whose territory it is found (Article 74 D (1)).

" Exemption from liquidation under sub-paragraph (*f*) depends on a double condition—the nationality of the owner (who must be an Italian national) and the situation of the property (in ceded territories). The place of residence of the owner is not relevant.

" Exemption from liquidation under sub-paragraph (*g*) depends on a double condition—the nationality of the owner (one who does not opt for Italian nationality) and the residence of the owner (in ceded territories or in the Free Territory of Trieste). The situation of the property is irrelevant except for the application of Article 74 A (2) (*b*) and part D (1) of the Treaty.

[[1] Article 19, para. 2, provides:

" 2. The Government of the State to which the territory is transferred shall, by appropriate legislation within three months from the coming into force of the present Treaty, provide that all persons referred to in paragraph 1 over the age of eighteen years (or married persons whether under or over that age) whose customary language is Italian, shall be entitled to opt for Italian citizenship within a period of one year from the coming into force of the present Treaty. Any person so opting shall retain Italian citizenship and shall not be considered to have acquired the citizenship of the State to which the territory is transferred. The option of the husband shall not constitute an option on the part of the wife. Option on the part of the father, or, if the father is not alive, on the part of the mother, shall, however, automatically include all unmarried children under the age of eighteen years."]

" It is clear that in sub-paragraph (*f*) the occupied territories cannot in any event include Ethiopia; the disposal of the property of Italian nationals situated in Ethiopia depends, in fact, on Article 36 of the Treaty, which excludes the application of paragraph 9 of Annex XIV to such property.

"As regards sub-paragraph (*g*), the idea of option is, for physical persons, of great importance. Article 19 of the Treaty, as has been shown earlier, is not applicable to Ethiopia and the question of opting does not arise in regard to that State. And there was, moreover, no need for an express exemption from liquidation of the property of Ethiopians resident in Ethiopia because the principle of paragraph 1 of Article 79 concerns only property belonging to Italy or Italian nationals, while under the Treaty Ethiopians remained Ethiopians, despite the Italian annexation. It results from this that the ceded territories within the meaning of Article 79, paragraph 6 (*g*), do not and cannot include Ethiopia.

" The care with which those who drew up the Treaty delimited the territorial scope of each provision appears from the fact that sub-paragraph (*f*) speaks only of ' ceded territories ' while sub-paragraph (*g*) enumerates, besides the ceded territories, the Free Territory of Trieste; sub-paragraph (*f*) does not assimilate the Free Territory of Trieste to the ceded territories because the disposal of the property of Italian nationals situated in that Territory is governed by paragraphs 9 and 10 of Annex X of the Treaty.

" It may be of some interest to recall that, during the discussion of paragraph 5 of Article 69 of the draft Treaty (which became paragraph 6 of Article 79 of the Treaty), Ethiopia submitted two proposals for restricting the list of property situate on the territory of one of the Allied and Associated Powers and excluded from liquidation by that Power, which proves that she regarded herself as benefiting from the principle of paragraph 1 of Article 69 (which became para. 6 of Article 79 of the Treaty). On the other hand, she disassociated herself entirely from Article 69, paragraph 5 (*e*) and (*f*), of the draft (which became Article 79, para. 6 (*f*) and (*g*), of the Treaty: *Recueil des Documents de la Conférence de Paris*—Palais du Luxembourg, 29 July–15 October 1946, vol. II, pp. 433, 466, 467). Ethiopia did not regard her territory as ceded territory under the Treaty and had no reason to believe that her interpretation was not generally accepted.

" (*e*) The notion of ' ceded territories ' plays an important part in Annex XIV, ' Economic and Financial Provisions relating to Ceded Territories '.

" In the first place, it appears from paragraph 4 of Article 21 of the Treaty that ' the Free Territory of Trieste shall not be considered as ceded territory within the meaning of . . . Annex XIV of the present Treaty.' The economic and financial provisions concerning the Free Territory of Trieste appear, in fact, in Annex X, which repeats, *mutatis mutandis*, for the Free Territory of Trieste most of the provisions appearing in Annex XIV.

" But Annex XIV does not apply either to the former Italian colonies in Africa: ' The economic and financial provisions to be applied therein will form part of the arrangements for the final disposal of these territories pursuant to Article 23 of the present Treaty ' (para. 19 of Annex XIV).

" It was observed on behalf of the French Government that if the authors of the Treaty had wished to adhere to the technical or proper meaning of ceded territories as it appears from Articles 6, 11 and 14 of the Treaty, they would not have needed to exclude expressly the application of Annex XIV to the Free Territory of Trieste and to the former Italian colonies.

" As regards the latter, it has been thought fit to recall that, their final disposal not having been determined directly by the Treaty (Article 23[1]), the economic and financial provisions concerning these territories could only form part of future arrangements. That is the object of paragraph 19 of Annex XIV, which thus falls outside the framework indicated by the title of the Annex: ' Economic and Financial Provisions relating to Ceded Territories '. In the same way, paragraph 7 of Article 78 falls outside the framework indicated by Section 1 of Part VII of the Treaty: ' United Nations Property in Italy '. There are thus anomalies of form, almost inevitable even when a treaty is drawn up in conditions more favourable to careful production than obtained at the Conference of Paris of 1946.

" As regards the express statement (in Article 21, para. 4, of the Treaty) that the economic and financial provisions of Annex XIV are not applicable to the Free Territory of Trieste, for which economic and financial provisions are set out in Annex X, it is the argument *a fortiori* and not that *a contrario* which applies in regard to Ethiopia, Albania and the Italian possessions in Africa, and that for reasons analogous to those which have been developed earlier in connection with the territorial scope of Article 19. In regard especially to Ethiopia, to which the present dispute is limited, none of the provisions of Annex XIV would appear to be applicable to her by the terms of the Treaty:

> " Paragraph 1 of Annex XIV deals with the disposal of Italian State and para-statal property within ceded territory; that matter is governed, as regards Ethiopia, by Article 34, paragraph 1, of the Treaty, which Article refers expressly, for the definition of para-statal property, to paragraph 1 of Annex XIV, which would not have been necessary if Annex XIV had been directly applicable to Ethiopa.

[1 See *supra*, p. 615, n.1.]

" Paragraph 2 of Annex XIV is not applicable to Ethiopia, who has the right to annul (if she has not already done so) the measures referred to therein, even if they were taken before September 3, 1943, but after October 3, 1935 (Article 35 of the Treaty).

" Paragraph 3 of Annex XIV deals with a situation of fact which does not apply to Ethiopia, which was not a maritime State when the Treaty was signed.

" Paragraph 4 of Annex XIV deals with a question which is dealt with as regards Ethiopia by Article 37 of the Treaty. That Article goes much further than paragraph 4; it lays down a period of 18 months for the restoration of ' all works of art, religious objects, archives and objects of historical value belonging to Ethiopia or its nationals ', even if they do not form part of the cultural heritage of Ethiopia, even if they were paid for, and whether or not held by the Italian Government or by Italian public institutions; it is sufficient that they were transported from Ethiopia to Italy after October 3, 1935.

" The obligations imposed on the successor State by paragraphs 5, 6, and 7 of Annex XIV are incompatible with the rights of the Ethiopian State which are recognized in Article 35 of the Treaty.

" Paragraphs 8, 10, 11, 12 and 17 of Annex XIV have no relevance to Ethiopia seeing that, as has been explained above, Article 19 does not apply to the relations between Ethiopia and Italy.

" Paragraph 9 of Annex XIV deals with a question which is dealt with in a different way as regards Ethiopia by Article 36 of the Treaty.

" Paragraph 13 of Annex XIV[1] merely states a general principle of public international law applicable without more, in virtue of the latter, to the debts owed by persons in Italy to persons in Ethiopia and to debts owed by persons in Ethiopia to persons in Italy.

" Paragraph 14 of Annex XIV is, in view of Article 35 of the Treaty, of no practical interest in connection with Ethiopia.

" Paragraph 15 concerns the Brioni Agreement, to which Ethiopia was not and is not a party.

" Paragraph 16 of Annex XIV, which deals with the restoration of property unlawfully removed after September 3, 1943, from ceded territory to Italy, refers to paragraphs 2, 3, 4, 5 and 6 of Article 75 of the Treaty; now, these provisions are directly applicable to property unlawfully removed from Ethiopia, which is one of the United Nations.

[[1] Para. 13 of Annex XIV of the Treaty provides:

" 13. Debts owed by persons in Italy to persons in the ceded territory or by persons in the ceded territory to persons in Italy shall not be affected by the cession. Italy and the Successor State undertake to facilitate the settlement of such obligations. As used in this paragraph, the term ' persons ' includes juridical persons."]

"Paragraph 18 deals with a factual situation which does not obtain between Italy and Ethiopia.

"Paragraph 19 is not a substantive provision, but concerns the territorial scope of paragraphs 1 to 18.

"The analysis of paragraphs 1 to 19 of Annex XIV, from the aspect of Articles 27 to 32 of the Treaty, leads to analogous results in regard to Albania.

"An attempt has been made to draw argument from the absence in Section VI, 'Albania', of a provision analogous to that in Article 37 on the restitution to Ethiopia of works of art, etc., removed to Italy. It is probable that Albania did not have the same cause for complaint in that respect as did Ethiopia—at least, not to the same extent. However that may be, works of art, etc., can only have been removed from Albania as the result of an agreement or arrangement made between Italy and the authorities installed in Albania by Italy from April 7, 1939, to September 3, 1943, and Article 31 of the Treaty declares such agreements and arrangements to be null and void.

"If the draftsman of the Treaty had intended to make the provisions of Annex XIV applicable to Albania and to Ethiopia, he would have avoided dealing with economic and financial questions which are the subject of the said provisions in Sections VI and VII of Part II, 'Political Clauses', of the Treaty, or at least he would, by a system of cross references and reservations, as in other parts of the Treaty, have been at pains to adapt the provisions of Annex XIV relating to Albania and Ethiopia to those of Sections VI and VII of Part II.

"(*f*) In conclusion, it does not appear from an examination of the Treaty as a whole that its authors employed, in any provision, and in particular in paragraph 7 of Article 78, the expression 'ceded territories' in other than the technical or proper meaning resulting from Articles 6, 11 and 14, and, as we have seen above, it does not appear to depart from the idea of cession as it is envisaged by public international law; but even if there were a divergence, preference would have to be given to the definition which appears from the Treaty, as being that which was intended in full agreement within the framework of the Treaty by the parties. It is only by way of confirmation and with a view to precision that in paragraph 4 of Article 21 of the Treaty it is mentioned that the Free Territory of Trieste shall not be considered as ceded territory within the meaning of Article 19 and Annex XIV, [and] that the provisions of the said Annex are not to be applied to the former Italian colonies.

"(*g*) The preliminary work appears to support these conclusions.

"The draft Treaty of Peace with Italy, of July 18, 1946, did not have two of the Annexes, one containing the economic and financial provisions relative to the ceded territories, the other containing economic and financial provisions relative to the Free

Territory of Trieste; instead, there was one Annex 3: 'Economic and Financial Provisions relating to Ceded Territories' (Draft Treaty of Peace with Italy, July 18, 1946, p. 66). On the other hand, Article 68 of the draft (subsequently Article 78 of the Treaty) did not contain the provisions extending its effects to territories other than the territory of Italy, which appear in paragraph 7 of Article 78 of the Treaty (*ibid.*, p. 45). It appears that the Yugoslav Delegation raised the question of the application by analogy of the Annex in the draft to the Free Territory of Trieste (*Recueil des Documents de la Conférence de Paris*, vol. X, pp. 526, 529, 530).

"The draft of July 18, 1946, and the amendments to it which were produced by the Allied and Associated Powers were submitted to the conference known as 'the Twenty-one', which was engaged on it in Paris from July 29 to October 15, 1946. The Draft Treaty of Peace which resulted from its labours appears at pp. 419 *et seq.* of the *Recueil des Documents de la Conférence de Paris*, vol. IV. It appears from that Draft that:

> "'Article 68 did not there either contain provisions for extending its effects to territories other than the territory of Italy;
>
> 'that question was in any event reserved, as regards property of the United Nations and their nationals which was situated in the ceded territories, by a note under paragraph 9 of Annex 3:
>
> > '"It is understood that the question of the compensation which Italy will have to pay when it is impossible to restore the property (*i.e.*, property of the United Nations which is situated in the ceded territory) will have to be studied in connection with other relevant provisions of the Treaty" (*ibid.*, vol. IV, p. 453);
>
> 'The United States proposed the addition of an Annex 13, "Provisions concerning Property and Debts relating to the Free Territory of Trieste", among which there is nothing dealing with the question which was eventually solved by Article 78, paragraph 7, of the Treaty; but under the Annex proposed by the United States there appeared also a note (*ibid.*, p. 377):
>
> > '"The question of the compensation to be paid by Italy in a case where the property cannot be restored will have to be studied in connection with the provisions of the Treaty which relate thereto."'

"It was during the last phase of the drafting of the Treaty, that is, in the course of the work of the Council of Ministers of Foreign Affairs of the United Kingdom, the United States of America, the Union of Soviet Socialist Republics and France (New York, November 4–December 12, 1946) that the new paragraph 6 (*a*) (subsequently paragraph 7) was inserted in Article 68 of the Draft (subsequently Article 78 of the Treaty); that provision appears for the first time in a report, dated December 3, 1946, of the Committee of Economic Experts to the Council of Ministers of Foreign Affairs, and it was not thereafter modified. The Council of Ministers of Foreign Affairs also welcomed the proposal of the United States of America to divide in two Annex 3 comprising the economic and financial provisions relative to the ceded territories: the first (Annex X) concerning the Free Territory of Trieste; the second (Annex XIV) concerning ceded territories.

" It results then from the genesis of these [Annexes] as follows: The authors of the Treaty had in mind from the outset that the ceded territories, being the subject of Annex 3, would not include the Free Territory of Trieste. When it was desired to extend to the latter the economic and financial provisions of Annex 3, mention was made at first of application by analogy; but finally the adoption of a parallel annex was preferred; neither of the annexes mentioned compensation for loss of and damage sustained by property of the United Nations and their nationals in the territories in question, but the problem was reserved for study in connection with other appropriate provisions. Article 68 of the Draft became in consequence Article 78 of the Treaty. In drafting the new paragraph 6 (*a*), later paragraph 7, of that Article, it was expressly given the same territorial scope as that of Annexes X and XIV, repeated, moreover, at the end of the provision, while it would have been simple, once the resolution of the problem within the formal framework of Annexes X and XIV had been abandoned, to choose—if that had been the desire of the draftsmen of the Treaty—a formula clearly indicating that it was proposed to extend the responsibility of Italy for loss of and damage to property in territories which were not the object of a cession in the technical or proper sense of that word, especially to property situated in Ethiopia and Albania.

" It has again to be recalled that Ethiopia did not formulate amendments to the provisions of Annex 3 of the Draft (which became Annex XIV of the Treaty), evidently because she did not regard herself as a grantee by cession under the Treaty ([see] Vedovati, *Il Trattato di Pace con l'Italia*, pp. 348–361; see also *Recueil des Documents de la Conférence de Paris*, already cited, Vol. IV, pp. 452–454.)

" 4. On behalf of the French Government, it was suggested that there was no reason to restrict the scope of paragraph 7 of Article 78 to the territories ceded in Articles 6, 11 and 14 and to the Free Territory of Trieste. The measures of sequestration, confiscation, etc., taken by the Italian Government during the war, which caused loss or damage to the property of nationals of the United Nations, had the same legislative basis (the Italian Law of War) as well in the territories which were subsequently ceded under Articles 6, 11 and 14, or which went to make up the Free Territory of Trieste, as in the other territories of which the Treaty was going to bring about or confirm the loss by Italy. The origin of the loss or damage appearing to be indentical, it calls for identical treatment. It is not clear why a French national should have the right to receive compensation from the Italian Government for war damage sustained by some of his property in one of the Islands of the Dodecanese while that right would be refused him if the property was situate in Ethiopia.

" What is certain is that treaties must be interpreted in good faith ([see] Rousseau, *Principes généraux de Droit International Public*, vol. I, p. 419). Their interpretation is, moreover, subject to the principle of effectiveness [*effet utile*], sometimes called the rule of effective interpretation (*ibid.*, p. 640); *cf.* Lauterpacht, Draft Resolutions cited above[1] . . . , Article 14: ' In so far as, on the basis of considerations of good faith and of the necessity for fulfilling the essential object of the treaty, one can invoke the principle of effectiveness—sometimes called the rule of effective interpretation —that principle constitutes a legitimate guide and a solid criterion in the matter of interpretation so long as its adoption is not excluded by the clear indication of a contrary intention of the parties. In particular, the possibility must be faced of treaty provisions to which the parties did not intend to give full legal efficacy.'

" In the present case, it is not only a question of giving to a provision the meaning which will permit it to have an effect rather than a meaning which will leave it without effect; paragraph 7 of Article 78 has a considerable practical scope even if its effects are limited to property situated in ceded territories, in the technical and proper sense, and in the Free Territory of Trieste.

" It cannot, on the other hand, be claimed that paragraph 7 of Article 78 is entirely without *ratio legis* if it is interpreted by giving to the words ' ceded territories ' the meaning which, as has been shown, results from the context of the Treaty. Indeed, the Treaty distinguishes between

" (a) reparations due by Italy to the Allied and Associated Powers (Article 74);

" (b) restitution which Italy is bound to make to any of the United Nations from whose territory property has been removed by force or duress (Article 75);

" (c) restitution by Italy to the United Nations and to their nationals of all property belonging to them in Italy with partial compensation in case of ' loss by reason of injury or damage ' ' as a result of the war ' (Article 78).

" Article 79 confers on each of the Allied and Associated Powers the right to liquidate the property of Italy or Italian nationals which are within its territory, and to apply the proceeds of the liquidation to the payment ' of its claims and those of its nationals against Italy . . . including debts, other than claims fully satisfied under other Articles of the . . . Treaty'; in Article 80

> " ' The Allied and Associated Powers declare that the rights attributed to them under Articles 74 and 79 of the present Treaty

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[1] See *supra*, p. 609.]

> cover all their claims and those of their nationals for loss or damage due to acts of war, including measures due to the occupation of their territory, attributable to Italy and having occurred outside Italian territory, with the exception of claims based on Articles 75 and 78.'

" According to the Treaty, then, loss or damage resulting from the war, including measures taken by the Axis Powers during the occupation of the territory of one of the Allied and Associated Powers, even if they were directed not at the United Nation in question but at one of its nationals, is covered by the reparations payable by Italy to that United Nation. This principle is subject to two exceptions (Article 80 uses that word): the first exception concerns property which was removed, by force or duress, from occupied territory and which had to be restored to the Government of the country from whose territory the property was removed (Article 75); the second exception relates to Article 78, and more particularly paragraph 7, for the remainder of Article 78 deals, by definition, with loss or damage sustained in Italian territory (and not ' outside Italian territory ' as mentioned in Article 80). If the expression ' ceded territories ' in Article 78, paragraph 7, is interpreted as comprising not all the territories of which the Treaty effects or establishes the loss by Italy, but only the territories ceded to France, to Yugoslavia, [and] to Greece, to which is assimilated (by Article 78, paragraph 7, itself) the Free Territory of Trieste, then it falls within the rule concerning the territories comprised in the first but not in the second of those definitions, that is to say, for those territories (Ethiopia, Albania, Italian territorial possessions in Africa) the claims of the Allied and Associated Powers for loss or damage sustained by them or by their nationals and due to acts of war, including measures due to the occupation, are covered by the rights which are accorded to the Allied and Associated Powers by Articles 74 and 79. Article 74 B provides for the payment by Italy to Ethiopia of reparations to a value of 25 million United States dollars. Article 74 D deals with reparations due from Italy to France and refers to Article 79 for their regulation. It is true that by Article 80, each of the Allied and Associated Powers gives discharge only for its own claims and those of its nationals, but Italy can take advantage of the discharge given by France as regards damage sustained by French nationals in Ethiopia, provided that the compensation for such damage is not dealt with by paragraph 7 of Article 78, which is expressly excluded, along with Article 75, in Article 80 *ad fin.* The discharge within the meaning of Article 80 is not given by France only for loss or damage due to acts of war *on her territory*; it is given especially for the results of acts of war due to the occupation of French territory, but that is only one of the categories (' including ') of loss or damage due to acts of war; the territorial limitation applies only to that category; it is sufficient as respects loss or damage due to acts of war that they have occurred ' outside Italian territory ', with the exceptions arising from Article 71 and paragraph 7 of Article 78. Article 80, in short, cannot serve to interpret paragraph 7 of Article 78, which it excepts; the scope of Article 80 depends rather on the interpretation which has to be given to paragraph 7 of Article 78. If this latter provision does not apply to Ethiopia, claims for loss or damage caused by acts of war to France or French nationals are covered by the declaration contained in Article 80.

" If paragraph 7 of Article 78 made paragraphs 3, 4, 5 and 6 of that Article applicable to property of United Nations nationals situate in Ethiopia, Ethiopian nationals, who are United Nations nationals, could invoke the responsibility of the Italian Government for loss or damage caused by acts of war to their property in Ethiopia, while French nationals (or those of another Allied or Associated Power) could not invoke it for loss or damage caused in analogous conditions to their property situated in the part of French territory which was occupied during the war by Italy. In the same way, Yugoslav nationals (or the nationals of another Allied or Associated Power) cannot invoke it for loss or damage caused, in analogous conditions, to their property situate in that part of Yugoslav territory which was occupied during the war by Italy; in the same way Greek nationals (or the nationals of another Allied or Associated Power) cannot invoke it for loss or damage caused, in analogous conditions, to their property situate in that part of Greek territory which was occupied during the war by Italy.

" It is possible that the authors of the Treaty had considered that, as regards compensation by Italy for war damage sustained by the property of nationals of Allied or Associated Powers, the situation of Ethiopia and Albania—countries which had been completely occupied by Italy and which were retroactively restored to their sovereignty—presented more similarity with those French, Greek and Yugoslav areas which had never been placed under Italian sovereignty and which had been occupied by Axis forces during the war, than with those Italian territories which were ceded by the Treaty to France, Yugoslavia or to Greece, or which were to constitute the Free Territory of Trieste. The Allied and Associated Powers could be interested in seeing that their nationals who possessed property in the territories ceded by Italy to France, to Yugoslavia, to Greece, were not treated less favourably than those who possessed property in the territories which were left by the Treaty to Italy and which were thus not prejudiced by the fact of annexation. It is not clear, on the other hand, what complaint nationals of the Allied and Associated Powers who possessed property in Ethiopa would have had, if they had been treated in respect of such property in the same way as in respect of that possessed by them in other territories of those Powers which were occupied during the war by Italy.

" It is probable that the choice was determined also by political motives, at least by the susceptibility of Ethiopia, who did not wish to appear as a State annexing or taking by cession territory which she regarded as never having ceased to be her own, despite an occupation and an annexation which the Treaty declared retrospectively to have been illegal (Article 38).

" However that may be, one can only affirm the choice made by the Treaty in relation to the payment by Italy of compensation for war damage sustained by property of United Nations nationals situated in Ethiopian territory, between two juridical methods both provided by the Treaty itself—one as being the rule and the other as being the exception—and the choice in favour of the rule would appear to lack any reasonable grounds.

" In these conditions, if it accepted the argument put forward on behalf of France, the Conciliation Commission would be going beyond the interpretation of the Treaty, and, under pretext of interpreting it, would in reality be laying down the content of an obligation placed upon Italy. That would appear the more inadmissible because the Treaty is not the result of a true conventional negotiation; Italy can adopt the meaning which, in good faith, she could and ought when she signed the Treaty to have given to paragraph 7 of Article 78 in accordance with its context.

" On behalf of the French Government insistence is placed on the responsibility of Italy flowing from the fact that she had undertaken a war of aggression, which is expressly referred to in the Preamble of the Treaty. There lies the cause of the obligations which the Treaty imposes on Italy, but not the determination of their object; the latter results from the provisions of the Treaty, which ought to be interpreted according to the natural meaning of each of them in relation to the content of the Treaty as a whole.

" As regards the teachings of writers and of international practice in the matter of succession to State debts in case of territorial changes, they are inconsistent (*cf.* Rousseau, *Droit International Public*, pp. 275 *et seq.*) and ought in any event to yield to solutions drawn from the Treaty in cases where, as in the present, the question at issue is governed by the Treaty.

" For the rest, the present dispute bears exclusively on the interpretation of paragraph 7 of Article 78 of the Treaty and not on an alleged responsibility of the Italian Government resulting from the general principles of public international law (*e.g.*, in regard to requisitions).

" The present decision does not, on the other hand, prejudice the question of claims by the Allied and Associated Powers against Italy for loss or damage sustained by them or their nationals and having occurred in the Italian territorial possessions in Africa (Libya, Eritrea and Italian Somaliland).

" For these reasons, the Conciliation Commission decides:

" I.—The request, dated June 29, 1950, of the French Government is rejected and it is established that the provisions of paragraph 7 of Article 78 of the Treaty of Peace do not apply to Ethiopian territory. . . ."

[Report: *Recueil des Décisions*, Part 5, p. 296 (in French).]

NOTE.—The Italian representative on the Commission appended a dissenting opinion.

II. The arguments of Professor Gros, Legal Adviser to the French Ministry of Foreign Affairs and Agent for the French Government, appear fully at pp. 341–357 of the Report.

Treaties—Interpretation of—Principles of—Interpretation by Reference to Municipal Law — Interpretation of Convention Providing for Unification of Rules of Private Law—Warsaw Convention of October 12, 1929, on International Carriage by Air—Requirement as to Period Within Which Action Must Be Brought —Whether Constituting Condition of Bringing an Action or Statute of Limitations.

BOCHORY *v.* PAN AMERICAN WORLD AIRWAYS.

United States, Supreme Court of New York, New York County.

April 23, 1956.

Supreme Court of New York, Appellate Division, First Department.

June 25, 1957.

THE FACTS.—This action by the widow and infant son of the deceased arose out of the decedent's death while a passenger on an aircraft operated by the defendant. The plane crashed in Brazil on April 29, 1952, in the course of an international flight. Proceedings were instituted on April 27, 1955. It was maintained on behalf of the infant that the period of two years within which an action must be brought pursuant to Article 29 of the Convention for the Unification of Certain Rules relating to International Carriage by Air, signed at Warsaw on October 12, 1929 (49 Stat. 3000, T.S. No. 876, 137 L.N.T.S. 11) (the " Warsaw Convention ") was tolled by the fact of his infancy. On motion to dismiss the complaint,

Held (by the Supreme Court, New York County): that the motion to dismiss the complaint must be granted. The law of New York determined the interpretation of the Warsaw Convention. Article 29 of that Convention, stipulating the period of time within which the action must be brought, was a condition precedent to the bringing of an action and not a statute of limitations susceptible of being tolled by the infancy of the plaintiff.

The Court (*per* Aaron Steuer J.) said: " There are two plaintiffs —the widow and the infant son of the deceased. The presence of these parties, rather than the representative of the deceased, is alleged to be in accordance with Brazilian law, which, it is claimed gives a cause of action to certain relatives of a person wrongfully killed rather than to his estate. This is one of many allegations as to the law of Brazil, all of which are mere conclusory statements and give no indication of how the pleader determines that they do represent the law of that country. For this reason an amended complaint would be required.

" It would be a short answer to plaintiff's motion to point out that an indifferent answer is quite good enough for a bad complaint. Such an attitude would ill repay counsel on both sides for the commendable research which went into both the attack on and the support of the separate defenses. The motion in regard to these defenses will be considered on the merits.

" It is not disputed that the Warsaw Convention is the law both of Brazil and this state and the time limit for a suit under it is two years. It is not seriously disputed that this bars the widow's claim. And there can be little doubt that if the action were representative on behalf of the infant, rather than by the infant, it would also be barred (*Mossip* vs. *Clement*, 283 N. Y. 554). This, incidentally, accentuates the necessity for a clear and authoritative pleading of the Brazilian law placing the right of action in the infant.

" Assuming for the purposes of this motion that the infant has the right, the question is whether the bar is lifted by virtue of the infancy. This, in turn, depends on whether the provision in the Warsaw Convention is a statute of limitations or a condition precedent to bringing suit. If the former, it may be tolled; if the latter, infancy furnishes no excuse for a failure to bring suit within the specified period. This question is one of interpretation of the Warsaw Convention, and it is the law of this jurisdiction which determines the interpretation (*Garcia* vs. *Pan Am. Airways, Inc.*, 269 App. Div., 287, 1946 U. S. Av. R. 496). The clause (article 29 of the Warsaw Convention) reads:

> " ' 1. The right to damages shall be extinguished if an action is not brought within two years reckoned from the date . . . on which the transportation stopped.'

" The general rule is that where a statute creates a remedy and in that same statute it is provided that the remedy must be availed of within a certain time, the limitation operates on the right and wipes it out (*The Harrisburg*, 119 U. S. 199). Of course, the distinction is always fine and sometimes tenuous, and a court can, if strongly motivated, make a statute of limitations out of what had been a limitation on the right on rather slight grounds (*Sharrows* vs. *Inland Lines, Ltd.*, 214 N. Y. 101), with the result that an injunction on this question may always be open to some question.

However, here the peculiarly appropriate language that is used, the history of this article of the treaty and the overwhelming number of holdings that language similarly used constituted a condition, tend to confirm the belief that the article here is such." [Report: 1956 U.S. & Can. Av. 209.]

On appeal,

Held (by the Appellate Division of the Supreme Court *per curiam*): that the order made by the Court below must be affirmed.

[Reports: 3 App. Div. 2d 1009, 165 N.Y.S.2d 444, 1957 U.S. & Can. Av. 180; motion for reargument or for leave to appeal denied, 4 App. Div. 2d 862, 167 N.Y.S.2d 418 (1957).]

NOTE.—In *Wanderer et Al.* v. *Société Anonyme Belge d'Exploitation de la Navigation Aérienne* (*Sabena*) *et Al.*, 1949 U.S. Av. 25, the Supreme Court, New York County, New York, *held* that protection of the two-year limitation established by Article 29 of the Warsaw Convention could be validly claimed by an airline alleged to have controlled the operations of that airline which owned the plane on which the plaintiff was injured. In *Chutter* v. *Royal Dutch Airlines* (*K.L.M.*) *et Al.*, 132 F. Supp. 611 (S.D.N.Y. 1955), 1955 U.S. & Can. Ab. 250, 4 Av. Cas. 17,733, it was *held* that an aviation service company, hired by the defendant airline to operate a boarding ramp for aircraft, could likewise claim the protection of that Article.

Treaties—Interpretation of—Principles and Rules of—Interpretation by Reference to Object of Treaty—Intention of the Parties—Comparison with Other Treaties *in pari materii*—Income Tax Convention—Taxation of Capital Gain of Domestic Trust with Foreign Beneficiaries—The Law of the United States of America.

AMERICAN TRUST COMPANY *v.* SMYTH *ET AL.*

United States, District Court, Northern District, California.

June 4, 1956.

Court of Appeals, Ninth Circuit. July 8, 1957.

THE FACTS.—The plaintiff, as trustee of a testamentary trust, paid a tax of $570,957.86 on the income of the trust for the year 1946. The four living beneficiaries of the trust were domiciled in, and residents of, the United Kingdom. During 1946, the trustee had sold shares of stock from the corpus of the trust, thereby realizing a long-term capital gain. Under the terms of the trust and of the law of California, this capital gain was allocated to the corpus, there to be held until distribution upon termination of the trust. The plaintiff took the view that the capital gain involved was exempt from United States income tax under Article XIV of the Income Tax Convention between the United States of America and the United Kingdom of Great Britain and Northern Ireland, signed at Washington on April 16, 1945 (60 Stat. 1377, T.I.A.S. No. 1546, 6 U.N.T.S. 189), which provided:

> "A resident of the United Kingdom not engaged in trade or business in the United States shall be exempt from United States tax on gains from the sale or exchange of capital assets."

The plaintiff's claim for refund was denied by the Commissioner of Internal Revenue, and the suit for refund followed.

Held (by the District Court): that judgment must be awarded for the defendant. Article XIV of the Convention did not admit of the construction that income taxable to the trustee under the law of the United States was instead to be taxed to the beneficiaries. Neither the fact that the economic burden of the tax fell on the beneficiaries in the United Kingdom nor the fact that the construction adopted did not result in complete reciprocity as between nationals of the United States and of Great Britain, could be allowed to alter the established law of the United States. [Report: 141 F. Supp. 414.]

On appeal,

Held (by the Court of Appeals): that the decision of the Court below must be reversed. Since the purpose of the Treaty was to provide full reciprocity and equality of tax treatment between nationals of the United States and of the United Kingdom, the Convention must be given a liberal interpretation consistent with its object. The object of the Treaty was to provide relief from the economic burden of double taxation and could be achieved only by treating a long-term capital gain of the trust as if it were taxable to the beneficiaries and thus exempt from taxation under Article XIV of the Treaty. This interpretation was borne out by the absence of language, found in other tax conventions, reserving to the United States the right to include all items of income taxable under its revenue laws.

The Court said: " § 22(b) (7), Internal Revenue Code of 1939, 26 U.S.C.A. § 22(b) (7), provided:

> " ' (b) Exclusions from gross income. The following items shall not be included in gross income and shall be exempt from taxation under this chapter: . . .
>
> ' (7) Income exempt under treaty. Income of any kind, to the extent required by any treaty obligation of the United States.'

" The following Treasury Regulation was in force and effect in 1946:[1]

> " ' Sec. 7.519 Exemption from, or reduction in rate of, United States Tax in the Case of Dividends, Interest, Royalties, Natural Resource Royalties, and Real Property Rentals.

. . . .

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[1] T.D. 5569, Section 1319 (c), 1947–2 Cum.Bull. 100,114.

> '*Beneficiaries of an estate or trust.*—A nonresident alien who is a resident of the United Kingdom and who is a beneficiary of a domestic estate or trust shall be entitled to the exemption, or reduction in the rate of tax, as the case may be, provided in Articles VI, VII, VIII, IX, and XIV of the convention with respect to dividends, interest, royalties, natural resource royalties, rentals from real property, *and capital gains to the extent such item or items are included in his distributive share of income of such estate or trust* if he is taxable in the United Kingdom on such income and is not engaged in trade or business in the United States through a permanent establishment. . . .' (Italics supplied.)

"The Government contends that while the Treaty exempts the capital gains tax on the distributive share of the British beneficiaries, it does not extend the exemption to the trust which, it is urged, is a separate taxable entity under the Internal Revenue Code. The Government's argument is bottomed upon the theory that the capital gain resulting from the sale of trust property was not income of the beneficiaries and remaindermen of the trust, but was income taxable to the trustee. In an attempt to sustain this theory, resort is had to the domestic scheme of taxation in the United States where a trust is conceded to be a distinct entity, subject to taxation upon income which is not currently distributable to the beneficiaries.[1]

"Appellant concedes that were it not for the Treaty provision, this argument might be entirely proper, but insists that Article XIV of the Treaty controls and by its terms exempts not only the tax on the capital gain upon the British beneficiaries, but also the tax upon the trust retaining the gain, notwithstanding absence of a current distribution.

"We conceive the purpose of the Treaty to have been full reciprocity and equality of tax treatment between nationals of the United States and the United Kingdom. Such being the case, this purpose requires a broad construction of Article XIV, so as to relieve the British beneficiaries from the burden of the capital gains tax to the same extent, in a given situation, as a United States beneficiary would be in a similar position in the United Kingdom.

"A broad, equitable purpose of the Treaty to exempt capital gains from taxation when a United Kingdom resident would otherwise sustain the burden of the tax directly or indirectly should be given effect without regard to our domestic scheme of taxation, in which the interposition of a bare legal title in the trustee is considered a separate taxable entity. A treaty, being a compact between two sovereigns, must be construed broadly to accomplish the intent of the contracting parties. Such an intent is not consonant with the Government's position in this case.

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[1] § 161 of the Internal Revenue Code of 1939 provided that income to trusts would be taxed to the trust the same as it is taxed to individuals, including accumulated income held for future distribution under the terms of a trust. § 162 (b) allowed a deduction to the trust for income of the year which is currently distributable to the beneficiaries. 26 U.S.C.A. §§ 161, 162 (b).

" ' Where a treaty admits of two constructions, one restrictive as to the rights, that may be claimed under it, and the other liberal, the latter is to be preferred. *Shanks* v. *Dupont*, 3 Pet. 242, 7 L.Ed. 666. Such is the settled rule in this court.' *Hauenstein* v. *Lynham*, 1879, 100 U.S. 483, 487, 25 L.Ed. 628.

" ' In choosing between conflicting interpretations of a treaty obligation, a narrow and restricted construction is to be avoided as not consonant with the principles deemed controlling in the interpretation of international agreements. Considerations which should govern the diplomatic relations between nations and the good faith of treaties, as well, require that their obligations should be liberally construed so as to effect the apparent intention of the parties to secure equality and reciprocity between them. For that reason if a treaty fairly admits of two constructions, one restricting the rights which may be claimed under it, and the other enlarging it, the more liberal construction is to be preferred. *Jordan* v. *K. Tashiro*, 278 U.S. 123, 127, 49 S.Ct. 47, 73 L.Ed. 214;[1] *Geofroy* v. *Riggs*, 133 U.S. 258, 271, 10 S.Ct. 295, 33 L.Ed. 642; *In re Ross*, 140 U.S. 453, 475, 11 S.Ct. 897, 35 L.Ed. 581; *Tucker* v. *Alexandroff*, 183 U.S. 424, 437, 22 S.Ct. 195, 46 L.Ed. 264; *Asakura* v. *City of Seattle*, 265 U.S. 332, 44 S.Ct. 515, 68 L.Ed. 1041.'[2] *Factor* v. *Laubenheimer*, 1933, 290 U.S. 276, 293, 54 S.Ct. 191, 78 L.Ed. 315.[3]

" This is also true as to the Income Tax Convention, its purpose being to secure reciprocity and equality of tax treatment between the nationals of the two contracting parties. The Income Tax Convention between the United States and the United Kingdom has the status of a treaty, and consequently, is ' the supreme Law of the Land.' U.S.Const., art VI, cl. 2.

" In construing the terms of the Treaty, we are constrained to look ' within the four corners of the Treaty ' keeping in mind the purpose of the contracting parties. Any resort to domestic law must be derived from the express terms of the Treaty itself. Article II (3) of the Treaty provides:

> " ' In the application of the provisions of the present Convention by one of the Contracting Parties any term not otherwise defined shall, unless the context otherwise requires, have the meaning which it has under the laws of that Contracting Party relating to the taxes which are the subject of the present Convention.'

" The precise provisions of Article XIV, *viz.*, ' resident of the United Kingdom ' is specifically defined by the Treaty;[4] ' gains from the sale or exchange of capital assets ' has a special meaning derived from both statute and judicial decision in United States tax law. But ' exempt ' is nowhere defined in the Treaty, nor in the Internal Revenue Code of 1939. Therefore, we are required to construe the term ' exempt ' in accordance with what we believe to be the intent of the contracting parties, in order to achieve reciprocity between similarly situated United States and United Kingdom taxpayers.

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[1] [See *Annual Digest*, 1927–1928, Case No. 308.]

[2] [See *Annual Digest*, 1923–1924, Case No. 182.]

[3] [*Ibid.*, 1931–1932, Case No. 160.]

[4] Art. II (1) (g) reads: " The term ' resident of the United Kingdom ' means any person (other than a citizen of the United States or a United States corporation) who is resident in the United Kingdom for the purposes of United Kingdom tax and not resident in the United States for the purposes of United States tax. A corporation is to be regarded as resident in the United Kingdom if its business is managed and controlled in the United Kingdom."

" We think ' exempt ' was employed in its broadest meaning, signifying a release from economic burden. If the capital gains tax is imposed on the trust in the instant case, the United Kingdom beneficiaries and remaindermen are burdened economically with the United States tax, as it diminishes both their respective incomes and corpus distributions.

" We are not persuaded that the contracting parties intended such an economic burden be placed on United Kingdom taxpayers, when in a similar situation a United States income beneficiary or remainderman would not have a similar burden arising from United Kingdom taxation.

"A study of the Articles of the Convention indicates an attempt to achieve a thoroughgoing reciprocity between the two nations' taxpayers in similar situations. Upon its face Article XIV does not portray any concession by the United Kingdom. The policy of reciprocity is apparent, however, when it is realized that the United Kingdom does not impose an income tax upon capital gains; it is obvious there was no occasion for any express concession on this point by it.

" The exemption found in Article XIV is not solely limited to a United Kingdom resident who would report and pay the tax. An analogous situation occurs when a United Kingdom resident holding legal title to a capital asset located in the United States sells it at a gain; in such a situation there is no question but that he would be exempt under Article XIV. Then, if the broad and overriding intent of the contacting parties to achieve reciprocity is to be given effect, how can a distinction reasonably be made where the United Kingdom resident has equitable ownership?

" The Government's contention that the trust is a separate taxable entity under domestic law and hence not a resident of the United Kingdom, is rather finely drawn and entirely overlooks the evident purpose of the Treaty. The phrase 'A resident of the United Kingdom ' found in Article XIV, and defined in Article II (1) (g),[1] does not refer to concepts of tax entities under American domestic law. The relevant concept is the economics burden upon the individual taxpayer,[2] and the chief purpose of the Treaty is relief from the economic burden of double taxation. The Proclamation preceding the Treaty, which reads:

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[1] See . . . *supra* [p. 635, n. 4]

[2] See Article VI of the Treaty for the treatment of corporate dividends, where the crucial principle involves economic burden upon individuals. Reciprocity is achieved by reducing the United States withholding tax on dividends received by United Kingdom residents, and exempting dividends received by United States residents from the United Kingdom surtax.

> " ' Desiring to conclude a Convention for the avoidance of double taxation and the prevention of fiscal evasion with respect to taxes on income, . . .'

sustains our conclusion.

"Article XIV exempted the tax upon the capital gain to the trust. The intervention of a trust and trustee having legal title did not contradict the pattern of reciprocal taxation and impose an unintended economic burden.

" The fact that the Income Tax Convention between the United States and the United Kingdom does not contain a ' savings clause ' found in sixteen of twenty Tax Conventions negotiated by the United States is significant.[1] Treaties containing the usual ' savings clause ' were negotiated both before and after the United Kingdom Treaty. The purpose of the ' savings clause ', as we read it, was to make plain that the United States reserved the right to include all items of income taxable under its revenue laws. Hence, were we here dealing with a treaty containing a savings clause, a different result might possibly be reached. Thus, it seems that the savings clause was incorporated into certain treaties with the express purpose of limiting exemptions. Its omission from the United Kingdom Treaty is further evidence of a purpose to exempt completely income from capital gains belonging to residents of the United Kingdom, regardless of where lodged between the time of receipt and distribution."

[Report: 247 F.2d 149.]

NOTE.—The above case is noted in *Harvard Law Review*, 71 (1958), p. 1163; *New York University Law Review*, 33 (1958), p. 233; *Stanford Law Review*, 9 (1957), p. 610.

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[1] A typical " savings clause " is found in the Income Tax Convention between the United States and Sweden, 1940, 54 Stat. 1759, wherein Art. XIV reads:

" It is agreed that double taxation shall be avoided in the following manner:

" (a) Notwithstanding any other provision of this convention, the United States of America in determining the income and excess-profits taxes, including all surtaxes, of its citizens or residents or corporations, may include in the basis upon which such taxes are imposed all items of income taxable under the revenue laws of the United States of America as though this Convention had not come into effect. The United States of America shall, however, deduct the amount of the taxes specified in Article I(b) (1) and (3) of this Convention or other like taxes from the income tax thus computed but not in excess of that portion of the income tax liability which the taxpayer's net income taxable in Sweden bears to his entire net income."

The following tax conventions contain a typical savings clause, as set out above:

The following tax conventions contain a typical savings clause, as set out above:

Canada, 1941; France, 1945; Sweden, 1940; Union of South Africa, 1946; Denmark, 1948; Netherlands, 1947; Belgium, 1953; Norway, 1951; Greece, 1953; Switzerland, 1951; Finland, 1952; Japan, 1955; Federal Republic of Germany, 1954; Italy, 1956; Honduras, 1957; Austria, Exchange of ratifications not yet made. No savings clause is found in the following tax conventions: United Kingdom, 1945; New Zealand, 1951; Ireland, 1951; Australia, 1953.

Treaties—Interpretation of—Principles and Rules of—Interpretation by Reference to Subsequent Statement by Parties—Relation between Treaty and National Legislation Implementing Treaty.

VAN GALEN *v.* BREIGOEDERENFABRIEK ACHIEL COCKELBERGH.

Holland, District Court of Amsterdam. June 25, 1955.

Court of Appeal of Amsterdam. February 13, 1957.

THE FACTS.—Van Galen levied a *saisie arrêt*[1] on assets belonging to Breigoederenfabriek Achiel Cockelbergh, a Belgian corporation, prior to a judgment. He now brought an action in the District Court of Amsterdam for judgment on his claim against Cockelbergh and for validation of the attachment. Cockelbergh pleaded to the jurisdiction, invoking Article 7 of the Treaty between the Netherlands and Belgium of March 28, 1925, respecting Territorial Jurisdiction in Bankruptcy and the Execution of Judgments.[2]

Held (by the District Court): that the Court had jurisdiction to deal with the case.

The Court said: " In this case the circumstances envisaged by Article 7 of the Netherlands-Belgian Treaty of 1935 do not apply. The Treaty does not provide in any other way for attachment of property in the hands of third parties. Having regard to Article 10 of the Treaty[3] and to Articles 126 (3) and 738 of the Netherlands Code of Civil Procedure, this Court has competence on the basis of Article 8 of the Act of May 18, 1929,[4] which brings into legal force the Netherlands-Belgian Treaty, and is therefore competent to hear actions for the validation of attachments and to adjudicate in actions relating to the claims in respect of which the attachments were levied."

Cockelbergh appealed to the Court of Appeal of Amsterdam, contending that the Netherlands-Belgian Treaty of March 28, 1925, had expressly cancelled the right to sue Belgian nationals domiciled in Belgium before a Netherlands court; that Article 8 of the Act of

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[1] Attachment of property in the hands of a third party.

[2] Article 7 provides: " If the party on whom a *saisie arrêt* has been levied is neither domiciled nor resident in either of the two countries, the Court of the place where the *saisie arrêt* is levied has jurisdiction to take cognizance of the existence of the claim, unless it is without jurisdiction by reason of the subject-matter and save in case of pendency of parallel proceedings. It has similar jurisdiction to deal with an application for validation or replevin [discharge of the attachment]."

[3] Article 10 of the Treaty provides: " In every case in which the preceding Articles neither establish rules of common jurisdiction nor effect derogation from national laws, jurisdiction is governed in each State by its own legislation."

[4] Article 8 of the Act of May 18, 1929, provides: " The action for validation and for discharge of conservatory attachments levied within the Netherlands shall be brought before the competent Netherlands court. Except for the provision of Article 7 read with Article 8 of the Treaty, competence shall be determined exclusively according to Netherlands legislation. The court competent to hear an action for validation is at the same time competent to hear the action in respect of which the attachment was levied."

May 8, 1929, when restoring jurisdiction to Netherlands courts in cases of attachment, was contrary to the Treaty; that the Netherlands Legislature could not be entitled to endow, by means of a subsequent enactment, Netherlands courts with jurisdiction contrary to the Treaty; and that Article 8 must be understood in such a way that the words 'Nederlandsche wet' ['Netherlands legislation'] mean Netherlands legislation including legislation on private international law.

Held (by the Court of Appeal): that the appeal must be dismissed and the judgment of the Court below upheld.

The Court said: "From the history of the Act of May 18, 1929, it appears that after the Netherlands-Belgian Treaty [of 1925] had come into force, further consultations between the Netherlands and Belgian Governments took place which led to the publication of a statement that—apart from Article 7, which does not apply—

> 'the Treaty purposely does not deal with jurisdiction as regards actions for the validation of conservatory attachments and actions in respect of which the attachments were levied . . . , so that Article 10 will apply or, in other words, the question as to which court will be competent . . . is to be answered by the municipal law of the State where the attachment was levied.'

In complete accordance herewith, Article 8 of the Netherlands Act provides that the action for validation . . . shall be brought before the competent Netherlands court and that the court competent to hear the action for validation shall at the same time be competent to hear the action in respect of which the attachment is levied. This provision of Article 8 is not contrary to the Treaty since both contracting States jointly declared that the Treaty does not derogate from national legislation. According to Article 10 of the Treaty, the competence of the courts on this point is to be determined in each State by its own legislation."

[Report: *N.J.*, 1958, No. 230.]

Treaties—Interpretation of—Principles and Rules of—Discrepancy between Heading of Article of Treaty and its Text—Whether Reliance on Heading Permissible—Heading Implying Less Restriction on Sovereignty than Text—Austrian State Treaty of May 15, 1955.

AUSTRIAN GLIDING CLUB CASE.

Austria, Administrative Court. May 31, 1957.

THE FACTS.—An Austrian gliding club applied for permission to build a glider based on a German design. Permission was refused, on the ground that Article 16 of the Austrian State Treaty of May

15, 1955,[1] did not permit Austria to manufacture " civil aircraft " which are of German design.[2] The appellant club contended that the term " civil aircraft " did not include gliders. This contention was based, *inter alia*, on a divergence between the heading and the wording of Article 16 in the German language. The heading, it was contended, referred to " civil aircraft " (*Zivilflugzeuge*) while the wording of the provision itself referred to " aeroplanes " (*Luftfahrzeuge*). To that extent, it was contended, the actual wording of Article 16 was not covered by the heading, which must be understood as comprising only power-driven aircraft and would thus, incidentally, suggest a smaller degree of limitation of sovereignty than the text itself.

Held: that the appeal must be dismissed. The wording of Article 16 was alone binding, and as that wording was clear and comprised aeroplanes of all kinds, whether power-driven or not, the refusal to grant permission to build a glider of German design must be upheld. The heading of Article 16 need not be considered even though it might imply a smaller degree of limitation of sovereignty.

The Court said: " In answering the question as to the interpretation of Article 16 of the State Treaty of May 15, 1955, we have to find out, first, which of the four versions of the Treaty are to be taken as the basis of our enquiry. Article 38 (1) of the State Treaty provides expressly that the four versions are equally authentic. We must infer from this provision that, for the application of the Treaty in Austria, where its provisions are directly applicable (Articles 49 and 50 of the Constitution), the State Treaty in its German version has been transformed into municipal law (Article 8 of the Constitution). In the German version the prohibition contained in Article 16 of the Treaty, which must be directly applied in Austria, is defined beyond doubt. According to this provision, the acquisition and manufacture of civil aircraft of German or Japanese design are prohibited in Austria. The technical term ' civil aircraft ', which is here used twice, has—and this is not denied by the appellant—a specific meaning. It comprises, according to the definition contained in the relevant Austrian Law of Civil Aviation of August 1, 1922, aeroplanes, other aircraft, gliders, balloons and other devices intended for movement in the air-space. This result, which is achieved by way of a grammatical interpretation of Article 16 of the State Treaty, does not call for objection from the point of view of any other method of interpretation. It cannot be contended that this result is contrary to the meaning and purpose of the relevant provision of the Treaty.

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[1] Peace Treaty of Vienna between the Allied and Associated Powers and Austria.

[2] The heading of Article 16 of the Treaty, in the English version, reads as follows: " Prohibition relating to Civil Aircraft of German and Japanese Design ". The wording of Article 16 is as follows: "Austria shall not acquire or manufacture civil aircraft which are of German or Japanese design or which embody major assemblies of German or Japanese manufacture or design."

"The importance of civil aviation in the event of war, the extensive use of aircraft of all kinds and in particular of gliders and balloons, for war purposes, do not suggest that the inclusion of aircraft which are not power-driven is in any way illogical if one considers the purpose of Part 2 of the State Treaty, which is to prevent any co-ordination between Austrian military and civil aviation and the military and civil aviation of Germany and Japan. If the appellant contests this interpretation by relying on the discrepancy between the wording and the heading of Article 16, which latter refers to 'civil aircraft'—meaning power-driven aircraft—he is met by the argument that the heading of a legal provision has not the same force as the legal provision itself. The purpose of summarizing the content of specific provisions or sections of a Law is merely to make the whole Law more easily intelligible and to facilitate the discovery of its individual provisions. This, in the nature of things, results in a lack of precision in the short headings used for this purpose. This consideration requires that direct validity must be denied to such headings, which are sometimes wider and sometimes narrower than the relevant legal provision itself. There is therefore no contradiction if the expressions used in the wording itself do not coincide with the heading. We agree with the appellant that this does not preclude a court from using the heading, in suitable cases, for the purpose of interpretation. This, however, can only be done where the wording of the relevant legal provision itself is not clear or where a purely grammatical interpretation does not convey a reasonable meaning. As in the present case this condition does not obtain, nothing can be gained by the appellant by relying on the heading of Article 16 of the Treaty, which does not include gliders.

"Nor can the reference to discrepancies between the German version and the other versions lead to any other result. While it may be that the French, and possibly the Russian, version may favour the contention of the appellant, the term used in the English version, which accords with the German term '*Luftfahrzeug*', shows that these versions do not by any means coincide. As long, therefore, as there is no decision providing an authorative interpretation of Article 16 in the manner laid down in Article 35 of the Treaty—and the initiative to obtain such a decision can only be taken on the plane of International law—the Austrian authorities must apply the German version, which is directly binding upon them as law. As we have pointed out, the German version does not admit of the interpretation for which the appellant contends. The argument of the appellant that a Treaty which limits the sovereignty of a State must be interpreted so as to result in the least possible limitation of sovereign independence, does not convince us. Such arguments are permissible only where there are doubts as to the meaning of a provision requiring interpretation. The clear wording of the provision contained in Article 16 of the State Treaty in the relevant German version does not leave room for the application of this rule."

[Report: Zl. 1983/56.]

Treaties—Interpretation of—Principles and Rules of—Applicability of Rules of International Law—Absence of Rigid Method of Interpretation—Comparison of Texts of Bilingual Treaties—Avoidance of Reference to Preliminary Negotiations.

See p. 101 (*Lake Lanoux Arbitration*), at p. 132.

Treaties—Interpretation of—Principles and Rules of—Relation between General and Particular Provisions.

See p. 693 (*Sociétés Minières du Bassin de la Ruhr* ("*Geitling*") v. *The High Authority of the European Coal and Steel Community*).

Treaties—Interpretation of—Principles and Rules of Interpretation—Intention of Parties—Presumption that Text Represents Intention of Parties.

See p. 654 (*Wollemborg Claim*), at p. 659.

Treaties—Interpretation of—Principles and Rules of—Consistency with Municipal Law—Treaty of Friendship, Commerce, and Navigation—Alleged Violation of Anti-Trust Laws—Rights of Nationals under Treaty—The Law of the United States of America.

See p. 673 (*United States* v. *R. P. Oldham Co. et Al.*).

Treaties—Interpretation of—Principles and Rules of Interpretation—Natural Meaning of Words—Literal Interpretation—German-Norwegian Extradition Treaty of 1878.

See p. 497 (*Re Kelinski*).

Treaties—Interpretation of—Principles and Rules of—Subsequent Conduct of Parties—Conclusiveness of—Extradition Treaty—Suspension of—By Existence of State of War—Revival of Treaty—By Unilateral Declaration Pursuant to Peace Treaty.

See p. 883 (*Argento* v. *Horn et Al.*).

III.—Bilingual Treaties

Treaties—Interpretation of—Bilingual and Multilingual Treaties —Translation into Languages Other than Original.

See p. 483 (*Grundul* v. *Bryner & Co. G.m.b.H. & Richteramt III Bern*).

IV.—Consideration of Preparatory Work

Treaties—Interpretation of—Reference to *Travaux préparatoires*—Relevance of Authentic Text of Treaty in French Language.

KÖNIG *v.* E.L. BOLS COASTWISE SHIPPING CO., LTD.

Holland, District Court of Amsterdam.
February 21 *and October* 30, 1956.

Supreme Court. May 24, 1957.

THE FACTS.—König, a ship's cook, sued the defendant company for payment of wages for a period during which he had been ill and during which he had been dismissed. His contract of employment contained a clause providing that all disputes relating to the contract were to be dealt with by arbitration. The Cantonal Court of Amsterdam held on November 11, 1954, that its jurisdiction was ousted by the arbitration clause, which was valid by virtue of Article 450 (*c*), section 2, of the Netherlands Commercial Code. The basis for this decision was that the Netherlands Government, in the Explanatory Memorandum to the Bill for parliamentary approval of the Geneva Convention of June 24, 1926, concerning Seamen's Articles of Agreement, had expressed the view that the reference made to arbitration in Article 4 of that Convention[1] included *pacta de compromittendo*.

The plaintiff appealed.

Held (by the District Court): that the judgment of the Court below must be reversed; the arbitration clause was void, so that the ordinary courts had jurisdiction.

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[1] Article 4 of the Convention reads:

"Adequate measures shall be taken in accordance with national law for ensuring that the agreement shall not contain any stipulation by which the parties purport to contract in advance to depart from the ordinary rules as to jurisdiction over the agreement.

"This Article shall not be interpreted as excluding a reference to arbitration."

The Explanatory Memorandum stated, in part, as follows:

"Article 4 forbids agreement in advance to depart from the ordinary rules of jurisdiction. Settlement of disputes by arbitration (the *pactum de compromittendo* included), however, is admitted."

Article 450 (*c*), section 2, of the Netherlands Commercial Code reads:

"They [*i.e.*, the parties to an agreement] shall not incorporate in the agreement clauses departing from the statutory rules as to jurisdiction over the agreement provided that they may agree to refer disputes to arbitration."

The Court said: "Article 450 (*c*), section 2, of the Commercial Code has been incorporated into the law of the Netherlands in order to adapt the law to the Geneva Convention. Article 4 of that Convention expressly lays down measures prohibiting the inclusion in the agreement of any stipulation by which the parties purport to contract in advance to depart from the ordinary rules as to jurisdiction of courts. Therefore the second section of Article 450 (*c*), which purports to incorporate this Article of the Convention into Netherlands law, must be read in the sense that its intention was only to enable parties to refer to arbitration disputes which had already arisen between them. Such an exceptional provision has a real significance, because without it the law would prevent the use of its other provisions which permit the referring of existing disputes to arbitration.

"Whatever may have been the intention of the Netherlands Government when preparing the Explanatory Memorandum to Article 4 of the Convention, this explanation must not lead to an interpretation of municipal law which would make the law incompatible with the wording of the Convention, even though the latter contains no rule directly binding upon nationals, but only principles for the guidance of the Contracting States." [Report: *N.J.*, 1956, No. 572.]

The plaintiff appealed further.

Held (by the Supreme Court): that the judgment appealed from must be reversed and that König's claim was inadmissible.

The Court said: "The final words of Article 450 (*c*) of the Commercial Code are intended to put beyond doubt that the parties to a seamen's agreement should in no way be deprived of their right under Article 620 of the Code of Civil Procedure to submit their differences to arbitrators, including the right to incorporate in that agreement a clause providing for the submission to arbitration of disputes which might arise between them in the future. This follows not only from the wording of Article 450 (*c*), but also from the intention clearly expressed by the Government in their Explanatory Memorandum accompanying the Bill for the insertion of the Article in question in the Commercial Code in order to comply with Article 4 of the Convention. On the other hand, it appears from the text and the preparatory work of the latter Article that it covers completely the intention expressed by the Netherlands Government. The authentic French text[1] of the Treaty provision is perfectly clear in this respect . . . , and the conclusion to be drawn from the text is confirmed by the explanation given to the Conference by the Committee on whose initiative the second paragraph was added to the text of Article 4: according to this explanation 'the parties

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[[1] The French text reads, so far as presently relevant, "Cette déposition ne doit pas être interprétée comme excluant la recourse à l'arbitrage."

may, consequently, provide in advance that differences which may arise from the contract shall be decided by arbitration ', and by the further discussions which led up to the acceptance of the paragraph in its actual wording. The ordinary courts of law could not, therefore, take cognizance of the claim."

[Report: *N.J.*, 1958, No. 455 (with the arguments of the Advocate General and a Note by H.B. [Professor Hyams van den Bergh]).]

Treaties—Interpretation of—Consideration of *Travaux Préparatoires*—Warsaw Convention of 1929 regarding International Air Transport.

ROTTERDAM ZOOLOGICAL GARDENS *v.* AIR FRANCE.

Holland, District Court of Amsterdam. June 15, 1956.

THE FACTS.—On July 9, 1951, the plaintiffs and Air France entered into a contract for the carriage by air of tropical birds and monkeys from Addis Ababa, via Djibouti and Paris, to Amsterdam, where the animals were to be delivered to the plaintiffs. Some of the animals died en route. The plaintiffs claimed compensation for the loss caused by the deaths. In their defence, Air France pleaded that: (a) no complaint had been made by or on behalf of the plaintiffs within the period and in the manner provided for by Article 26, paragraph 2,[1] of the Warsaw Convention of October 12, 1929, for the Unification of Certain Rules relating to International Carriage by Air; (b) the death of animals could not be regarded as destruction or loss of or damage to goods as a result of an occurrence causing damage in the sense of Article 18, paragraph 1,[2] of that Convention; hence, Article 17[3] applied, and as there had been no accident on board the aircraft causing death of the animals, Air France were not liable; (c) Air France had taken all the measures which they could reasonably be expected to take for the proper care of the animals; nevertheless owing to the exceptional heat prevailing at Djibouti the animals had either died there or been so affected that they died during the subsequent part of the journey; the installations at the airport at Djibouti complied with all reasonable standards and the air-conditioning of the aircraft had functioned normally during the later part of the flight.

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[1] Paragraph 2 of Article 26 provides: "(2) In the case of damage, the person entitled to delivery must complain to the carrier forthwith after the discovery of the damage, and, at the latest, within three days from the date of receipt in the case of luggage and seven days from the date of receipt in the case of goods. In the case of delay the complaint must be made at the latest within fourteen days from the date on which the luggage or goods have been placed at his disposal."

[2] Paragraph 1 of Article 18 provides: "(1) The carrier is liable for damage sustained in the event of the destruction or loss of, or of damage to, any registered luggage or any goods, if the occurrence which caused the damage so sustained took place during the carriage by air."

[3] Article 17 provides: "The carrier is liable for damage sustained in the event of the death or wounding of a passenger or any other bodily injury suffered by a passenger, if the accident which caused the damage so sustained took place on board the aircraft or in the course of any of the operations of embarking or disembarking."

Held: that contentions (a) and (b) must be rejected, but that Air France should be permitted to submit further evidence under (c).

The Court said, as regards (a): " In the present case there was a loss (*perte*) of the goods concerned. The animals which died must be deemed to have perished as goods, and they were not delivered to the plaintiff. Although it must be admitted that the meaning of paragraph 1 of Article 26,[1] when read in conjunction with paragraph 4 of the same Article,[2] is not entirely clear, it follows in any case from the connection between paragraphs 1 and 2 that there must be ' receipt ' of the goods and subsequently ' discovery ' of damage before a complaint can be made. As a consequence of the loss of the goods concerned there could be question neither of their delivery and receipt nor of any discovery of damage. Therefore a complaint was not required in this case."

As regards (b): " Living animals are goods and therefore come under Article 18. Article 17 applies to human beings and not to movables."

As regards (c): " Under Article 20[3] of the Convention the carrier is not liable if he proves that he and his agents have taken all necessary measures to avoid the damage or that it was impossible for him or them to take such measures. Although the defendants, who took upon themselves to carry live animals by air in a tropical climate, may be expected to be equipped in such a way and to take such measures that the carriage will not cause harm to the animals, it cannot be argued therefrom—as do the plaintiffs—that Article 20 of the Convention implies that it is for Air France to prove that the damage was caused by something for which they were not responsible. The conclusion that exoneration of the carrier is not limited to absolute *force majeure* follows not only from the text of this Article, but also from the *travaux préparatoires* of the Convention. During the First International Conference on Private Air

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[1] Article 26, para. 1, provides: " (1) Receipt by the person entitled to delivery of luggage or goods without complaint is *prima facie* evidence that the same have been delivered in good condition and in accordance with the document of carriage."

[2] Article 26, para. 4, provides: " (4) Failing complaint within the times aforesaid, no action shall lie against the carrier, save in the case of fraud on his part."

[3] Article 20 provides:

" (1) The carrier is not liable if he proves that he and his agents have taken all necessary measures to avoid the damage or that it was impossible for him or them to take such measures.

" (2) In the carriage of goods and luggage the carrier is not liable if he proves that the damage was occasioned by negligent pilotage or negligence in the handling of the aircraft or in navigation and that, in all other respects, he and his agents have taken all necessary measures to avoid the damage."

Law at Paris, which led to the Warsaw Conference, on October 26, 1925, the following was stated:

" ' Il faut bien admettre que celui qui utilise un aéronef n'ignore pas les risques inhérents à un mode de circulation qui n'a pas encore atteint le point de perfection que cent années ont donné aux chemins de fer. Il est donc juste de ne pas imposer au transporteur une responsabilité absolue et de le dégager de toute responsabilité lorsqu'il a pris les mesures raisonnables et normales pour éviter le dommage; c'est la diligence que l'on peut exiger d'un bon père de famille.'

Air France must therefore prove that they have taken all necessary measures which in the circumstances could reasonably be expected from them with respect to proper care for the animals."

[Report: *N.J.*, 1957, No. 551.]

V.—Miscellaneous

Treaties — Interpretation of — Miscellaneous — Peace Treaties — Meaning of Expression " the laws in force in Italy during the war " —Legislation Enacted Before Outbreak of War—Anti-Jewish Legislation of Italian Socialist Republic—Failure of Administering Agency to Issue Shares in Respect of Confiscated Property to Dispossessed Owner—Whether Basis of Claim against State.

SONNINO CLAIM.

Italian-United States Conciliation Commission. November 27, 1956.

(Matturri, Sorrentino, Bolla.)

THE FACTS.—The claimant, an Italian Jew domiciled in Italy, left that country in 1937 for the United States, where he became naturalized in 1946. On May 22, 1954, the District Office of Direct Taxes in Rome served on him a notice of assessment of the special progressive tax on property established under Italian Law No. 828 of September 1, 1947.[1] The claimant refused to pay this tax, contending that he was a United Nations national within the meaning of Article 78, second part of paragraph 9(*a*), of the Treaty of Peace:[2] it had been agreed between Italy and the United States that United Nations nationals were, on the strength of paragraph 6 of Article 78, exempted from the payment of the Italian progressive tax on property.

The Italian Government denied that the claimant could be regarded as having had the status of a United Nations national;

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[1] See *Re Italian Special Capital Levy Duties* (*Recueil des Décisions*, Part I, p. 95; *International Law Reports*, 1951, Case No. 128).

[2] Article 78, para. 9(*a*), second part, reads as follows: "The term 'United Nations nationals' also includes all individuals, corporations or associations which, under the laws in force in Italy during the war, have been treated as enemy ".

according to the Italian Government, the claimant was not considered (" *traité* ", " treated ") as enemy under the legislation in force in Italy during the war.

The events leading up to the imposition of the tax on the claimant's property were as follows:

(a) Prior to the outbreak of the Second World War, the Italian Government, by Royal Decree Law No. 1728 of November 17, 1938, made certain provisions " for defending the Italian race ". Article 10 of this Decree reads as follows:

> " Italian nationals belonging to the Jewish race cannot: . . .
>
> " (d) be the owners of plots of land the global value of which exceeds 5,000 lire;
>
> " (e) be owners of urban buildings the global taxable value of which exceeds 20,000 lire;
>
> " By Royal Decree, at the proposal of the Minister of Finance, in concurrence with the Ministers of the Interior, of Justice, of Corporations and of Exchange & Currencies, new regulations shall be issued for implementing the provisions contained in sub-paragraphs (c), (d) and (e)."

These regulations for implementing the provisions contained in Article 10 of Royal Decree Law No. 1728, regarding the limitations on the property owned and industrial and commercial activities performed by Italian nationals belonging to the Jewish race, were included in Royal Decree Law No. 126 of February 9, 1939, enacted, that is, prior to the outbreak of the Second World War. Under this latter Decree there was established (Article 11) a corporation known as " Ente di Gestione e Liquidazione Immobiliare " (E.G.E.L.I.), with its head office in Rome, for the purpose of taking over, managing and selling " that part of the property exceeding the limits permitted to Italian nationals belonging to the Jewish race " (Article 4). The Decree provided for a procedure which permitted recourse to a provincial commission (Articles 23–25) for the determination of the permitted quota, the excess quota and the evaluation of the property. When the determination of the excess quota of the property became final, it was transferred to E.G.E.L.I. (Articles 26–31), which, in application of the principles laid down in the Decree, remitted to the owner the corresponding amount, in the form of special registered 30-year 4 per cent. interest shares. Normally, these shares were transferable only to persons belonging to the Jewish race (Article 33); and their replacement by Public Debt Bonds was to be provided for thirty years after their issue (Article 35). The disposal of the real property transferred to E.G.E.L.I. was to be effected in accordance with a progressive plan of sale; the proceeds collected as a result of the sale were to be paid into the Treasury of the State (Article 40).

(b) These regulations were applied to the claimant in the following manner: By Decree dated November 10, 1942, that is, after

Italy and the United States had entered the Second World War, the Intendenza di Finanza of the province of Rome transferred to E.G.E.L.I., at the latter's request, the title to seven urban properties in the province of Rome owned by the claimant, " an Italian national of the Jewish race ", including part of a small villa with garden at via Po, the remaining part of which was left to the claimant as his permitted quota.

About three months later, in implementing the same regulations of the Royal Decree Law of February 9, 1939, the Intendenza di Finanza of the province of Frosinone, by Decree dated January 19, 1943, transferred to E.G.E.L.I. certain other property of the claimant, namely, plots of land and rural buildings located in the territory of the municipality of Paliano (province of Frosinone).

On January 3, 1943, E.G.E.L.I. took possession of that part of the villa with garden at via Po which had been considered to be the excess quota; the value of this quota, and therefore the price thereof, had been fixed at 402,580 lire, equal to twenty times its taxable value, according to the principles laid down in the Royal Decree Law of February 1, 1939 (Article 20). E.G.E.L.I. took possession of the other real property located in the province of Rome, which also came under the excess quota, by *procès-verbaux* of January 8, 18, 21 and 25 and February 5 and 10, 1943. E.G.E.L.I. also took possession of the plots of land and rural buildings owned by the claimant in Paliano.

When the war came to an end, the retransfer of all the buildings formerly owned by the claimant and transferred to E.G.E.L.I., was effected under Article 3 of Royal Decree Law No. 6 of January 20, 1944, published by virtue of Legislative Decree of the Lieutenant of the Realm No. 252 of October 5, 1944. The retransfer of the property other than the portion of the villa at via Po and the plots of land and rural buildings at Paliano was verified by an amicable *procès-verbal* dated December 13, 1944, which was subsequently confirmed and extended, by notarial deed of October 24, 1946, to the buildings at Paliano. The recitals in the deed of October 1946 show that, as regards the real property retransferred, E.G.E.L.I. had " delayed the payment of the amount due under Royal Law Decree No. 126 of February 9, 1939, because a state of emergency had arisen "; the " failure to deliver the shares representing the amount of the transfer " had already been pointed out by the claimant's attorney, in the amicable *procès-verbal* of December 13, 1944, and E.G.E.L.I. had raised no objection in that respect.

As regards the quota of the villa at via Po, which had been transferred to E.G.E.L.I., the corporation had in the meanwhile sold that quota by notarial deed of April 23, 1943, for 2,250,000 lire; it was retransferred by the purchasers to the claimant by notarial deed of February 20, 1945; E.G.E.L.I. intervened in this transaction and repaid one of the purchasers the price it had collected from them. For this property also the claimant had not been handed the shares due to him in payment therefor.

(c) The claimant was also co-owner of a farm at Monte Porzio Catone. This farm does not appear to have been subjected to measures based on racial laws. It appears, however, from the sworn statements contained in the records, that the Sonnino farm at Monte Porzio Catone was occupied by German troops from October 1943 to June 1944, that these troops persecuted the claimant's agents in order to discover his whereabouts and that the occupying troops laid mines and set fire to the buildings of the farm when they withdrew prior to the arrival of the American troops. From another sworn statement contained in the records it appears that, after the outbreak of war, Italian police searched for the claimant, presumably to arrest him, and that on October 16, 1943, German S.S. personnel accompanied by Italian policemen called at via Po No. 28, the claimant's former residence, to arrest and deport him and his family.

Held: that the claim must succeed. The claimant must be regarded as having been " treated as enemy under the laws in force in Italy during the war ", even though the Law under which his property was confiscated was enacted prior to the outbreak of war.

The Commission said: " 1. The issue involved is whether or not the claimant was considered as enemy ' under the laws in force in Italy during the war '.

" The Italian Government admits that, by decrees of November 19, 1942, of the Intendenza di Finanza of the Province of Rome, and of January 19, 1943, of the Intendenza di Finanza of the province of Frosinone, all the buildings owned in Rome and Paliano by the claimant were confiscated and turned over to E.G.E.L.I., in application of Article 26 of Royal Law Decree No. 126 of February 9, 1939, because he belonged to the Jewish race.

" The Agent of the Italian Government acknowledges that the Law Decree under which the transfer to E.G.E.L.I. occurred was in force in Italy during the war and does not deny that said Law Decree, enacted prior to the time when Italy was divided in two, comes within the notion of legislation as intended by the second part of paragraph 9 (*a*) of Article 78 of the Treaty of Peace.[1]

" But, the Agent of the Italian Government adds, the Law Decree of February 9, 1939, was enacted not only prior to the Armistice but prior to the outbreak of war as well. It cannot, therefore, have considered as enemies Italian nationals belonging to the Jewish race because on February 9, 1939, Italy was at war with no one. Law Decree of February 9, 1939, which authorized racial discriminatory measures, should be considered—still in the words of the Agent of the Italian Government—as a mere and simple peacetime police act; these measures which are distinct and separate

[[1] See *supra*, p. 647, n.2.]

from the contingencies of war, appear to be, in the technical sense, different to those which were applicable to nationals of enemy Powers.

" 2.—The Argument of the Agent of the Italian Government, even if it were to be accepted in principle, does not take into any account whatever the fact that the claimant never received from E.G.E.L.I. the shares representing the amount due on the transfer to that corporation of his property in Rome and Paliano (province of Frosinone), in accordance with Royal Law Decree of February 9, 1939. The treatment to which the claimant was subjected by the Italian authorities during the war cannot therefore be referred to the mere and simple implementation against him, and his property located in Rome and Paliano, of Royal Law Decree of February 9, 1939, which provided for (Article 36) the payment of compensation ' within ninety days of the date of publication in the Official Gazette of the Kingdom, of the decree concerning transfer of property to E.G.E.L.I. ' (the decree of November 19, 1943, concerning the claimant, was published in the Official Gazette of November 25, 1942).

" Nor can the failure to deliver the shares to the claimant be attributed to any negligence on his part or to the arbitrary action of a State or State controlled agency, which had been careless and had not fully implemented Royal Law Decree of February 9, 1939. From the premises appearing in the notarial deed of October 24, 1946, which were accepted by E.G.E.L.I.'s attorney, it seems that failure to make delivery of the shares was due to the ' existence of a state of emergency '. In fact, Royal Law Decree of February 9, 1939, was not immediately implemented against the claimant, as it should have been, in accordance with the spirit and the letter thereof (*cf.* Article 13) but after a lapse of three to four years, and was implemented against him when Italy had changed from a state of peace to a state of war. It is a well known fact that Italy's entry into World War II, and to even a greater extent the United States' entry into the war, caused a stiffening on the part of the Italian Government against Italian nationals belonging to the Jewish race, and especially against those who had left the country, most of them to take refuge in an enemy country such as (from December 1941) the United States. Whatever the arguments in this respect, after the Armistice was published on September 8, 1943, Rome, its province and the province of Frosinone formed part, until this area was occupied by the Allied forces, of the territory subjected *de facto* to the power of the Italian Social Republic. Said Republic had proclaimed the principle that, during the war, all individuals belonging to the Jewish race were enemy nationals. In implementing this principle, the Duce of the Italian Social Republic, Head of the Government, enacted Legislative Decree No. 2, of January 4, 1944, published in the Official Gazette No. 6 of January 10, 1944, under which Italian nationals belonging to the Jewish race were deprived, in the territory of the State, of the possibility of being owners of plots of land, buildings or of stocks, valuables, credits and movable property, whatever the nature thereof (Article 1); this decree confiscated said property in favor of the State and turned it over to E.G.E.L.I. for management in order that it be disposed of and the proceeds of the sale paid into the State ' in partial recovery of the expenses sustained for assisting, paying subsidies and compensation for war damage to individuals rendered homeless by enemy air attacks '. The reference to the ' state of emergency ' contained in the deed of October 24, 1946, cannot be interpreted other than as a specific reference to this *de facto* and *de jure* change of condition, and in any event to the issuance of the decrees of November 10, 1942, of the Intendenza di Finanza of Rome and of January 19, 1943, of the Intendenza di Finanza of Frosinone.

" 3.—Even supposing that the claimant, notwithstanding the radically changed situation of fact, had still been entitled to obtain certain shares in payment of the excess quota of his property transferred to E.G.E.L.I., this right was in any event wiped out in favor of the Italian State through the enactment of the Legislative Decree of January 4, 1944, which deprived claimant also of title to the quota permitted (part of the small villa at via Po in Rome) and of his joint interest in the Sonnino Farm at Monte Porzio Catone.

" Certainly, Decree Law of January 4, 1944, required a decree of confiscation issued by the Head of the Province. But even supposing that, with regard to the quota of the small villa at via Po and the joint ownership of Monte Porzio Catone, treatment as enemy within the meaning of paragraph 9 (*a*) of Article 78 of the Treaty of Peace could have occurred only by the issuance of the executive decree of confiscation, no decree was required to free E.G.E.L.I., in actual fact the Italian State, from the obligation to deliver the shares representing compensation for the excess quota. It was in fact not a question of property, whether movable or immovable, in the hands of the claimant or of third parties, and of taking this property away from its holder; there were here involved shares, which were to be issued by the State controlled agency in question (Article 32 of Royal Law Decree of February 9, 1939) and it is obvious that this was an obligation to issue shares in favor of an individual who, under the intervening Law Decree of January 4, 1944, had been deprived of the possibility of owning ' shares, valuables, credits and real property, whatever the nature thereof '. A decree of confiscation by the Head of the Province would have been utterly redundant; in this case implementation had already resulted from the confiscation required by law; and this was exactly E.G.E.L.I.'s thinking in that it never issued the shares and even less attempted to deliver them to the claimant. The latter was therefore completely dispossessed of his property located at Rome and at Paliano, *ope legis*, without receiving the slightest compensation.

" 4.—Coming to the question as to whether or not the legislation of the Italian Social Republic can be considered as legislation in force in Italy during the war within the meaning of the second paragraph of paragraph 9 (*a*) of Article 78 of the Treaty of Peace, this Commission has given an affirmative opinion in its decisions rendered on September 24, 1956, in the *Vittorio Leone and Amalia Sacerdote Levi*,[1] *Peter G. and Gino Robert Treves*[2] and *Leo J. Wollemborg* cases,[3] which are incorporated herein.

" This decision in no way conflicts with the two-Member decision of this Commission, rendered on February 19, 1954, in the *Hilde Gutman Bacharach* case.[4] In that decision the Commission judged that ' to be treated as enemy necessarily implies on the one hand that there be an actual course of action on the part of the Italian authority (and not an abstract possibility of adopting one), and on the other hand that said course of action be aimed at obtaining that the individual who is subjected to it be placed on the same level as that of enemy nationals.' Actual comportment may result also from an omission and in the instant case it flows from the failure to deliver the shares representing compensation of the property transferred; this failure to deliver, which was due to intervening regulations, has changed a partly compensated expropriation (the portion of the villa at via Po transferred to E.G.E.L.I. on January 3, 1943, for 402,580 lire, had been re-sold by E.G.E.L.I., on April 24, 1943, for 2,250,000 lire) into a total dispossession, which is fully equal to treatment as enemy within the meaning of the second [sub-]paragraph of paragraph 9 (*a*) of Article 78 of the Treaty of Peace; in this latter connection, reference is made to the afore-mentioned decisions rendered on September 24, 1956, by this Commission in the *Vittorio Leone and Amelia Sacerdote Levi, Peter G. and Gino Robert Treves* and *Leo J. Wollemborg* cases. In addition to the arguments contained therein, it should be stated that the premises of the Treaty of Peace make specific reference to the Armistice clauses signed by Italy on September 3 and 29, 1943, and to the fact that the Armistice clauses of September 29, 1943, contain an Article 31, which reads as follows:

> " ' All Italian laws involving discrimination on grounds of race, color, creed or political opinions will insofar as this is not already accomplished be rescinded, and persons detained on such grounds will, as directed by the United Nations, be released and relieved from all legal disabilities to which they have been subjected. The Italian Government will comply with all such further directions as the Allied

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[1] See *supra*, p, 303.]

[2] See *supra*, p. 313.]

[3] See *infra*, p. 654.]

[4] See *International Law Reports*, 1955, p. 646.]

> Commander-in-Chief may give for repeal of Fascist legislation and removal of any disabilities or prohibitions resulting therefrom.'

An interpretation of Article 78, second [sub-]paragraph of paragraph 9 (*a*), of the Treaty of Peace, such as that proposed by the Italian Government, would mean an utter disregard of the letter of said provision and of the reasons for which the Allied and Associated Powers had insisted on its inclusion, reasons which had been clearly explained in the Armistice of September 29, 1943. For these reasons, the afore-mentioned provision of the Treaty of Peace appears to be a logical confirmation and completion of said Article 31.

" 5.—One can therefore leave unresolved the question as to whether or not the treatment required by the second paragraph of paragraph 9 (*a*) of Article 78 of the Treaty of Peace against the claimant can be found in the conduct of the detachment of German troops in the Sonnino Farm at Monte Porzio Catone during the period December 1943 through the first days of June 1944, and the search for the claimant made in Lazio by the Italian police, subsequent to the outbreak of war; and by German security men accompanied by Italian policemen, subsequent to the Armistice."

[Report: Unpublished (Decision No. 155).]

NOTE.—The Representative of Italy appended a dissenting opinion.

Treaties—Interpretation of—Miscellaneous—Peace Treaties—Meaning of Expression "treated as enemies"—Anti-Jewish Legislation of Italian Socialist Republic—Confiscation of Property Before Coming into Force of Legislation—Retroactive Effect of Law—Claims—Effect of Prior Purported Settlement of Claim—Relevance of Knowledge of Treaty Provisions—Supremacy of Treaty Provisions Over Private Law Acts—Supremacy of Human Rights over Domestic Law—Waiver of Claims—Presumption Against Waiver.

WOLLEMBORG CLAIM.

Italian-United States Conciliation Commission. December 21, 1956.

(Matturri, Sorrentino, Bolla.)

THE FACTS.—This was a claim presented by the Government of the United States against the Government of Italy under paragraph 6 of Article 78 of the Treaty of Peace with Italy, for exemption from the special progressive tax on property imposed on the claimant's property by the Government of Italy and for repayment, with interest, of certain sums paid as tax since September 3, 1951. The claimant was an Italian Jew who in 1939 took refuge in the United States of America to escape racial persecution in Italy.

On December 2, 1943, he became an American national by naturalization. He owned certain lands and buildings in Loreggia, Italy. As a consequence of the measures taken against the Jews and in compliance with a telegram of the Head of the Province dated December 13, 1943, this property was taken over by the Podestà of Loreggia on December 16, and was taken care of by the Jewish Property Commissioner at Padua from the end of December 1943 until May 10, 1945, on which date it was returned to its legitimate owner. The statement of account drawn up by Commissioner Ugo Vittadello showed a balance of 25,884.05 lire to debit of the claimant, who paid that sum to the Commissioner's office on April 5, 1946.

On September 11, 1945, and December 11, 1946, the claimant deposited with the Intendenza di Finanza at Padua two claims directed at obtaining under Article 78, paragraph 4 (*a*), of the Peace Treaty with Italy compensation covering two-thirds of the war damage which his real and personal property at Loreggia had suffered during the months of January and February 1945. The claimant, with regard to his active right to claim, invoked Article 5 of the Italian-United States Agreement of August 14, 1947 (known as the Lombardo Agreement), under which

> " for the purposes of this Memorandum of Understanding, the term ' nationals ' means individuals who are nationals of the United States of America, or of Italy, or corporations or associations organized under the laws of the United States of America or Italy, at the time of the coming into force of this Memorandum of Understanding, provided, that under Article 3 . . ., nationals of the United States of America shall, for purposes of receiving compensation, also have held this status either at the time at which their property was damaged or on September 3, 1943, the date of the Armistice with Italy."

The claimant was naturalized on December 2, 1943, and therefore after September 3, 1943, but before the property was damaged as a result of the war.

On September 19, 1947, the claimant's attorney filed with the District Office of Direct Taxation of Camposampiero a statement concerning the special progressive tax on property established by Decree Law No. 828 of the Italian Republic on September 1, 1947.[1] The statement covered all the personal and real property owned in Italy by the claimant. On September 3, 1951, the claimant's attorney reached a compromise settlement (" *concordato* ") with the Tax Collector of Camposampiero, on the basis of which the taxable property for the purposes of the special progressive tax on property was fixed at 118,000,000 lire and the amount of the tax at 22,195,800 lire, plus an additional 2 per cent. per annum from January 1, 1947, and the collection premiums.

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[1] As to which see *Re Italian Special Capital Levy Duties* (*Recueil des Décisions*, Part I, p. 95; *International Law Reports*, 1951, Case No. 128).

On December 30, 1952, the United States Embassy, on behalf of the claimant, submitted a claim under Article 78, paragraph 6, of the Treaty of Peace[1] to the Government of the Italian Republic, directed at obtaining exemption from the payment of this special progressive tax on property. At the time the claim was filed the claimant had already paid part of the sum agreed to under the compromise settlement for said tax. Subsequently, the claimant was requested to pay, and did in fact pay, further instalments of that sum. The balance was held in abeyance pending the decision on the claim.

The Government of the United States took the position that the request for the payment of further instalments which was made after the claim was filed on December 30, 1952, was to be interpreted as a rejection of said claim and, on December 28, 1954, placed the dispute before the Italian-United States Conciliation Commission.

The Petition filed by the Agent of the United States of America concluded by requesting that the Commission

" (a) Decide that the claimant is to be considered a United Nations national within the meaning of paragraph 9 (*a*) of Article 78 of the Treaty of Peace;

" (b) Decide that the claimant is entitled to exemption from the Extraordinary Progressive Patrimonial Tax imposed on his property by the Italian Government;

" (c) Order that any sums paid by the claimant to the Italian Government under the tax assessment dated September 3, 1951, be refunded to the claimant and that the claimant be granted interest thereon at the rate of 5%;

" (d) Order that the costs of and incidental to this claim including the necessary expenses of the prosecution of this claim before this Commission be borne by the Italian Republic."

It was contended that the claimant was a United Nations national not only within the meaning of the first paragraph of paragraph 9 (*a*) of Article 78 of the Treaty of Peace, as amended by Article 5 of the Lombardo Agreement, but also within the meaning of the second paragraph of paragraph 9 (*a*) of Article 78; and that in fact, because he was a Jew, the claimant was treated as enemy under the laws in force in Italy during the war. This conclusion was based on the fact that his property at Loreggia was placed under sequestration in December 1943 and was restored to him only on May 10, 1945.

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[1] Article 78, para. 6, provides:

" 6. United Nations nationals and their property shall be exempted from any exceptional taxes, levies or imposts imposed on their capital assets in Italy by the Italian Government or any Italian authority between September 3, 1943, and the coming into force of the present Treaty for the specific purpose of meeting charges arising out of the war or of meeting the costs of occupying forces or reparation payable to any of the United Nations. Any sums which have been so paid shall be refunded."

On behalf of the Italian Government it was contended that the Petition was " inadmissible for lack of right to claim ". It was impossible to find " treatment as enemy under the laws in force in Italy during the war " in acts connected with the so-called Laws of the Republic of Salò,[1] which—because it was itself outside the law—had neither right nor title to issue " laws ".

The Italian Government also contended that the merits of the case were groundless. A lawful representative of the present claimant had freely entered into a tax settlement with the Italian Finance Offices at a time subsequent not only to the coming into force of the Treaty of Peace but also to the well-known decision rendered by the Franco-Italian Conciliation Commission on August 29, 1949, concerning the property tax.[2] The Conciliation Commission, in the exercise of its powers, however broad, could not proceed to an examination of that settlement, which belonged wholly and entirely within the sphere of Italian domestic law.

In reply on behalf of the United States, reference was made to a decision of the Supreme Court of Cassation and the Central Commission of Direct Taxation in Italy, according to which the tax settlement ("*concordato fiscale* ") was not a compromise settlement entered into by the fiscal authorities and the tax-payer, and binding on the parties, but an administrative act of the Government which was agreed to by the tax-payer. It therefore represents the combination of a public act (the assessment of the tax on the part of the authorities) with a private act (the agreement of the tax-payer to consider said assessment as final). The settlement does not prejudice the question of law, which may again be raised within the prescribed time-limit before the competent agencies, in view of the fact that the settlement hinges, and can only hinge, on the amount of the tax to be levied, and on the extent of the taxable property. In the instant case the settlement referred only to the amount of the tax payable by the claimant.

In the Counter Reply on behalf of the Italian Government it was admitted that the settlement (" *concordato* ") did not constitute a compromise agreement in the private law sense of the term. In the Italian legal system there was no possibility of a compromise agreement in matters of taxation. On the other hand, the signing of the fiscal agreement, at the time and under the conditions in which it was signed by the claimant's attorney, represented an act of acquiescence in the tax claim of the Italian Government. This act of acquiescence, which was expressed in terms of domestic law, could not be attacked on the international level. By that act the legal relationship of taxation became extinct through the extinction of the fiscal obligation and an international tribunal was completely incompetent for the purpose of reviving this relationship.

[[1] See *supra*, p. 306, n. 1.]

[2] See *Re Italian Special Capital Levy Duties* (*supra*).

Held: that the claim must succeed. The claimant was entitled to exemption from the special progressive tax on property and to be repaid what he had paid to the Italian Government, but without interest. The legislation of the Italian Socialist Republic was to be regarded as " the laws in force in Italy during the war ", and it was immaterial that the confiscation of the claimant's property in fact took place before the relevant Law came into force. The claimant had been treated as an enemy within the meaning of the Treaty of Peace.

The Commission said: " 1.—This decision does not deal with the claims submitted by Leo J. Wollemborg on September 11, 1945, and December 11, 1946, directed at obtaining compensation for the war damage suffered by his property in Italy. The Italian Government has not yet taken a position on these claims so that they have not, so far, become the subject of a dispute within the meaning of Article 83 of the Treaty of Peace.

" In the absence of a dispute, the Commission cannot even render an opinion on the preliminary question of Mr. Leo J. Wollemborg's active right to file a claim for war damages. The request contained in paragraph No. 1 of the conclusions of the Petition of December 28, 1954, can only concern the claim relating to the special progressive tax on property.

" The claimant should however be advised that, during the discussion of the case before the Commission, the Agent of the Italian Government admitted that Leo J. Wollemborg should be considered as a United Nations national within the meaning of Article 5 of the Lombardo Agreement for the purpose of obtaining compensation for the war damage suffered by his property in Italy, under Article 78, paragraph 4 (*a*), of the Treaty of Peace, on the condition that it is proved that [this damage] occurred after the claimant became an American national by naturalization.

" 2.—The active right of the claimant to avail himself of paragraph 6 of Article 78 of the Treaty of Peace is disputed; on the other hand it is not disputed by the two Governments that the special progressive tax on property falls under the provisions of the afore-mentioned paragraph 6.

" The claimant derives his right in the first place from Article 5 of the Lombardo Agreement,[1] which amended the first paragraph of paragraph 9 (*a*) [of Article 78] of the Treaty of Peace,[2] extending the benefit of certain provisions of Article 78 from individuals who were United Nations nationals on September 3, 1943, to individuals who became United Nations nationals at a later date but prior to the date when their property was damaged. Nevertheless, Article 5 of the Lombardo Agreement only considers cases in which the property, or the interests of United Nations nationals in property, in Italy were damaged and hence have a right to receive compensation. This appears unquestionably either by the reference made in Article 5 of the Lombardo Agreement to Article 3 thereof, which deals exclusively with sub-paragraphs *a* and *d* of paragraph 4 of Article 78, or by the two expressions contained in the afore-mentioned Article 5: 'for the purposes of receiving compensation' and 'at the time at which the property was damaged'.

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[1] See *supra*, p. 655.]

[2] Article 78, para. 9 (*a*), of the Peace Treaty provides:

" (*a*) ' United Nations nationals ' means individuals who are nationals of any of the United Nations, or corporations or associations organised under the laws of any of the United Nations, at the coming into force of the present Treaty, provided that the said individuals, corporations or associations also had this status on September 3, 1943, the date of the Armistice with Italy. . . ."]

" The Agent of the Government of the United States finds that there is contradiction in the fact that a national of the United States of America, who is entitled to receive partial compensation for the war damage suffered by his property in Italy, should be forced to pay to the Italian State the special progressive tax on property which was established to meet the expenses arising out of the payment of war damage compensation also. This contradiction, if there is a contradiction, would lie solely in the contentions of one of the contracting parties and in any case would not be so broad as to allow the interpreter to wander from the clear text of Article 5 of the Lombardo Agreement; there are no grounds whatever for doubting that the expressions used in this article have faithfully interpreted the intentions of the contracting parties, nor are there any positive elements to assume a different intention to that expressed in the words used (*cf.* Balladore Pallieri, *Diritto internazionale pubblico*, p. 236). In Article 5 of the Lombardo Agreement the Italian Government made a concession to the United States Government by accepting, in certain specific cases and for specific purposes, a date subsequent to that established by the first paragraph of paragraph 9 (*a*) [of Article 78] of the Treaty of Peace concerning the possession of *status*; the effects of this concession cannot be extended by the interpreter beyond the clear limits of the Agreement for the sole reason that the Government of the United States might have had reasonable grounds for requesting such an extension from Italy during the negotiations.

" 3.—In the second place, the claimant derives his active right to claim from the second paragraph of paragraph 9 (*a*) of Article 78, namely, because he was considered (' *traitée* ', ' treated ') as enemy ' under the legislation in force during the war '.

" On the interpretation to be given to this provision the Commission has rendered an opinion in the two Decisions issued this date in the cases of *Vittorio Leone* [*Levi*] *and Amelia Levi Sacerdote* and *Peter G. and Gino Robert Treves.*[1] Specific reference is made here to these Decisions.

[[1] See *Levi Claim, supra,* p. 303 and Note thereto at p. 313.]

" In view of the arguments set forth in the afore-mentioned decisions, the Commission is of the opinion that the provision to be interpreted intended to subordinate the similarity required by it to a condition of fact, namely, that the effective treatment as enemy should be linked with legislative provisions in force in Italy during the war, hence also subsequent to the Armistice (September 3, 1943), little mattering whether enacted by the national Government or by the Government of the Italian Social Republic, the legitimacy of the legislative enactments of the latter being unprejudiced. The Commission also believes, still for the reasons set forth in the decisions referred to above, that the application of the second paragraph of paragraph 9 (*a*) [of Article 78] of the Treaty of Peace does not require that the legislation in question have in the abstract specifically declared certain Italian nationals as enemies, and, as such, subjected them to the War Law; it is sufficient that it required the application against them of measures which, in substance, permitted a treatment as enemy.

" The only peculiarity in the instant case is that the measures directed against the claimant's property (inventory and beginning of the administration by the Jewish Property Commissioner at Padua) were taken before the coming into force (January 10, 1944) of the Legislative Decree of the Duce, No. 2, of January 4, 1944, published in the Official Gazette of January 10, 1944. By this Decree, containing new provisions concerning property owned by citizens of the Jewish race, confiscation and sale of the property owned by said Jews was ordered. The State was the beneficiary of the proceeds of said sale ' as partial recuperation of the expenses sustained in assisting and in paying subsidies and compensation for war damage to persons rendered homeless by enemy air attacks ' (Art. 15). By this Decree, a treatment which was even more severe than that provided for enemy owned property was made lawful with respect to property owned by Italian Jewish nationals.

" The question as to whether or not the program approved in November 1943 by the First Assembly of Republican Fascism may be considered as ' legislation ' can remain unsolved. Point 7, included in this program, reads as follows:

> " ' Individuals of the Jewish race are aliens. During the war they belong to enemy nationality.'

" It is a fact that, in pursuance of this policy, certain property owned by Italian nationals of the Jewish race was placed under sequestration in December 1943 (see, in the records, the Decree of December 28, 1943, of the Head of the Province of Brescia concerning Vittorio Coen di Edmondo, which refers to the ' instructions issued by the Ministry of the Interior on December 1, 1943 ' and which contains in the ' having seen ' paragraphs, the sentence: ' having seen that Jews are considered as subjects of an enemy State ').

" The more decisive factor is that said measures were in any event made lawful *a posteriori* by the Decree of the Duce of January 4, 1944. There could be no justification in conferring [on] Italian nationals of the Jewish race a different treatment, when implementing the second paragraph of paragraph 9 (*a*) of Article 78 of the Treaty of Peace, according to whether the measures taken against their property by the agencies of the Italian Social Republic were in actual fact taken before or after January 10, 1944; and that the benefits of the said provision should be denied primarily to those individuals who were the first to be attacked and therefore for a longer period.

" 4.—As regards the merits of the case, the Agent of the Italian Government opposes to the Petition the fact that on September 3, 1951, the claimant's attorney signed an agreement with the Italian financial administration concerning the special progressive tax on property and that the sums paid by the claimant were paid in fulfilment of this agreement (' *concordato* ') and that, also in fulfilment of this agreement, claimant was requested to pay further instalments.

" The parties have discussed at length and learnedly the nature and the effects of the tax settlement (' *concordato* ') under Italian domestic law. The Commission does not believe it should follow them on this ground. The proceedings started by the United States Government are in the sphere of international law, because they are based on paragraph 6 of Article 78 of the Treaty of Peace.

" Without it being necessary to embark here on an academic discussion as to whether or not the question of relationship between international and domestic law should be solved according to the teachings of the doctrine of monism or of dualism (*cf.* Rousseau, *Principes généraux de droit international public*, vol. I, pp. 54 through 75, above all 74), one thing is certain: the Italian Government cannot avail itself, before an international court, of its domestic law to avoid fulfilling an accepted international obligation. Judicial decisions of the Permanent Court of International Justice are all identical on this point:

" (a) in the [Advisory Opinion] of February 21, 1925 (matter of exchange of Greek and Turkish peoples[1]), the Court refers to ' the self explanatory principle according to which, a State that has validly subscribed to international obligations is bound to provide its legislation with such amendments as are necessary to ensure the fulfilment of these obligations);

" (b) in the [Advisory Opinion] of July 31, 1930 (matter of the Greek-Bulgarian community[2]), the Court expressed the following

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[[1] *Exchange of Greek and Turkish Populations* (*P.C.I.J.*, Series B, No. 10; *Annual Digest*, 1925–1926, Case No. 290).]

[[2] *Greco-Bulgarian "Communities"* (*P.C.I.J.*, Series B, No. 17; *Annual Digest*, 1929–1930, Case No. 2).]

opinion: ' It is a generally recognized principle of human rights that in the relationships between Powers who are contracting parties to a treaty, the provisions of a domestic law shall not prevail over those of the treaty ';

" (c) this principle is restated in the decision of June 7, 1932, in a dispute between France and Switzerland (matter of the free areas [zones][1]): ' France cannot avail itself of its legislation for the purpose of restricting the scope of its international obligations.'

" In any event, within these limits, the priority of human rights over domestic law in the relationships between treaty and law must be recognized by the international court established under the treaty itself.

"Article 78, paragraph 6, of the Treaty of Peace, after having charged the Italian Government with the obligation of exempting United Nations nationals from certain specific taxes (and it is undisputed between the parties that these taxes include the special progressive tax on property), imposes on the Italian Government the obligation to return all sums which may have been collected for that purpose. Restitution should be made also in the event that the Italian fiscal legislation, like that of certain other States, should rule out in a general and absolute manner any restitution by the fiscal authorities of sums [improperly] collected.

" Viewed from the international standpoint, the cited settlement (' *concordato*') could be relevant only as a waiver of a right on the part of its principal (Balladore Pallieri, *op. cit.*, p. 251). Certainly, the waiver is, save in exceptional cases, binding on the subject from whom the unilateral declaration of relinquishment emanates (*ib.*). But waivers cannot be presumed and there is nothing in the instant case that authorizes one to admit that there was intention to relinquish. The claimant's attorney, according to the sworn statement contained in the records, was unaware, at the time of the signing of the settlement (' *concordato* ') of the provisions of the Treaty of Peace concerning the exemption of United Nations nationals from certain taxes; the attorney, as a good administratrix, could not take any heed of the consequences of the notification of September 19, 1947, and, in settling by compromise the amount of the taxable property, certainly did not intend to relinquish any possible rights which may have been due to the claimant, of which she was unaware, and wished to oppose every imposition of this kind. As to the claimant, he was absent from Italy; even though the French-Italian Conciliation Commission had admitted on August 29, 1949,[2] the applicability of Article 78, paragraph 6, of the Treaty of Peace to the special progressive tax on property, it does not appear that he became aware of this until September 3, 1951. Neither did he learn before this date of the Exchange of Notes of June 13, 1950, by which Italy acknowledged the applicability of said exemption to the United States of America also; until then no action whatever had been taken on his claim filed on September 11, 1945, and December 11, 1946, for war damage compensation and the Italian Government denied, and still denies, that Italian nationals of Jewish origin, racial persecutees under the Italian Social Republic, have a right to be considered as ' United Nations nationals ' within the meaning of the second [sub-]paragraph of paragraph 9 (*a*) of Article 78 of the Treaty of Peace. It was excluded therefore that the exceptions raised by the claimant could be made the subject of a trial, and in no event of a favorable trial on the part of the Italian fiscal authorities; it was only possible to have recourse to an international court (Article 83 of the Treaty of Peace) and it was not necessary to make any specific reservation in this connection.

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[1] *Case concerning the Free Zones of Upper Savoy and the District of Gex* (*P.C.I.J.*, Series A/B, No. 46; *Annual Digest*, 1929–1930, Case No. 6).]

[2] *Re Italian Special Capital Levy Duties* (*Recueil des Décisions*, Part I, p. 95; *International Law Reports*, 1951, Case No. 128).]

" 5.—It follows that the claimant is entitled to be exempt from the payment of the special progressive tax on property established by the Italian Republic by Law Decree No. 828 of September 1, 1947, and that the sums already paid by the claimant for this purpose are to be reimbursed to him by the Italian Government.

" Paragraph 6 of Article 78 of the Treaty of Peace makes no reference to interest on delayed payments and there is therefore no legal basis thereto.

" 6.—The claimant requests that the expenses for the legal proceedings, including those incurred in the proceedings before this Commission, be charged to the Italian Government.

" Article 83, paragraph 4, of the Treaty of Peace provides that each Government shall pay the fees of its Member on the Conciliation Commission and the fees of its Agent. The fees of the Third Member and the joint expenses of the Commission shall be borne by the two Governments on a fifty-fifty basis.

" The claimant can avail himself only of Article 78, paragraph 5, of the Treaty of Peace under the terms of which ' all reasonable expenses incurred in Italy in establishing claims, including the assessment of loss or damage, shall be borne by the Italian Government.' This provision is brought to the knowledge of the claimant, who has so far mentioned no figures in this connection; wherefore the Commission finds it impossible to fix a specific amount (Article 13 of the Rules of Procedure dated June 29, 1950)."

[Report: Unpublished (Decision No. 146).]

NOTE.—The Italian Representative on the Commission filed a dissenting opinion.

Treaties—Interpretation of—Miscellaneous—Warsaw Convention of 1929 on International Carriage by Air—Meaning of " principal place of business".

Winsor *v.* United Air Lines, Inc.

United States, District Court, Eastern District, New York.

June 25, 1957.

The Facts.—This was an action to recover damages for the death of the plaintiff's wife by reason of the crash of the defendant's aeroplane through the explosion of a bomb which had been placed aboard it. The deceased was killed between New York and Seattle while travelling on an aircraft of the defendant Air Lines on a return ticket from Gander, Newfoundland, to Seattle, Washington, U.S.A., issued by Trans World Airlines, Inc.

Since the transportation was international, it was governed by Article 28, para. 1, of the Convention for the Unification of Certain Rules relating to International Carriage by Air, signed at Warsaw on October 12, 1929 (49 Stat. 3000, T.S. No. 876, 137 *L.N.T.S.* 11) (the " Warsaw Convention "), which provides:

> "An action for damages must be brought, at the option of the plaintiff, in the territory of one of the High Contracting Parties, either before the court of the domicile of the carrier or of his principal place of business, or where he has a place of business through which the contract has been made, or before the court at the place of destination."

The defendant, which had its principal executive offices in Chicago, Illinois, and its main operating base in Denver, Colorado, maintained that New York was not its " principal place of business".

On defendant's motion to dismiss or to transfer the case to the United States District Court for the District of Colorado,

Held: that the motion to dismiss must be denied but that the motion to transfer the case to the federal court in Colorado must be granted. Since the airline did much of its booking for air flights at its New York office, New York constituted a " principal place of business " at which suit could be brought, within the meaning of Article 28 of the Warsaw Convention. Because of the presence of a large number of witnesses in the vicinity of Denver, the action would, however, be transferred.

The Court said, with reference to the Warsaw Convention: " The question of jurisdiction under Article 28 of the Warsaw Convention is not free from doubt, the narrow issue being whether the defendant maintains a ' principal place of business ' in New York City, since it is clear that the decedent did not there enter into contactual relations with this defendant.

" The plaintiff relies upon *Berner* v. *United Air Lines, Inc.*, 3 A.D.2d 9, 157 N.Y.S.2d 884.[1] In that case the ticket was purchased in the New York office of the Air Line sought to be held responsible for an airplane crash. The decision was that the British Commonwealth Pacific Air Lines sold the ticket in question through British Overseas [Airways Corporation] which maintained an office in New York, namely, it was doing business there through the activities of British Overseas.

" The case is parallel to this only with reference to the nature of the business being conducted by this defendant in the City of New York in view of the assertion made in the affidavits submitted on behalf of this motion. From that of its said Vice-President, Petty, it appears that this defendant is a Delaware corporation and that ' its principal executive offices are located in Chicago, Illinois, and its main Operating Base is located in Denver, Colerado.'

" There is a paucity of factual showing concerning the nature of the business done in the New York office of the defendant, but sufficient has been shown to support the inference hereby drawn, that the New York office is the place where much of the booking for air flights over the defendant's line is done; and it is thought that not too fine a distinction should be drawn at least for the purposes of this motion, between the New York office and the Chicago office.

" Thus the motion to dismiss will be denied, for the reason that apparent compliance with the jurisdictional requirements of Article 28 of the Warsaw Convention has been shown.

"As above stated, it is thought however that the case should be transferred for trial to the Denver jurisdiction for the convenience of witnesses. . . ."

[Reports: 153 F. Supp. 244, 5 Avi. 17, 509; 1957 U.S. & Can. Av. 466.]

NOTE.—In *Waldrep's Estate; Northwest Airlines, Inc.* v. *Gorter*, 49 Wash. 2d 711, 306 P.2d 213, 5 Avi. 17, 267 (1957), it was *held* that the Courts of the State of Washington, the destination of the aircraft in the crash of which the decedent was killed, had jurisdiction of an action for wrongful death against the airline, pursuant to Article 28 of the Warsaw Convention.

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[1] See *International Law Reports*, 1956, p. 493.]

Treaties—Interpretation of—Miscellaneous—Limitation of Interpreptation of Provisions of Peace Treaties by Reference to Events Connected with War—Treaty of Peace with Italy of February 10, 1947—Undertaking by Italy to Restore Property of United Nations Nationals—Property to be Restored " Free of all Encumbrances " —Whether Italian Legislation Conferring Security of Tenure on Tenants of Property Constitutes " Encumbrance "—The Law of Italy.

AMMINISTRAZIONE FINANZIARIA *v.* POMA.

Italy, Court of Cassation. May 25, 1956.

THE FACTS.—In 1938 the respondent, an Italian citizen, was granted a tenancy of property owned by the national of a country which subsequently became one of the United Nations. On July 19, 1940, an Italian Law was enacted which provided for security of tenure of sitting tenants. Some years later the property concerned was requisitioned as enemy property, and the sequestrator appointed by the Italian authorities made an agreement with the respondent whereby the latter was allowed to remain in possession. An action for possession against the respondent (brought by the appellants herein on behalf of the owner) failed, on the ground that the respondent was entitled to the benefit of the Law of July 19, 1940, which had automatically extended his tenancy and kept it in being. On appeal, the appellants contended that by virtue of Article 78 of the Peace Treaty with Italy the owner was entitled to the return of his property " free of all encumbrances ", and accordingly to vacant possession thereof.[1]

Held: that the appeal must be dismissed. (1) Article 78 of the Peace Treaty was intended only to impose on Italy a duty to cancel all measures taken by it against the property of United Nations nationals as a direct consequence of the war, but not measures taken for other reasons. (2) The Italian legislation providing for security of tenure was a measure unconnected with the state of war as such and was not taken against United Nations property as such; it therefore continued to apply to Italians and United Nations nationals alike. (3) The respondent's security of tenure did not constitute an encumbrance within the meaning of Article 78 of the Treaty, and the respondent was entitled to remain in possession under the contract made between himself and the owners in 1938, as extended by the legislation here referred to. (4) The fact that the sequestrator had concluded a fresh contract with the respondent during the war did not affect the continued existence of the original contract (as extended by law).

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[1] The relevant part of Article 78 (paragraph 2) of the Treaty provides as follows: " The Italian Government undertakes that all property . . . [of the United Nations and their nationals] shall be restored free of all encumbrances . . . to which [it] may have become subject as a result of the war . . . The Italian Government shall nullify all measures, including seizures, sequestration or control, taken by it against United Nations property between June 10, 1940, and the coming into force of the present Treaty. . . ."

The Court said: " The Court of first instance found that a contract was made on Setember 10, 1938, between Poma (the respondent herein) and the owners of the property and that this contract was tacitly renewed, with the result that when the Law of July 19, 1940—which provided for security of tenure—came into force, Poma was in occupation as a tenant and accordingly entitled to an automatic extension of his lease. In the opinion of the Court of first instance, the contract made by the sequestrator in respect of the same property did not conflict with that extension. The extension is concerned only with the original contract of September 10, 1938, which was still in existence when rent control was introduced; Article 9 of the Decree-Law of March 26, 1946,[1] which is concerned only with contracts brought into existence by the sequestrator, is therefore inapplicable. The Court whose judgment is under appeal held that the intention of Article 78 of the Peace Treaty was to cancel only those restrictions which were imposed by the Italian Government by way of reprisals or for similar reasons as a direct consequence of the state of war. This meant the exemption of contracts of a private or commercial character governed by Italian law which were not concerned with the state of war or the status of ex-enemies. This interpretation is essential in the present case, having regard to the prior existence of the relationship of landlord and tenant where one of the parties is a United Nations national, because if United Nations nationals were exempt from the legislation governing security of tenure they would be in a privileged position by comparison with Italian citizens.

" Nor is the second contention of the appellants well-founded. It is contended that the last contract made directly between the parties on August 6, 1939, contained a suspension clause: ' in the event of war involving Italy ', and that accordingly the contract automatically came to an end on June 10, 1940, the day when war was declared and before the legislation on security of tenure came into force, and that the tenancy subsequently granted by the sequestrator (on May 13, 1944) constitutes the original contract between the parties. It is further said that the Court below declared the suspension clause to be inoperative as being contrary to the legislation on security of tenure, without having regard to the fact that this legislation came into force on June 19, 1940, *viz.*, after the insertion of the clause and at a time when that clause had become operative. On March 18, 1941, the property was sequestrated by order of the Prefect of Aosta. The previous position, however, as far as the respondent is concerned, remained the same until three years later, when the sequestrator made two further contracts with the respondent: one on May 13, 1944, with regard to the house, and one on July 24, 1944, with regard to the cottage. These contracts undoubtedly resulted *ipso jure* in a suspension of the existing relationship because they took precedence, for the duration of the sequestration, as being contracts made by a public authority in the exercise of its powers. The new relationship thus brought into being is of a public character. The public authority acted in its special capacity, and not as the agent of the owner of the sequestrated property. It acted in the public interest, its function being to safeguard the property of citizens of the United Nations with whom Italy was at war. Its action was designed to prevent any loss or damage which might be difficult to ascertain while the owner was not in a position to protect his property and also because such property might be used as a guarantee for the payment of reparations in the event of the war being brought to a successful conclusion. Upon the expiration of the contracts made by the sequestrator, therefore, the original contract made between the parties, which was concluded on September 10, 1938, was tacitly renewed and extended by law, having regard to the fact that the suspension clause by the implied will of the parties did not become operative. The right of the respondent to an extension of the tenancy cannot therefore be disregarded because the original contract was valid at the time of the entry into force of the Decree-Law of June 19, 1940, which for the first time introduced security of tenure."

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[1] This Decree-Law provides that persons entitled to the restitution of their property which has been leased by the sequestrator must be let into possession thereof immediately upon application being made.

The Court then dealt with certain subsidiary arguments of the appellants, which did not affect its decision.

[Report: *Giurisprudenza italiana*, 109 (1957), Part I, Section I, col. 56.]

Treaties—Interpretation of—Miscellaneous—Treaty of Peace with Italy, 1947—Meaning of Term " Allied Powers "—Clause Prohibiting Prosecution of Persons " Having Taken Action in Support of Cause of Allied Powers "—Whether Acting for Benefit of a Single Allied Power (Yugoslavia) within Clause—The Law of Italy.

Re TOFFANIN AND OTHERS.

Italy, Court of Cassation. June 19, 1957.

THE FACTS.—The defendants were convicted of the offence of plotting against the security and territorial integrity of Italy in that they had engaged, *inter alia*, in certain activities favouring the expansionist policy of Yugoslavia. They relied, as far as here material, on Article 16 of the Peace Treaty with Italy of February 10, 1947, which provides as follows:

> " Italy shall not prosecute or molest Italian nationals, including members of the armed forces, solely on the ground that during the

period from June 10, 1940, to the coming into force of the present Treaty, they expressed sympathy or took action in support of the cause of the Allied and Associated Powers."

Held: that Article 16 of the Peace Treaty did not afford a defence because the activities of the defendants were designed to support the cause of only one of the Allied and Associated Powers, namely, Yugoslavia, and not the Allied and Associated Powers generally, acting in concert to achieve common aims.

The Court said in part:[1] "The Court of Florence rightly considered Article 16 to be inapplicable in cases where the incriminating facts are concerned with acts designed to benefit only one of the Allied and Associated Powers. It follows clearly from the final wording of the Treaty (which has in mind the group of Powers jointly) and the rejection, in the course of the *travaux préparatoires*, of the Yugoslav proposal to provide for the application of this exceptional clause to cases where the work of the person concerned has resulted in benefit to one single Power, that the privilege of Article 16 is conditional upon the incriminating act being directed towards benefiting not just one of the Allied and Associated Powers but all of them acting in concert for the purpose of achieving the realization of the common aims. As the Court of Florence has found in the present case that the acts were committed in order to benefit one single Power, its decision is unexceptionable."

[Report: *Giurisprudenza italiana*, 110 (1958), Part II, col. 200.]

Treaties—Interpretation of—Miscellaneous—Peace Treaties—Meaning of Expression "treated as enemy"—Anti-Jewish Legislation of Italian Socialist Republic—Whether Constituting "laws in force in Italy during the war".

See p. 303 (*Levi Claim*).

Treaties—Interpretation of—Miscellaneous—Meaning of Terms in Treaty—Extradition "may also be granted" for Attempted Larceny—Whether Extradition for Attempted Larceny Mandatory or Permissive.

See p. 493 (*Re Gerber*).

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[1] The judgment of the Court is here set out only so far as it deals with the interpretation of Article 16. The rest of the decision is concerned with Italian criminal law and procedure.

E—SPECIAL KINDS OF TREATIES

I.—Commercial Treaties. Most-Favoured-Nation Clause

Treaties — Special Kinds of — Commercial Treaties — Treaty Providing for Tariff Preference—Suspension by Later Treaty—General Agreement on Tariffs and Trade, 1947 — Consistency with Municipal Law—The Law of the United States of America.

Colonial Molasses Co., Inc. *v.* United States.

United States, Customs Court. January 22, 1957.

The Facts.—This was a proceeding on protest against the failure of the Collector of Customs to apply to 50 cans of bees' honey, imported into the United States from Cuba, the 20 per cent. preferential reduction in customs duty provided under the Convention of Commercial Reciprocity between the United States and Cuba, signed at Havana on December 11, 1902 (33 Stat. 2136, T.S. No. 427). The Collector had assessed duty at the rate stipulated in the Tariff Act of 1930, as modified by the General Agreement on Tariffs and Trade, signed at Geneva on October 30, 1947 (61 Stat. A3, T.I.A.S. No. 1700). By an Exclusive Agreement suplementary to the General Agreement on Tariffs and Trade, signed on the same day (61 Stat. 3699, T.I.A.S. No. 1703, 119 U.N.T.S. 163), the United States and Cuba had agreed to make inoperative the Treaty of 1902 and the Trade Agreement of 1934 for the period that the United States and Cuba were both contracting parties to the General Agreement on Tariffs and Trade. The Agreement of 1947 eliminated the preferential reduction of 20 per cent. provided for under the Treaty of 1902 and under the Trade Agreement of 1934 and provided for the flat rate agreed under the General Agreement on Tariffs and Trade. The plaintiff contended that the duty on bees' honey had been increased by the suspension or rendering inoperative of the Treaty of 1902, and that this increase in duty had not been authorized by the Congress.

Held: that judgment must be rendered for the United States. Under § 350 (b) of the Trade Agreements Act (48 Stat. 944, as amended, 19 U.S.C. § 1351 (b)), the President of the United States was not precluded from modifying any pre-existing preferential customs treatment of any article, provided that duties in force in 1945 were not thereby increased or decreased by more than 50 per cent. Even if the suspended Treaty of 1902 were taken into account, the duty on the imported honey was within the 50 per cent. adjustment.

After denying the motion of the United States to dismiss on the ground of *stare decisis*, the Court said: " It is true, as plaintiff argues, that the issue before this court in *Marianao Sugar Trading Corporation* v. *United States*, 29 Cust.Ct. 275 C.D. 1481 was not the same as the issue here presented.

" In the *Marianao* case, plaintiff claimed the right to Cuban preferential reduction of 20 per centum of the internal revenue tax levied on importations of Cuban sugar in 1947 and 1949. The same Cuban treaty was effective in 1949 as in 1948. The differences in the treaty that was effective in 1947 are not material to this issue.

" There was no issue in the *Marianao* case as to preferential reduction of regular duties, which is the issue here. The decision of this court in that case turned on its holding that ' while the additional tax was, in fact a customs duty for the reasons claimed, Article II of the Cuban treaty [of 1902] granted the preferential reduction only with respect to regular duties accruing under tariff acts, and that by the terms of Article IX of that treaty additional charges or taxes were treated separately, the only guarantee being that they would be assessed without discrimination in relation to like articles from other countries.' Pages 279, 280, citing *Faber, Coe & Gregg* (*Inc.*) v. *United States*, 19 C.C.P.A., Customs 8, T.D. 44851. Judge Ekwall proceeded to review, in a scholarly and comprehensive opinion, the further issue as to whether the suspension of the 1902 treaty was valid. Defendant argued there that the attack on legality of the provisions suspending or abrogating the Cuban Treaty of 1902 presented questions not before the court, and that a ruling on the validity of such suspension would have no bearing on the judgment in that case. It may be noted that defendant now takes the contrary position, namely, that the *Marianao* decision, supra, is *stare decisis* of that issue. We do not agree.

" When the *Marianao* case reached our appeals court, the decision there (41 C.C.P.A., Customs, 236, C.A.D. 557)[1] turned solely on the internal revenue tax issue. The court made the following observation as to the issue of invalidity of the President's action in suspending the treaty of 1902, as follows, at page 242 of the published decision:

" ' Other subsidiary issues have been raised by the appellant which we consider totally irrelevant to the one isolated and controlling question principally discussed herein. It is well, however, to note that in accordance with the Trade Agreements Act; *supra*, the President negotiated various Cuban Trade Agreements, the first of which was effective September 3, 1934. That agreement, as well as subsequent agreements between the two nations, modified and rendered inoperative the general 20 per cent. preferential granted in Article II of the Cuban Treaty of 1902 under conditions stated in such agreements. The appellant has persistently urged that the President thereby exceeded the authority delegated to him by the Trade Agreements Act and that such agreements are henceforth invalid. *We do not regard a discussion of such point as necessary.*' (Emphasis supplied.)

[[1] See *International Law Reports*, 1955, p. 583.]

" The Cuban Treaty of 1902 was made effective by congressional act and not merely by Senate approval. The duty provisions, including the preferential reduction of 20 per centum, thus became domestic law, as well as a foreign treaty negotiated by the President.

" The Trade Agreements Act of 1934 (48 Stat. 943) is, likewise, an act of Congress. It was pursuant to the authority of that act, as extended, that the Cuban Trade Agreement of 1934 was negotiated and revised and duties thereunder proclaimed. To the extent of the authority conferred on the President by Congress, such proclaimed duties likewise are domestic law.

" Section 350 (b) of the Trade Agreements Act was further amended in 1949, but it is the section as it was on March 5, 1948, which controls our decision. As subparagraph (b) then read, the Trade Agreements Act neither prevents the preferences granted by the 1902 Cuban Treaty from being applied to new rates of duty established by trade agreements concluded with countries other than Cuba, nor precludes the President from giving effect to an exclusive trade agreement with Cuba modifying the existing preferential customs treatment of any article the growth, produce, or manufacture of Cuba, provided only that such changes shall not increase or decrease duties ' however established, existing on January 1, 1945 (even though temporarily suspended by Act of Congress) ' by more than 50 per centum.

" The rate on honey imported from Cuba, established January 1, 1945, was 0·012 cents per pound, except as it might be reduced by a most-favoured-nation rate. There is no evidence that it had been reduced. The President proceeded, in exercise of authority conferred on him by Congress, to change the existing duty on bees' honey, product of Cuba, by eliminating the general preferential reduction of 20 per centum. through the mechanism of continuing the inoperative status of the 1902 Cuban treaty and proclaiming that status as well as a new rate of 0·10 cent. per pound under the General Agreement on Tariffs and Trade, *supra*. Even if the cited language of section 350 (b) means (and this is far from clear) that the Presidential authority to raise or lower duty on Cuban imports must take into account, as the basis for increase or decrease, the temporarily suspended treaty of 1902, the duty on honey imported from Cuba is, nevertheless, within the permitted 50 per centum adjustment."

[Report: 152 F. Supp. 242.]

Treaties—Special Kinds of—Commercial Treaties—Treaty of Friendship, Commerce, and Navigation—" National Treatment " Clause—Alleged Violation of Anti-Trust Laws—Jurisdiction—Personal—Over Crimes Committed Abroad—Nationality of Corporations—Interpretation of Treaties—Consistency with Municipal Law—Rights of Nationals under Treaty—The Law of the United States of America.

UNITED STATES *v.* R. P. OLDHAM CO. *ET AL.*

United States, District Court, Northern District, California.

June 11, 1957.

THE FACTS.—The defendants were charged with a conspiracy in restraint of inter-state and foreign commerce in violation of Section 1 of the Sherman Act (26 Stat. 209, as amended, 15 U.S.C. § 1) and Section 73 of the Wilson Tariff Act (28 Stat. 570, as amended, 15 U.S.C. § 8). Five of the defendants were United States corporations which imported Japanese wire nails for re-sale on the West Coast of the United States, and one an American subsidiary of a Japanese corporation which was an exporter of nails to the United States. In addition, a number of Japanese firms were named as co-conspirators but were not named as defendants.

The indictment alleged that the defendant importers had engaged in a conspiracy with five Japanese makers of wire rod and certain Japanese exporters whereby the rod makers had furnished wire rod to nail makers only for the manufacture of nails to be sold and shipped through the co-conspirator exporters and to the defendant importers. The defendant importers, it was alleged, had in turn purchased a designated amount of nails and re-sold them in allocated sales territories at designated prices. The defendant importers had thereby acquired complete control of the Japanese wire nail market on the West Coast; competition in this area had been eliminated; and prices had been stabilized.

The defendants alleged that all or part of the acts constituting the conspiracy were beyond the jurisdiction of the Court and that Article XVIII of the Treaty of Friendship, Commerce, and Navigation between the United States of America and Japan, signed at Tokyo on April 2, 1953 (4 U.S.T. 2063, T.I.A.S. No. 2863), providing for consultation as to restrictive business practices, was the only remedy available to the United States. On motion to dismiss,

Held: that the motion to dismiss must be denied. The United States had jurisdiction over the activities of its nationals and its corporations even though their conduct took place on foreign soil and was lawful under the law of the foreign State. Article XVIII of the Treaty of Friendship, Commerce, and Navigation was to be read consistently with United States law and did not provide an exclusive remedy to the United States. Nationals of the United States had in any event no standing to interpose an objection grounded in the Treaty. An American subsidiary of a Japanese corporation was entitled, under the Treaty of Friendship, Commerce, and Navigation, to no more than treatment equal to that accorded to American corporations not so controlled.

After dealing with an issue of the municipal law of the United States, the Court said: " Relying mainly on *American Banana Co.* v. *United Fruit Co.*, 1909, 213 U.S. 347, 29 S.Ct. 511, 53 L.Ed. 826, the defendants strongly urge that the indictment reaches too far, that all or part of the alleged conspiracy and acts in furtherance of the conspiracy are beyond this court's jurisdiction, or at least that Japanese law controls in determining the legality of these activities.

"At the outset, it should be made clear that there is no attempt here to regulate Japanese commerce as such, or to indict Japanese firms or Japanese nationals.[1] Only American corporations and American nationals are named as defendants. The only commerce sought to be regulated is the importation and sale of wire nails on the West Coast of the United States. Surely this is within the jurisdiction of United States courts. Japanese firms and activities in Japan are considered only in so far as they relate to the precise charge, against American defendants, of a conspiracy in restraint of trade in the importation and sale of wire nails on the West Coast of the United States. Under the circumstances, it is absurd to say that principles of international law and comity of nations put the charges of this indictment within the exclusive jurisdiction of the Japanese courts, or require that Japanese law be applied.

" There seems to be some disagreement as to where the alleged conspiracy was formed. But assuming, arguendo, that the conspiracy at least ' has its situs ' in Japan and that most acts in furtherance of the conspiracy have been done in Japan, this does not deprive the court of jurisdiction where, as here, the conspiracy is alleged to operate as a direct and substantial restraint on inter-state and foreign commerce of the United States. *United States* v. *Aluminum Co. of America*, 2 Cir., 1945, 148 F.2d 416; *United States* v. *Timken Roller Bearing Co.*, D.C.N.D.Ohio 1949, 83 F. Supp. 284, modified and affirmed, 1951, 341 U.S. 593, 71 S.Ct. 971, 95 L.Ed. 1199.

" Nor does the fact that the agreement may be lawful in Japan serve to make it lawful in this country. *United States* v. *American Tobacco Co.*, 1911, 221 U.S. 106, 31 S.Ct. 632, 55 L.Ed. 663. Defendants also press the point that if the situation were reversed—*i.e.*, if the agreement concerned exportation of American products to

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[1] Even if the Japanese co-conspirators had been joined as defendants, this would not in itself be cause for dismissal of the indictment. *United States* v. *Aluminum Co. of America*, 2 Cir., 1945, 148 F.2d 416; *United States* v. *American Tobacco Co.*, 1911, 221 U.S. 106, 31 S.Ct. 632, 55 L.Ed. 663; *United States* v. *Pacific & Arctic Railway & Navigation Co.*, 1913, 228 U.S. 87, 33 S.Ct. 443, 57 L.Ed. 742.

Japan—the agreement would be under the aegis of the Webb-Pomerene Act.[1] Suffice it to say that the situation is not reversed.

" Much is made of the fact that this is a criminal action. A criminal statute of course must be construed more strictly than a civil statute. But it requires no stretching of the Sherman Act to apply it to the facts of this case. The Supreme Court had no difficulty in similarly applying the Sherman Act in *United States* v. *American Tobacco Co., supra*, and *United States* v. *Pacific & Arctic Railway & Navigation Co.*, 1913, 228 U.S. 87, 33 S.Ct. 443, 57 L.Ed. 742, both criminal actions.

"As to *American Banana Co.* v. *United Fruit Co., supra*, to the extent that the case still has vigor in anti-trust actions, the facts in the instant action are far closer to those in *United States* v. *Sisal Sales Corp., supra*, where it was held that the *American Banana* case did not apply.

" One further point raised by the defendants in support of their motion goes to the evidentiary problems which will come up at trial because of the inclusion of these foreign elements in the indictment. But evidentiary difficulties do not divest a court of jurisdiction. As to the argument that the defendants should not be put to an explanation of the acts of their foreign co-conspirators, it should not be forgotten that the government will have the burden of proof in this action.

" For the foregoing reasons, the motion to dismiss the indictment for lack of jurisdiction is denied.

"*Effect of the Treaty*

" In 1953 the United States and Japan entered into a Treaty of Friendship, Commerce and Navigation. The effect of the Treaty is to accord ' national treatment ' and ' most favored nation treatment ' by one party to nationals of the other party (I use the term ' nationals ' to include companies as well as individuals). In other words, nationals of one party are not to be discriminated against by the other party.

"Article XVIII of the Treaty states:

> ' 1. The two Parties agree that business practices which restrain competition, limit access to markets or foster monopolistic control, and which are engaged in or made effective by one or more private or public commercial enterprises or by combination, agreement or other arrangement among such enterprises, may have harmful effects upon commerce between their respective territories. Accordingly, each Party agrees upon the request of the other Party to consult with respect to any such practices and to take such measures as it deems appropriate with a view to eliminating such harmful effects.
>
> ' 2. . . . '

It is contended by the defendants that Article XVIII provides the exclusive remedy available to the government in reaching the conspiracy charged in the indictment.

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[1] 15 U.S.C.A. §§ 61–65.

" I cannot agree that Article XVIII was intended to provide any such exclusive remedy. The language of this Article is permissive rather than mandatory. If it had been intended that the Article should operate as a pro tanto revocation of the anti-trust laws, the Article could easily have been so worded. The tenor of the entire Treaty is *equal* treatment to nationals of the other party, not *better* treatment. In view of these considerations, I conclude that Article XVIII was intended to supplement the anti-trust laws, not replace them.

" Even if Article XVIII were held to provide an exclusive remedy for anti-trust violations, the defendant importers would have no standing to invoke this Article. All are American corporations. Certainly the Treaty was not intended to exempt nationals from the sanctions of their own country's laws. Cf. *Skiriotes* v. *State of Florida*, 1941, 313 U.S. 69, 61 S.Ct. 924, 85 L.Ed. 1193.[1]

" Nor do I think Kinoshita & Co., Ltd., U.S.A., would have any standing to invoke Article XVIII. Though wholly owned by a Japanese corporation, the defendant Kinoshita is an American corporation organized under the laws of California. Article XXII of the Treaty is the only article devoted to definition of terms used in the Treaty. After defining ' national treatment ' and ' most favored nation treatment ' in paragraphs 1 and 2, respectively, Article XXII goes on in paragraph 3 to define ' companies ', and then states:

> ' . . . Companies constituted under the applicable laws and regulations within the territories of either Party *shall be deemed companies thereof* and shall have their juridical status recognized within the territories of the other Party. (Emphasis added.)
>
> ' 4. . . .'

Thus by the terms of the Treaty itself, as well as by established principles of law, a corporation organized under the laws of a given jurisdiction is a creature of that jurisdiction, with no greater rights, privileges or immunities than any other corporation of that jurisdiction.[2]

" If co-conspirator Kinoshita & Co., Ltd., Tokyo had wished to retain its status as a Japanese corporation while doing business in this country, it could easily have operated through a branch. Having chosen instead to gain privileges accorded American corporations by operating through an American subsidiary, it has for most purposes surrendered its Japanese identity with respect to the activities of this subsidiary.

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[1] [See *Annual Digest*, 1941–1942, Case No. 68.]

[2] But of course, the rights of an alien owned corporation may be *less* than those of domestically owned corporations. See *Clark* v. *Uebersee Finanz-Korporation, A.G.*, 1947, 332 U.S. 480, 68 S.Ct. 174, 92 L.Ed. 88 [*Annual Digest*, 1947, Case No. 91]; *Daimler Co.* v. *Continental Tyre & Rubber Co.*, [1916] A.C. 307 (H.L.).

"Article VII of the Treaty in no way weakens the above conclusion.[1] Although it equates domestic subsidiaries with their foreign parents, it does so only for purposes of that Article, which has the effect of according nationals of one party engaging in business within the territory of the other party the same treatment accorded nationals of the other party. For example, an American subsidiary of a Japanese parent is to have the same rights as any domestically owned American corporation. The Article nowhere attempts to give greater rights to such subsidiaries.

" The motion to dismiss the indictment on the basis of the Treaty of Friendship, Commerce and Navigation between the United States and Japan is therefore denied. . . ."

(The Court then dealt with further issues of the law of the United States.)

[Report: 152 F. Supp. 818.]

Treaties—Special Kinds of—Commercial Treaties—Most-Favoured-Nation Clause—As to Duties and Customs Formalities—Whether Applicable to Import Quotas—General Agreement on Tariffs and Trade, 1947 — Subsequent Statute Inconsistent with Treaty—Effect in Municipal Law—The Law of the United States of America.

TENNANT, SONS & CO. OF NEW YORK *v.* DILL.

United States, District Court, Southern District, New York.

December 16, 1957.

THE FACTS.—The plaintiff, an importer of Paraguayan tung oil, sought a preliminary injunction restraining the defendant from denying the entry into the United States of certain tung oil owned by it. On September 2, 1957, 662,540 pounds of tung oil, of a value of approximately $150,000, were shipped to the plaintiff from Asunción, Paraguay, followed by a further shipment of 485,012 pounds on September 12. On September 9, 1957, the President of the United States, pursuant to the Agricultural Adjustment Act (§ 22,

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[1] The pertinent provisions of Article VII read: " 1. Nationals and companies of either Party shall be accorded national treatment with respect to engaging in all types of commercial, industrial, financial and other business activities within the territories of the other Party, whether directly or by agent or through the medium of any form of lawful juridical entity. Accordingly, such nationals and companies shall be permitted within such territories: (a) to establish and maintain branches, agencies, offices, factories and other establishments appropriate to the conduct of their business; (b) to organize companies under the general company laws of such other Party, and to acquire majority interests in companies of such other Party; and (c) to control and manage enterprises which they have established or acquired. Moreover, enterprises which they control, whether in the form of individual proprietorships, companies or otherwise, shall, in all that relates to the conduct of the activities thereof, be accorded treatment no less favorable than that accorded like enterprises controlled by nationals and companies of such other Party."

49 Stat. 773, as amended at various times from 1936 to 1951, 7 U.S.C. § 624), issued a Proclamation (22 Fed. Reg. 7265) imposing a quota of 96,452 pounds on imports of tung oil prior to October 1, 1957, and of not more than 131,556 pounds per month from October 1957 to January 1958. No reference was made to tung oil en route to the United States. On October 7, the plaintiff attempted to obtain entry of his first shipment, but the defendant Collector of Customs permitted the entry of only 131,460 pounds, being the entire quota for the month of October 1957. The second shipment was similarly rejected.

The plaintiff maintained that under the most-favoured-nation clause of the Agreement between the United States of America and Paraguay respecting Reciprocal Trade, signed at Asunción on September 12, 1946 (61 Stat. 2688, T.I.A.S. No. 1601, 125 U.N.T.S. 179), it was entitled to the benefit of the provision of sub-paragraph 3 (*b*) of Article XIII of the General Agreement on Tariffs and Trade concluded at Geneva on October 30, 1947 (61 Stat. A42, T.I.A.S. No. 1700, 55 U.N.T.S. 238), exempting goods en route at the time of the establishment of import restrictions from the effect of such quotas. Paraguay was not a party to the latter Agreement.

Article I of the Reciprocal Trade Agreement with Paraguay provides:

> " 1. The United States of America and the Republic of Paraguay will grant each other unconditional and unrestricted most-favored-nation treatment in all matters concerning customs duties and subsidiary charges of every kind and in the method of levying such duties and charges, and, further, in all matters concerning the rules, formalities and charges imposed in connection with the clearing of goods through the customs, and with respect to all laws or regulations affecting the sale, taxation, distribution or use of imported goods within the country.
>
> " 2. Accordingly, articles the growth, produce or manufacture of either country imported into the other shall in no case be subject, in regard to the matters referred to above, to any duties, taxes or charges other or higher, or to any rules or formalities other or more burdensome, than those to which the like articles the growth, produce or manufacture of any third country are or may hereafter be subject."

Article III of that Agreement provides:

> " 1. No prohibition or restriction of any kind shall be imposed by the Government of the United States of America or the Government of the Republic of Paraguay on the importation, sale, distribution or use of any article the growth, produce or manufacture of the other country, or on the exportation of any article destined for the territory of the other country, unless the importation, sale, distribution or use of the like article the growth, produce or manufacture of all third countries, or the exportation of the like article to all third countries, respectively, is similarly prohibited or restricted."

Article XII of the same Agreement provides:

> " 1. If, as a result of unforeseen developments and of the concession granted on any article enumerated and described in the Schedules annexed to this Agreement, such article is being imported in such increased quantities and under such conditions as to cause or threaten serious injury to domestic producers of like or similar articles, the Government of either country shall be free to withdraw the concession, in whole or in part, or to modify it to the extent and for such time as may be necessary to prevent such injury. Accordingly, if the President of the United States of America finds as a fact that imports of any article enumerated and described in Schedule II are entering the United States of America under the circumstances specified in the preceding sentence, he shall determine whether the withdrawal, in whole or in part, of the concession with regard to the article, or any modification of the concession, by the imposition of quantitative regulations or otherwise, is necessary to prevent such injury, and he shall, if he finds that the public interest will be served thereby, proclaim such finding and determination, and on and after the effective date specified in such proclamation, and so long as such proclamation remains in effect, imports of the article into the United States of America shall be subject to the customs treatment so determined to be necessary to prevent such injury. . . ."

Sub-paragraph 3 (*b*) of Article XIII of the General Agreement on Tariffs and Trade provides:

> " In the case of import restrictions involving the fixing of quotas, the contracting party applying the restrictions shall give public notice of the total quantity or value of the product or products which will be permitted to be imported during a specified future period and of any change in such quantity or value. Any supplies of the product in question which were en route at the time at which public notice was given shall not be excluded from entry; *Provided* that they may be counted so far as practicable, against the quantity permitted to be imported in the period in question, and also, where necessary, against the quantities permitted to be imported in the next following period or periods. . . ."

Held: that the motion for a preliminary injunction must be denied. An agreement providing for most-favoured-nation treatment as to duties and customs formalities does not require such treatment as to import restrictions and quotas. The " en route " clause of the General Agreement on Tariffs and Trade accordingly had no application to trade relationships between Paraguay (which was not a party to the General Agreement on Tariffs and Trade) and the United States. In any event, the provisions of the Agricultural Adjustment Act would prevail over an inconsistent stipulation in an international agreement.

The Court said: " Paraguay was not a signatory to GATT (see table following 19 U.S.C.A. § 1351). Nevertheless, the plaintiff contends that by reason of the ' most-favored-nation ' clause contained in Article I of the Paraguayan Trade Agreement, Paraguay is a beneficiary of the en route clause in GATT and that, therefore, the quota restriction here at issue does not apply to plaintiff's en route tung oil. This contention, in my opinion, lacks merit. Article I, subdivision 1, of the Trade Agreement with Paraguay in effect requires the signatories to grant each other unconditional and unrestricted 'most-favored-nation' treatment in all matters concerning:

" 1. Customs duties and subsidiary charges of every kind;

" 2. The method of levying such duties and charges;

" 3. The rules, formalities and charges imposed in connection with clearing goods through customs;

" 4. All laws or regulations affecting the sale, taxation, distribution or use of imported goods within the country.
Subdivision 2 of Article I in substance requires that each of the signatories be accorded treatment equal to that accorded any third country with respect to 'duties, taxes or charges' or 'any rules or formalities.'

" The subjects covered by subdivisions 1 and 2 of Article I are described with clarity and particularity. The phrase 'import restriction' and the word 'quota' nowhere appear. Furthermore, these subdivisions do not, in my opinion, contain language from which their applicability to import restrictions involving the fixing of quotas can be implied.

" The following excerpt from Judge Campbell's opinion in *Dobrin* v. *Mallory S.S. Co.*, D.C.E.D.N.Y.1924, 298 F. 349, 351, would appear pertinent:

'" I am unable to agree with the plaintiff's contention. The "most favored nation" clause, article 5 of the Convention (31 Stat. 1940), relied on by the plaintiff herein, reads as follows:

'" In all that concerns the right of disposing of every kind of property, real or personal, citizens or subjects of each of the high contracting parties shall in the dominions of the other enjoy the rights which are or may be accorded to the citizens or subjects of the most favored nation."

'In *Maiorano* v. *Baltimore & O. R. Co.*, 216 Pa. 402, 65 A. 1077, 21 L.R.A.,N.S., 271, 116 Am.St.Rep. 778, the court says in construing a treaty:

'" The general rule obtains that the court is to be guided by the intention of the parties, and if the words clearly express the meaning and intention no other means of interpretation can be employed."

'It is therefore clear that the "most favored nation" clause in that treaty is limited to all that confers the right of disposing of every kind of property real and personal and does not refer to any right to recover for the death of a relative.' (298 F. 351).

" It is interesting to note that Article I of the Trade Agreement with Paraguay is considerably more explicit and restrictive than are certain other parts of the Trade Agreement. For example, Article III, subdivision 1 of the Agreement employs the language ' no prohibition or restriction of any kind ' and in Article XII, subdivision 1 the all-inclusive terms ' concession ' and ' customs treatment ' are used.

" It seems clear, therefore, that the ' most-favored-nation ' clause contained in the Trade Agreement with Paraguay is not sufficiently broad to entitle Paraguay, and, hence, the plaintiff, to the benefits of the en route provision of GATT.

" The Presidential Proclamation of September 9, 1957, while it does not expressly mention en route goods, nevertheless, declares ' That for the period commencing September 9, 1957, and ending October 31, 1958, *the total quantity of tung oil entered* shall not exceed 26,000,000 pounds.' (Emphasis supplied.) Since no exception was made as to en route tung oil, the presumption is that none was intended. See *Cella Commission Co.* v. *Bohlinger*, 8 Cir., 1906, 147 F. 419, 425, 8 L.R.A., N.S., 537; *United States* v. *Alamogordo Lumber Co.*, 8 Cir., 1912, 202 F. 700, 706; *Lynch* v. *Alworth-Stephens Co.*, 8 Cir., 1923, 294 F. 190, 194, affirmed 1925, 267 U.S. 364, 45 S.Ct. 274, 69 L.Ed. 660. This is particularly true in the case at bar where a contrary interpretation would seriously impair the effectiveness of the Proclamation by flooding the American market with large quantities of imported tung oil.

" Since the Proclamation by its terms purports to apply to all foreign producers of tung oil, there has been no evident violation of Article III, subdivision 1 of the Trade Agreement with Paraguay, and none can be implied. Furthermore, Article XII, the so-called ' escape clause ' of the Paraguayan Agreement, would seem to afford the President sufficient right to withdraw concessions to Paraguayan products at any time when the interests of the American economy may dictate. In this Agreement there is no provision exempting goods en route on the date when quota restrictions go into effect.

" The Presidential Proclamation of September 9, 1957 was issued pursuant to Section 22 of the Agricultural Adjustment Act, 7 U.S.C.A. § 624. This section authorizes the President to limit imports which render or tend to render ineffective or materially interfere with any program or operation under the Act. Section 22 (f) as amended in 1951 expressly provides that:

> " ' No trade agreement or other international agreement heretofore or hereafter entered into by the United States shall be applied in a manner inconsistent with the requirements of this section.'

" The Agricultural Adjustment Act, as thus amended, would in any event take precedence over the International Trade Agreements upon which plaintiff relies, even if, as plaintiff contends, these Agreements are in essence treaties. As was stated by Mr. Justice

Field in *Whitney* v. *Robertson*, 1887, 124 U.S. 190, 194, 8 S.Ct. 456, 458, 31 L.Ed. 386:

" ' . . . By the constitution, a treaty is placed on the same footing, and made of like obligation, with an act of legislation. Both are declared by that instrument to be the supreme law of the land, and no superior efficacy is given to either over the other. When the two relate to the same subject, the courts will always endeavor to construe them so as to give effect to both, if that can be done without violating the language of either; but, if the two are inconsistent, the one last in date will control the other. . . .'

See also *Chae Chan Ping* v. *United States*, 1888, 130 U.S. 581, 600, 9. S.Ct. 623, 32 L.Ed. 1068."

(The Court then went on to deal with the municipal law of the United States relating to equitable relief in the circumstances of the case.)

[Report: 158 F. Supp. 63.]

Commercial Treaties—Position of Aliens under—" National Treatment "—Access to Courts—Whether Amounting to Waiver of Sovereign Immunity of Government.

See p. 480 (*Eustathiou & Co.* v. *United States*).

II.—Peace Treaties

Peace Treaties—Nature of—War of Aggression as Determining.

See p. 602 (*Franco-Ethiopian Railway Company Claim*), at p. 629.

Peace Treaties—Compensation for War Damage Under—Effect of Discharge in Treaty.

See p. 602 (*Franco-Ethiopian Railway Company Claim*), at p. 627.

F—MISCELLANEOUS

Treaties—Miscellaneous—Obligation to Negotiate Terms for International Agreement.

See p. 101 (*Lake Lanoux Arbitration*), at p. 132.

Treaties—Miscellaneous—Effect of Outbreak of War on—Treaty for Mutual Enforcement of Judgments in Civil Matters—Whether Suspended by War between Contracting Parties—The Law of Italy.

See p. 890 (*Società Fornaci di Stazzano* v. *Rancillo*).

PART IX

INTERNATIONAL ORGANIZATION AND ADMINISTRATION

B—THE UNITED NATIONS

II.—The General Assembly

United Nations—General Assembly—Resolutions of—Binding Force in Municipal Law—War Criminals—Extradition of—Recommendation of General Assembly—Effectiveness to Change Nature of Political Offence—The Law of the United States of America.

See p. 510 (*Karadzole et Al.* v. *Artukovic*).

IV.—Other Organs of the United Nations

International Organization—United Nations—Subsidiary Organs of—U.N.R.W.A.—Officials of—Termination of Employment—Competence of Administrative Tribunal.

RADICOPOULOS *v.* UNITED NATIONS RELIEF AND WORKS AGENCY FOR PALESTINE REFUGEES IN THE NEAR EAST.

Administrative Tribunal of the United Nations. August 23, 1957.

(Madame Paul Bastid, President; Lord Crook, Petrén, Venkataraman.)

THE FACTS.—This was a complaint by a former official of the United Nations Relief and Works Agency for Palestine Refugees in the Near East, who alleged that his appointment was wrongfully terminated on the basis of an erroneous medical diagnosis of true epilepsy while he was suffering from traumatic epilepsy, which was curable, and which resulted from two accidents attributable to his service. After protesting against the termination of his appointment, the complainant instituted proceedings against the Agency in the Egyptian courts. The Agency invoked its immunity from jurisdiction to bar proceedings in the local courts. The complainant then suggested that his case be referred to an internal Joint Appeals Board, to which the Agency agreed, but the terms of reference established by the Agency for the Board excluded the possibility of any further appeal except to an adjudicator. The complainant protested against this clause and submitted that the Administrative Tribunal would be competent to entertain such an appeal. The Joint Appeals Board considered the case and unanimously rejected the complaint as having no legal justification, but recommended, on humanitarian grounds, that if the complainant were medically fit and should there be a post available for him, he be given employment. A medical examination was agreed upon, but while the Agency made his re-employment in the event of his being declared fit conditional upon the availability of a suitable post, the complainant claimed the right to be re-employed immediately on the same terms and conditions as he enjoyed prior to the termination of his appointment, and instituted proceedings before the Administrative Tribunal. On behalf of the Agency, it was argued that the Tribunal was not competent because the complainant was not an official of the United Nations who, alone, had access to the Tribunal under its Statute, and because the terms of reference of the Appeals Board provided for further appeal to an adjudicator and thus excluded an application to the Administrative Tribunal. On the merits, it was submitted that the complainant's state of health had justified termination of his appointment and that the burden of proof that the accidents were service-incurred or that the accidents were the cause of his epileptic condition had not been discharged.

Held: That the Tribunal was competent but that the complaint must be dismissed on the merits.

The Tribunal said: " 1. The competence of the Tribunal is contested by the Respondent on three grounds:

" i. The Applicant, a former official of the Agency, cannot be regarded as a member of the United Nations Secretariat with respect to whom the Tribunal would have competence under Article 2 of its Statute.

" ii. The circumstances which enabled the Tribunal to recognize its competence with respect to an official of the Agency in Judgment No. 57 (*Hilpern*[1]) are not repeated in this case.

" iii. Under certain conditions, the Applicant had a different remedy by way of appeal against the decision adopted pursuant to the recommendation of the Appeals Board.

" 2. The Tribunal notes that the United Nations Relief and Works Agency for Palestine Refugees in the Near East was established by General Assembly Resolution 302 (IV) under Article 22 of the Charter authorizing the Assembly to establish subsidiary organs. In that resolution, the Assembly laid down regulations relating to the staff of the Agency. In doing so, it exercised its power under Article 101, paragraph 1, of the Charter to establish regulations relating to the staff of the United Nations. By reason of the functions peculiar to the Agency, however, the Assembly confined itself to establishing the legal status of the Director and laying down the procedure to be followed in issuing regulations concerning the staff.

[[1] *Hilpern* v. *Secretary-General of the United Nations*, reported *infra*, p. 715.]

" It follows from this Resolution that the staff of the Agency is placed under the legislative authority of the Assembly, like the whole of the staff referred to in Chapter XV of the Charter, but no provision of that Chapter obliges the Assembly to establish uniform rules for all who serve the United Nations.

" 3. In order to reach a decision regarding its competence, it is necessary for the Tribunal to ascertain whether the legal rules applicable to the Applicant under Resolution 302 (IV) include the right to make applications to the Tribunal. The Tribunal recognizes that that right may be denied in certain cases. The rules applicable to the local staff of the Agency, drawn up by agreement between the Secretary-General and the Director of the Agency and in force since July 1, 1957, provide for an adjudication procedure which, in the opinion of the competent authorities, answers the needs mentioned by the International Court of Justice in its Advisory Opinion of July 13, 1954, on the *Effect of Awards of Compensation Made by the United Nations Administrative Tribunal, viz.:*

> ' It would, in the opinion of the Court, hardly be consistent with the expressed aim of the Charter to promote freedom and justice for individuals and with the constant preoccupation of the United Nations Organization to promote this aim that it should afford no judicial or arbitral remedy to its own staff for the settlement of any disputes which may arise between it and them.' (*Reports*, 1954, page 57.[1])

" But no evidence was produced before the Tribunal to show that before the entry into force of these rules, on July 1, 1957, a similar ' general provision ' had been agreed upon between the Secretary-General and the Director of the Agency and carried into effect.

" 4. On December 29, 1955, the Respondent sent to the Applicant a copy of the terms of reference of an Appeals Board, of which paragraphs XIII and XIV were worded as follows:

> " ' XIII. A unanimous recommendation by the Board which is accepted by the Director shall debar the applicant in the case concerned from any further appeal to a special panel of adjudicators as provided in paragraph XIV below.
>
> " ' XIV. When either the recommendations of the Board are not unanimous or the Director decides not to accept a unanimous recommendation of the Board the applicant may appeal to an adjudicator whose decision shall be final. This adjudicator shall be a member of a special panel of impartial adjudicators of high professional standing, established by the Director, from persons unconnected with the UNRWA.'

" On January 14, 1956, however, the Applicant's Counsel announced that he was not in agreement with those provisions and, relying on Judgment No. 57 [*infra*], he indicated that in his opinion an appeal was within the competence of the Tribunal.

[[1] See *International Law Reports*, 1954, p. 310, at p. 318.]

" There can be no question, therefore, of an agreement having been reached between the parties to accept possible adjudication on the terms proposed by the Respondent. In the absence of any general provision to that effect, therefore, the terms of reference of the Appeals Board are not in themselves sufficient to exclude the competence of the Tribunal if it can be established by other means.

" 5. The purpose of the exchange of letters between Mr. Byron Price, Assistant Secretary-General in charge of Administrative and Financial Services of the United Nations, and Major-General Kennedy, Director of the Agency, dated June 28 and September 15, 1950, was to apply the provisions of paragraph 9 (*b*) of Resolution 302 (IV).

"According to the communication of June 28, 1950 (paragraph (a)), the whole of Chapter 15 of the Staff Rules of the United Nations, together with the interpretations and conditions of application forming the subject matter of the draft Manual for Missions published on January 19, 1950, should, in the absence of express provision to the contrary, be applicable to the staff of the Agency. Chapter 15 of the Staff Rules referred to Chapter 10, which provided for the right of appeal to the Administrative Tribunal (Article 149 of the Staff Rules).

" The right of the staff of missions to appeal to the Tribunal was, it is true, deleted from the Staff Rules on August 17, 1950, but it was restored on July 1, 1951. If, therefore, it is considered that the agreement relates to the provisions in force at the time when Mr. Byron Price made his proposal, it must be admitted that the staff of the Agency still have that right.

" If, on the other hand, the Agreement is regarded as relating to a particular chapter of the Staff Rules, the right was restored after being suspended for some months.

" In its Judgment No. 57 (*Hilpern* [*infra*]), the Tribunal referred both to the opinion of the Secretary-General and to the statement by the Acting Director of the Agency and the terms of reference of the Appeals Board established to deal with this case. It reached the following conclusion: ' It is clear, therefore, that at this stage at least, the Secretary-General and the Director of the Agency were in agreement that the United Nations Staff Regulations and Rules concerning the right of appeal to the Tribunal were available to the applicant.' In making that statement, the Tribunal found that the authorities competent to determine which United Nations Staff Regulations and Rules were applicable to the staff of the Agency were in agreement as to the Applicant's right to bring his case before the Tribunal.

" 6. In the present instance, the Applicant brought his case before the Egyptian courts after his dismissal.

" The Respondent invoked immunity from jurisdiction, as it had done in the *Hilpern* case. He expressed the view that the two cases were absolutely analogous.

"In the course of the Respondent's representations to the Egyptian authorities, it appeared to be of the greatest importance that the Respondent should be able to give the assurance that internal remedies were open to the person concerned. These representations were made at the very time when the Agency was maintaining before the Tribunal the Tribunal's lack of competence to deal with the *Hilpern* case. The various documents emanating from the Respondent at that time expressed contradictory views on the legal position with respect to the remedies available to a staff member of the Agency and to their nature and legal basis. None of those documents warrants an assertion that the interpretation of the legal position given both by the Secretary-General and by the Acting Director and Director of the Agency and referred to by the Tribunal in its Judgment No. 57 has been replaced by a new agreement on this point.

"7. Since the case was withdrawn from the Egyptian courts on November 11, 1955, the Applicant's Counsel presented to the Respondent a request that the case should be referred to the Appeals Board (*Comité d'Appel*). He was careful to include the following statement:

"'You will then have to make your decision in the light of these considerations; and my client may be entitled to appeal to the Administrative Tribunal, which, as you know, has rendered a decision dated September 9, 1955, affirming its competence in disputes between UNRWA and its staff.'

"On November 26, the General Counsel of the Agency replied:

"'The Director, in accordance with the request on behalf of your client contained in your aforesaid letter, is making immediate arrangements to set up an *ad hoc* Joint Appeals Board, along the lines of the internal administrative procedure of the United Nations.'

"No observation or reservation was made by him regarding a possible appeal to the Tribunal. The reference to the internal procedure applied by the United Nations clearly indicated that the Appeals Board should remain a purely administrative and advisory body. Thus the importance and necessity of further jurisdictional appeal was maintained and no objection was raised by the Respondent in this connexion.

"It was only in the terms of reference for the Appeals Board addressed to the Applicant on December 29, 1955, that the provisions of paragraphs XIII and XIV expressing quite a different procedure was first contemplated; and the Applicant's Counsel made express reservations with regard to those paragraphs on January 14, 1956. The Respondent was no doubt entitled to propose new rules of procedure; but since those rules were not accepted by the person concerned, and since the procedure thus established on an *ad hoc* basis was not of a mandatory nature, the Applicant could not be deprived, by such a proposal, of the right of appeal which he enjoyed under the regulations mentioned above relating to the Agency's staff.

" 8. The Tribunal, therefore, considers that since no mandatory provision instituting another procedure had been laid down at the time of the application, it is competent to deal with the application on the basis of the agreement established under Resolution 302 (IV), in accordance with the interpretation placed upon that resolution and described in Judgment No. 57."

The Tribunal then discussed in great detail the evidence submitted to it with respect to the circumstances of the accidents, which was " deliberately separated . . . from the medical evidence ", and came to the conclusion that the epilepsy from which the complainant suffered was not caused by any event in the service of the Agency and that the claim for compensation for service-incurred injuries was unfounded. On the basis of the evidence pertaining to the manner in which the decision to terminate the complainant's appointment had been arrived at, the Tribunal concluded that this decision did not constitute wrongful dismissal.

[Report: *Judgments of the United Nations Administrative Tribunal* (1958), p. 419, Judgment No. 70.]

NOTE.—With respect to the jurisdiction of Administrative Tribunals over disputes involving members of the staff of local offices or subsidiary organs, see *Desgranges* v. *International Labour Organization* (*International Law Reports*, 1953, p. 523), *Hilpern* v. *U.N.R.W.A.* (*ibid.*, 1956, p. 613) and *In re Sharma* (reported *infra*, p. 757).

VI.—Miscellaneous

International Organization—The United Nations Headquarters District—Protection against Obstruction—Picketing of Entrance —Headquarters Agreement between United Nations and United States of America, 1947—Obligations of the United States Under.

PEOPLE *v.* CARCEL *ET AL.*

United States, City Magistrate's Court of City of New York, Upper Manhattan Arrest Court. March 30, 1956.

Court of Appeals of New York. July 3, 1957.

THE FACTS.—The defendants appeared before the main entrance of the United Nations in New York and there displayed a placard and distributed leaflets calling for the independence of Puerto Rico. They moved aside to allow the entry of the large number of persons who were using the entrance. On the complaint of an official of the United Nations, the police appeared and requested the defendants to picket on the other side of the street. When the defendants refused to do so, they were arrested and charged with disorderly conduct. They maintained that their arrest was in derogation of their right to freedom of speech and assemblage under the Constitutions of the United States and of the State of New York.

The relevant portions of the Agreement between the United Nations and the United States of America regarding the Headquarters of the United Nations, signed at Lake Success, New York, on June 26, 1947 (61 Stat. 3416, T.I.A.S. No. 1676, 11 U.N.T.S. 11), are quoted in the opinion. The area within which the defendants were demonstrating was not within the Headquarters District as defined in Annex 1 of the Agreement.

Held (by the Magistrate): that the defendants must be found guilty of the offence of disorderly conduct. Under Section 18 of the Headquarters Agreement, the United States authorities were under a duty to ensure the amenities of the Headquarters. The police accordingly acted within the scope of their authority in directing the defendants to cease their picketing before the main entrance to the United Nations.

The Court said: "Article VI of the Agreement relates to police protection of the Headquarters District, and Section 16(a) provides as follows:

> 'The appropriate American authorities shall exercise due diligence to ensure that the tranquility of the headquarters district is not disturbed by the unauthorized entry of groups of persons from outside or by disturbances in its immediate vicinity and shall cause to be provided on the boundaries of the headquarters district such police protection as is required for these purposes.'

"Section 18 of the Agreement provides in part as follows:

> 'The appropriate American authorities shall take all reasonable steps to ensure that the amenities of the headquarters district are not prejudiced and the purposes for which the district is required are not obstructed by any use made of the land in the vicinity of the district.'

"Counsel for the defendants in his brief submitted herein waives the defendants' claim that the situs wherein the incident involved herein took place as being international in character and concedes the jurisdiction of this Court, and accordingly the jurisdiction of the Police Department to act.

"The defendants claim that under the 1st and 14th amendments to the Constitution of the United States and by Sections 1, 3, 8 and 9 of art. 1 of the New York State Constitution the arrest herein was a direct violation of their right to freedom of speech and assemblage and that the arrest herein operated in derogation of their rights.

"The United Nations consists of 76 Member Nations and other States, not members thereof, send official representatives, as do many dependent territories and non-governmental organizations from all over the world. On any average day, even when the General Assembly is not meeting, more than 10,000 persons enter the building. Some 3,000 take the guided tours. The public seating capacity for those who come to attend meetings is 3,000. In addition there are delegations, secretariat staff and others who come to transact business. A City bus line has its stop there. Chartered buses, frequently several at one time, arrive and park in a recess at the main public entrance, which is also fed by a taxi rank. Official delegation cars moving delegates to and from the many meetings of the United Nations pull into one entrance and emerge within a few feet of the main entrance which was here picketed.

" In *Frend* v. *United States*, 69 App.D.C. 281, 100 F.2d 691, 693, *certiorari* denied 306 U.S. 640, 59 S.Ct. 488, 83 L.Ed. 1040,[1] the United States Court of Appeals for the District of Columbia upheld a resolution of the Congress of the United States making it unlawful within 500 feet of an embassy, legation or consulate in the District of Columbia to display placards or devices adapted to bring into public disrepute any foreign government or organization or its political, social or economic acts or views, and to refuse to disperse after being ordered to do so by the police department, the Court holding,

> ' The resolution, interpreted in the light of its purpose and according to the limitations of the Constitution, places no restriction upon speech or assembly except to the extent that they may constitute offensive public demonstrations calculated to arouse passions and resentments in those governments with which we have official relations, and then only when such offensive conduct is committed upon the public streets immediately adjacent to embassies, legations, consulates, and other buildings used for official purposes by such governments. These are reasonable and proper restrictions. In them there is no abridgement of the right of speech or of assembly or of any other constitutional right of the citizen.'

Hague v. *Committee for Industrial Organization*, 3 Cir., 101 F.2d 774; *DeJonge* v. *Oregon*, 299 U.S. 353, 57 S.Ct. 255, 81 L.Ed. 278.

" It is rather evident that because of the necessity of affording to the Member Nations of the United Nations such protection as will not involve the United States in any difficulty with the members of the United Nations because of the failure on the part of the United States as a host to give ample protection to the members, the courts have felt it proper to approve such measures which aid towards the protection of foreign governments. This principle has been set forth in I Hyde, *International Law as interpreted and applied by the United States*, 17. It is indeed a duty upon the United States to take reasonable precautions to prevent the doing of things which might lead to a disruption of the proceedings of the United Nations.

" The agreement entered into between the United Nations and the United States setting up the headquarters of New York City provides, as heretofore stated in Section 18 thereof, that 'the appropriate American authorities shall take all reasonable steps to ensure that the amenities of the headquarters district are not prejudiced and the purposes for which the district is required are not obstructed by any use made of the land in the vicinity of the district.'

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[1] See *Annual Digest*, 1938–1940, Case No. 161.]

" Under the agreement the police force of necessity would be the Police Department of the City of New York and Section 435 of the Charter of the City of New York in part gives the New York City Police Department the right to set up certain rules and regulations to preserve the public peace as follows:

> ' The police department and force shall have the power and it shall by their duty to preserve the public peace, . . . disperse unlawful or dangerous assemblages and assemblages which obstruct the free passage of public streets, sidewalks, parks and places; . . . regulate, direct, control and restrict the movement of vehicular and pedestrian traffic for the facilitation of traffic and the convenience of the public as well as the proper protection of human life and health; remove all nuisances in the public streets, parks and places; . . . enforce and prevent the violation of all laws and ordinances in force in the city '

" The defendants further contend herein that the People have failed to prove a breach of the peace herein. In *People* v. *Galpern*, 259 N.Y. 279, 181 N.E. 572, 573, 83 A.L.R. 785, a police officer asked the defendant who was debating with friends as to where to go to eat on a summer's evening on East 14th Street in New York City to move on as he was interfering with the flow of traffic; defendant who was an attorney refused to accede to the officer's request and was arrested and charged with disorderly conduct. The Court of Appeals in upholding the conviction held by Lehman, J.,

> ' They must " move on " when a police officer so directs for the purpose of avoiding possible disorder which otherwise might ensue . . . [this] tends to preserve public order in the streets of a great city. A refusal to obey such an order can be justified only where the circumstances show conclusively that the police officer's direction was purely arbitrary and was not calculated in any way to promote the public order.'

People v. *Nixon*, 248 N.Y. 182, 188, 161 N.E. 463, 466; *People* v. *Ward*, 272 N.Y. 615, 5 N.E.2d 359.

" Since under the Agreement between the United Nations and the United States Section 18 thereof, it is the duty of the American authorities to take all reasonable steps to ensure the amenities of the headquarters district, I hold that the police officer acted within the scope of his authority and duty to act as he did herein and that the conduct of the defendants was such that under the circumstances herein it comes within the purview of Section 722 of the Penal Law of this State. I, therefore, find the defendants guilty." [Reports: 2 Misc. 2d 827; 150 N.Y.S. 2d 436.]

The defendants appealed. The Court of Special Sessions of the City of New York, Appellate Part, First Judicial Department, affirmed, and the defendants once more appealed, by permission of an Associate Judge of the Court of Appeals.

Held (by the Court of Appeals): that the convictions must be reversed and the complaint dismissed. Nothing in the case turned upon the Headquarters Agreement, and the case was governed solely by the law of New York. The conduct of the defendants did not constitute disorderly conduct under § 722 of the New York Penal Law.

The Court said, in the course of an opinion otherwise devoted to issues of municipal law: "It should be noted at the outset that nothing turns on the agreement executed between the United States and the United Nations concerning the maintenance and police protection of the United Nations headquarters, referred to in the briefs before us and commented upon by the Magistrate below. The case arises solely under New York law. The arrest was made by a New York City policeman on property concededly within his jurisdiction and the conviction was under section 722 of the Penal Law. No suggestion was made that the conviction was bottomed upon any other agreement or provision of law nor is it so contended by the People here. Accordingly, our inquiry is directed to the sufficiency of the convictions under section 722 . . ."

[Reports: 3 N.Y. 2d 327, 165 N.Y.S. 2d 113, 144 N.E. 2d. 81.]

NOTE.—The proceedings in the Magistrate's Court are discussed in "International Law in the New York Courts–1956", *Cornell Law Quarterly*, 31 (1957), pp. 521–524.

D—OTHER INTERNATIONAL ORGANIZATIONS AND ORGANS OF INTERNATIONAL ADMINISTRATION

International Organization—European Coal and Steel Community —Prohibition of Restriction of Competition—Extent of Duty of High Authority to Issue Reasoned Decisions—Interpretation of Treaty Establishing the Community—Relationship between Detailed Provisions on a Particular Topic and General Provisions.

SOCIÉTÉS MINIÈRES DU BASSIN DE LA RUHR (" GEITLING ") *v.* THE HIGH AUTHORITY OF THE EUROPEAN COAL AND STEEL COMMUNITY.

Court of Justice of the European Coal and Steel Community.

(Pilotti, President; Hammes, Serrarens, Delvaux, Rueff JJ.)

March 20, 1957.

THE FACTS.—The Ruhr coal-basin comprises some fifty collieries. When the European Coal and Steel Community was formed, all these collieries sold their products through one marketing organization, known as the " Gemeinschafts-Organisation Ruhrkohle GmbH." As this organization was a monopoly, the High Authority split it up, but rather than allow each of the fifty collieries to sell independently, it decided that it would make for efficiency if the collieries were grouped into three, and each group had its own marketing organization. The first plaintiffs in the present action are the nineteen collieries forming one of the three groups, and " Geitling ", the second Plaintiff, is their marketing organization—the other two marketing organizations being known as " Präsident " and " Mausegatt ".

In February 1956, these three organizations drew up similar agreements setting out what conditions wholesalers were required to have satisfied before they would be accepted as direct customers.

" Geitling's " conditions were that the wholesalers: (1) must sell, within a prescribed region of sale,[1] at least 12,500 tons of coal per year purchased from " Geitling "; (2) must sell within the same region at least 25,000 tons of coal per year purchased from any of the three Ruhr coal marketing organizations—including " Geitling "; (3) must sell within the same region 40,000 tons of coal per year purchased from coal producers within the Community; and (4) must sell within the Common Market at least 75,000 tons of coal per year purchased from coal producers within the Community.

By Article 65, para. 1, of the Treaty establishing the Community, all agreements among enterprises which tended directly or indirectly to restrict or distort the normal operation of competition within the Common Market by allocating markets or customers, were forbidden.

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[1] The Community for this purpose is divided into seven " regions of sale ": see Annex to Decision No. 5–56 of the High Authority.

By para. 2 the High Authority could, nevertheless, authorize agreements to engage in joint selling if it found that such joint selling would contribute to a substantial improvement in the distribution of the products in question and that the agreement was essential to achieve this improvement and was not more restrictive than necessary. In view of this, therefore, "Geitling" submitted its Agreement to the High Authority for authorization, but by Article 8 of its Decision No. 5–56 of February 1956, the High Authority, while authorizing all the other provisions of the Agreement, refused to sanction the second provision above, namely, that wholesalers must purchase, in addition to 12,500 tons of coal per year from "Geitling" under the first provision, a further 12,500 tons per year, making 25,000 tons of coal per year in all, from one of the other two marketing organizations or from "Geitling" itself.

The plaintiffs appealed against this refusal. Following the grounds of appeal open to them under Article 33 of the Treaty, they alleged, first, that the decision had been passed in violation of a substantial procedural requirement. Article 15 of the Treaty declares that decisions of the High Authority shall be supported by reasons, and the Plaintiffs contended that this particular Article had not been adequately supported.

The plaintiffs' second contention was that their Agreement did not tend to restrict competition, so that it was not made void by Article 65, para. 1; in consequence, it had not required the authorization of the High Authority under paragraph 2 at all. It was, therefore, they argued, valid despite the fact that it had not been authorised.

The High Authority argued that the clause in the Agreement that wholesalers must purchase a further 12,500 tons of coal per year from one of the three marketing organizations was more restrictive than was necessary, and therefore by Article 65, para. 2, could not have been authorized; and also that the clause was discriminatory and therefore would in any event have been void under Article 4 (b), which forbids any measures which hamper the buyer in the free choice of his suppliers.

The plaintiffs sought to answer this by saying that Article 65, para. 2, was a special provision of the Treaty, and therefore that Article 4, being a general provision, could not apply concurrently with it.

Held: that the appeal should be rejected. The High Authority was not required to discuss all possible objections to a decision and it was not necessary to support, independently and exhaustively, each individual provision of a complex decision, provided that the reasons for the individual provision could be deduced from the reasons given for the taking of the decision as a whole. Further, it was not necessary to show that the reasons of the High Authority were correct; it was only necessary that they should logically support the decision being taken.

By restricting the number of persons who could be direct purchasers from "Geitling" the Trade Agreements did restrict competition, and therefore required authorization. There was no ground for holding that certain provisions of the Treaty were to be regarded as special and others as general, but Articles 4 (b) and 65 were to be applied together.

The Court said: "1. The plaintiffs allege a violation of a substantial procedural requirement on account of the insufficiency of the reasons given to support Article 8 of the decision and the inaccuracy of the reasons given, which amount, in their contention, to an absence of reasons.

"By the general provisions of Articles 5 and 15 of the Treaty, the High Authority is required to support its decisions by setting out the factual events upon which the legal justification for the measure depends, and the considerations which have led them to take the decision. These reasons must specify the grounds upon which the decision has been based in order to enable any legal control to be exercised. However, the High Authority is not required to discuss each conceivable objection which might be brought against the decision.

"2. Generally speaking, it is not necessary to support with reasons both exhaustively and independently a particular article that is being challenged where it forms merely a part of a complex decision. Sufficient supporting reasons may be able to be inferred from all the grounds that are relied upon to support the decision as a whole.

"Such is the case in the present instance. The High Authority has always contended that the provisions of commercial regulations—and the provision here challenged is one of them—which determine who are the wholesalers who are to be supplied directly, contain an 'allocation of customers and of the market' within the meaning of Article 4 (d) and of Article 65, para. 1, of the Treaty (*Journal Officiel de la Communauté*, No. 6, March 13, 1956, p. 33). The High Authority has therefore stated which of these regulations can be authorized, and upon what conditions. It has also declared that the parties to those commercial regulations which have been authorized shall observe the conditions that are laid down, and has specified the necessity for this (*ibid.*, p. 34).

"The High Authority has at the same time set out the grounds upon which it maintains that the provision here in question does not satisfy these required conditions. This provision states that in sales up to the amount of 25,000 tons the wholesaler 'shall make a distinction between the purchase of coal from producers of other coal basins . . .'. Furthermore, this provision amounts to 'a discrimination' and 'on the other hand, is of a more restrictive character than is required for the purpose of this selection '—this purpose being to set out who are the wholesale merchants who are allowed to make direct purchases (*ibid.*).

" These reasons for the decision must be considered as sufficient, for they specify in a full and clear way what are the considerations of fact and of law which support the rejection of this provision.

" In judging whether there has been a violation of a substantial procedural requirement, it is not necessary to consider whether the contentions of the High Authority are correct in law: it is only necessary that they should be logically consistent with the decision being enacted.

" *As to violation of Article* 65 *of the Treaty.*—

" 1. Is there a restriction of the normal operation of competition within the meaning of Article 65, para. 1?

" (a) The plaintiffs did not at first dispute that the commercial provision embodied in their agreement constitutes a restriction of the normal operation of competition and as such is required to be authorized. It was only in their reply that, for the first time, they alleged that the provision in question did not of itself impose any restriction and that it did not therefore require to be authorized. This contention may be regarded as a development of the claim of violation of Article 65, alleged in the request, and not as an independent ground of appeal, liable to be rejected under Article 22 of the Statute of the Court as being out of time.

" (b) It is not disputed that the whole of the plaintiffs' agreement for joint sales, which includes the commercial provision, was submitted for authorization, or that the agreement allocates customers and markets and is of a nature to restrict or to distort the normal operation of competition between the different enterprises grouped within ' Geitling '. If the agreement for joint sales was itself submitted for approval, this submission covered also the means for carrying out the agreement, and thus, in the present case, covered the clause in dispute.

" Moreover, any limitation upon the number of wholesale merchants allowed as direct customers restricts or distorts competition between those merchants, however many of them there may be. In view of the above consideration, it is not necessary to examine the concrete effects of this regulation in the present case. The above consideration follows logically from Article 65, para. 1.

" (c) Other special considerations must be added in the present case. The clause in dispute, and the inevitable effects upon the purchases of Ruhr coal which it would have, will make the competitive position of all sellers of Ruhr coal more favourable in comparison with the rest of the producers of the Community, and thus restrict the normal interplay of competition upon the Common Market between each of these sellers and their competitors. If the clause in dispute distorts or restricts competition, this is above all brought about by the limitations which it causes upon competition in the sale of the products of each seller of Ruhr coal.

" The obligation upon wholesalers who have already bought 12,500 tons from the second plaintiffs, to purchase from one of the two other sellers of Ruhr coal—if they do not purchase it from the plaintiffs themselves—12,500 additional tons of Ruhr coal in order to satisfy the prescribed requirements, distorts or restricts competition as between the three firms.

" The contention that the clause in dispute distorts and restrains competition is supported by a purely legal assessment of the commercial regulation, without there being any need to inquire into and evaluate economic circumstances. The question as to whether the Court is competent to adjudicate on the above contention does not arise in the present instance.

" It follows from the above considerations that the clause in dispute was submitted for authorization not merely as part of the wider agreement concluded by the plaintiffs, but also specifically.

" 2. Is there a restriction such as can be authorized by virtue of Article 65, para. 2?

" (a) The High Authority justified its refusal to authorize the clause in dispute by reference to the terms of Article 65, para. 2, on the ground that the requirements for anyone to qualify as a wholesaler were of a more restrictive nature than was necessary (*Journal Officiel de la Communauté* No. 6, March 13, 1956, p. 34).

" Moreover, all the reasons for the decision have made it clear that the agreement, as far as the provisions submitted for authorization concerning commercial regulations—and therefore those providing for joint sale—are concerned, has been examined and assessed especially from the point of view of whether it was likely to contribute to facilitating the distribution of coal (*ibid.*, p. 31).

" The plaintiffs, on this, declare that the clause was necessary within the framework of the commercial regulations in order to define the qualifications of a wholesaler who was to have the rights of direct purchase. The qualifications would not be observed unless the wholesaler, under identical conditions as to freight and transport and as to stocks held, sold an appreciable amount of fuels of the same sort—in the present case 25,000 tons of Ruhr coal. They maintain that a judicious choice of wholesalers is essential for any appreciable inprovement in the distribution of the plaintiffs' products, and that the clause therefore complies with the aims of Article 65, para. 2.

" The clause in dispute, and in particular the fact that it specifies the quantities to be purchased from other firms selling Ruhr coal, does bring about a certain improvement in the distribution of Ruhr coal as a whole. However, since Decision No. 5–56 of the High Authority, each new sales organization which is set up must follow an independent policy concerning distribution. Its commercial regulations, under Article 65, para. 2, cannot be authorized unless it assists the distribution of the particular product of each of its members.

" The clause here in dispute does not satisfy this condition, because, in determining who shall be the wholesalers, it specifies in addition what quantities are to be purchased from the other two marketing organizations, and this, as has been set out above, is not necessary for the improvement of the distribution of the particular production of the organizations concerned. This consideration follows directly and not from an assessment of the economic situation, which is, possibly, outside the scope of the Court's considerations.

" (b) There is no occasion for the Court to determine whether this clause could have been authorized if it had only required the purchase of 25,000 tons from ' Geitling ' and if it had not exceeded the extent necessary for an appreciable improvement in the distribution of its products. In any event, the High Authority was not required to modify the terms of an agreement that had been presented to it with a view to making it possible to authorize it.

" (c) Hence, by refusing to authorize the clause in dispute the defendants have not violated Article 65 of the Treaty.

"*As to discrimination.*—In order to justify its refusal to authorize the plaintiffs' commercial regulations, the High Authority relied also upon the fact that this clause involved discrimination both between producers of the Community and between certain groups of wholesalers.

" The plaintiffs see a violation of the Treaty in the fact that, first, the High Authority had patently misconstrued the relationship existing between Article 4 (b) and Article 65, and secondly, had wrongly applied Article 4.

" 1. In support of their claim that there was a misconstruction of the relationship between Article 4 (b) and Article 65, the plaintiffs contend that the provisions of Article 65, as being a *lex specialis*, exclude the fundamental provisions of Article 4 (b). This, however, is not so.

"Articles 4 (b) and 65 of the Treaty regulate, each in their own field of application, different aspects of the economic sphere. These two Articles are not mutually exclusive, far less does the one cancel the other. They serve to further the aims of the Community. In this respect they are, therefore, complementary.

" In certain circumstances, their provisions may cover a situation justifying a joint and simultaneous application of these Articles. This is so above all when, as in the present case, the clause in dispute has a more restrictive character than the purpose of the regulation requires, so that not only is the clause not able to be authorized by reason of Article 65, but in addition may involve a discrimination within the meaning of Article 4 (b). In relying upon Article 4 (b) as a ground for its decision, the High Authority has thus not violated the Treaty.

" 2. The High Authority has rightly decided that the clause in dispute might involve discrimination.

" The appeal must therefore be rejected."

[Report: *Recueil de la Jurisprudence de la Cour*, vol. III, 1957, p. 11.]

International Organization—European Coal and Steel Community—Institutions of—Powers and Autonomy of—Grading and Appointments under Staff Code—Illegal Decisions—Withdrawal of—Decisions Illegal in Part—Severability—Abuse of Power—The Law Applied by the Court—The Law of Member States—Apparent Gap in Treaty—Comparative Study of Relevant Systems of Law

ALGERA *ET AL.* *v.* COMMON ASSEMBLY OF THE EUROPEAN COAL AND STEEL COMMUNITY.

Court of Justice of the European Coal and Steel Community.

(Hammes, Acting President; Serrarens, Riese, Rueff, Van Kleffens JJ.)

July 12, 1957.

THE FACTS.—This was a complaint by five officials of the Secretariat of the Common Assembly of the European Coal and Steel Community against the decision to modify their grading as a result of the adoption of a common grading system for all the institutions of the Community, after they had been classified on the basis of a grading system adopted by the Common Assembly. In the autumn of 1955, the Common Assembly reorganized its secretariat with a view to remedying certain organizational deficiencies. Since the Commission of Presidents—consisting of the Presidents of the Court of Justice, the Council of Ministers, the Common Assembly and the High Authority—which was entrusted with the task of preparing a Staff Code for all four institutions of the Community, had nearly completed its work, and the contractual appointments of the officials of the secretariat of the Common Assembly were due to expire on December 31, 1955, the Common Assembly decided to link the reorganization arrangements to the application of the Staff Code to the officials concerned. On December 12, 1955, the Commission of Presidents took note of the fact that the Staff Code it had prepared had been finally adopted by all institutions of the Community, with the exception of the Committee of Ministers, whose President felt it necessary to consult his colleagues. The Annexes to the Code, which were to include descriptions of various posts, were to be the subject of further discussion between the administrations of the four institutions of the Community with a view to standardization, but such discussions were not to affect the optional character of the Annexes. On December 12, 1955, the President of the Common Assembly issued to each official an individual order cancelling his contractual appointment and substituting for it, with his consent, an appointment under the Staff Code, which recognized establishment in a post and assigned each official to a grade and a step within the grade. On January 28, 1956, the Commission of Presidents proceeded to the final adoption of the Staff Code and decided, with respect to the Annexes, that each institution would retain its full freedom of action and that since the Annexes were referred to the Committee for an opinion only, any amendments agreed upon would merely constitute proposals submitted to the institutions of the Community and not binding decisions. Further study revealed serious discrepancies in the grading of officials of the secretariats of the four institutions of the Community; and while the Common Assembly had reserved the right to adopt its own grading system, should it not prove feasible to reach agreement on a common grading system, it agreed to attempt to implement transitional measures designed to bring the grading of its staff into line with the common grading system which had commended itself to the Commission of Presidents. On June 27, 1956, after consultations with the staff, the Vice-President of the Common Assembly (Mr. Vanrullen) wrote to the officials affected by the " measures of harmonisation " to inform them that they would only be recognised as established officials in grades and steps below those recognised by the orders of December 12, 1955, but that the difference in emoluments would be made up by a personal allowance for a period of two years. Five officials rejected the proposal and insisted on strict adherence to the orders of December 12, 1955. The Common Assembly then called upon the five officials concerned to elect between the benefits of a permanent appointment under the Staff Code in a lower grade than that provided for under the orders of December 12, 1955, or the revival of their former contracts, which would be extended to December 31, 1956, after which they would not be further extended. This option was rejected, and after the Common Assembly had decided to deprive the officials concerned of the benefit of established appointments under the Staff Code and to revive their contractual appointment, the officials instituted proceedings before the Court of Justice of the Community.

Before the Court, the complainants sought the annulment of the decision to deprive them of the benefit of the orders of December 12, 1955, on the ground that the said orders constituted a single decision, no part of which could be withdrawn without their consent. Admission to the benefits of the Staff Code could only be put an end to as a result of termination of appointment, which had not taken place. The decision appealed against deprived the complainants of the benefit of the Staff Code in violation of their acquired rights and had the same effect as a disciplinary sanction. In the light of the agreement reached by the Committee of Presidents on December 12, 1955, the complainants were entitled to consider their legal position, as set out in the orders of the same date, as finally settled. While the administration could amend the Staff Code for reasons of service, it could do so only subject to the preservation of acquired rights. Even an illegal decision creating individual rights could only be withdrawn on grounds of illegality within the time-limit for appeal against illegal decisions, after which it became final. In the absence of any provision for such a time-limit in the law of the Community, as regards the status of officials, the orders of December 12, 1955, created a legally irrevocable position with immediate effect. The compensation offered was inadequate because compensation for loss of earnings was limited in time and no compensation was offered in respect of loss of administrative position and pension rights. Subsidiarily, the complainants claimed damages.

The defendant organization, namely, the Common Assembly, argued that there had been no downgrading of the complainants but a modification of their original grading, which had been effected at the same time as the appointment of the complainants as established officials under the Staff Code, in anticipation of the establishment of a common grading system, the final outcome of which proved not to correspond to expectations. The standardization of grading was consonant with the spirit of the Treaty establishing the Community, and everything had been done to defend the interests of the staff of the Common Assembly. A *sui generis* situation had been created and called for an *ad hoc* solution. The alternative claim for damages was irreceivable and without substance. If the decision appealed against were upheld, the complainants would suffer no damage, and if it were annulled other remedies were available.

Held: that the decision to withdraw from the complainants the benefit of appointments under the Staff Code and to revive their previous contractual appointments must be annulled; that the complaint must be dismissed as regards the withdrawing of the grades and steps provided for in the orders of December 12, 1955; that the Common Assembly must make a new decision regarding the complainants' grading; and that the complainants be each awarded damages in the amount of $100.

The Court said, in part:

"III. *On the withdrawal of administrative decisions creating subjective rights.*—The claimants criticize the withdrawal by the Assembly of the orders of December 12, 1955, [on the ground] that these orders bestowed upon them acquired rights which could not be revoked without their consent. It falls to be considered whether such decisions can legally be withdrawn.

" First of all, one must reject a false reasoning likely to lead to a vicious circle, which consists in postulating an acquired right to conclude that it cannot be revoked. Indeed, if a right conferred by an administrative decision may be unilaterally revoked by the administration, it does not constitute an acquired right.

" The orders of December 12, 1955, provide that the claimants shall enjoy the benefits of the Staff Code, that they shall be appointed to certain grades, and that they shall be placed on certain steps within the grades. Should these orders be legally valid, they would be individual administrative decisions creating subjective rights.

" The possibility of withdrawing such decisions is a problem of administrative law well known in the doctrine and judicial precedents of all the Member States of the Community but for the solution of which the Treaty [establishing the Community] makes no provision. Short of a denial of justice, it is incumbent upon the Court to solve this problem in the light of the rules recognized by the legislation, the judicial precedents and the doctrine of the Member countries.

"A comparative study of their law reveals that in the six Member States an administrative decision creating subjective rights cannot in principle be revoked, if the decision itself [is lawful]. In such a case, a subjective right having been acquired, the necessity of preserving confidence in the situation so created must prevail over the interests of the administration wishing to withdraw its decision. This is applicable, in particular, to the appointment of an official.

" If, on the other hand, the administrative decision is illegal, the law of all the Member States allows of the possibility of withdrawing the decision. The absence of an objective legal basis for the decision adversely affects the subjective right of the beneficiary of the decision and justifies its withdrawal. It must be emphasized that while this principle is generally recognized, the manner in which it is applied differs.

" Under French law, the illegal decision must be withdrawn before the expiry of the time-limit within which [an appeal would lie, or, if an appeal has been lodged], before a decision on the appeal is handed down. With minor variations, similar rules obtain in Belgian, Dutch and Luxembourg law.

" However, German law does not provide for a time-limit within which the right to revoke a decision must be exercised, except under specific legislative provisions. Thus, under Article 13 of the Federal Law concerning Public Officials, the cancellation of an appointment can only take place within a six months' time-limit. Nevertheless, it is generally recognized that the principle of *bona fides* (*Treu und Glauben*) prevents an unduly belated withdrawal taking place later than the time at which the decision could have been revoked. Judicial precedents and doctrine rely in this respect on the concepts or renunciation (*Verzicht*) and of time-bar (*Verwirkung*) of the right to withdraw a decision.

" Italian law is particularly clear in this respect. Any administrative decision which is [unlawful] because *ultra vires*, contrary to law, or tainted with abuse of power (*eccesso di potere*), may be rescinded *ex tunc* by the administration which originally took it, without regard to the subjective rights it may have bestowed. Such withdrawal may take place at any time (*in qualsiasi momento*). There can therefore be no time-limit for the withdrawal of the decision. However, according to judicial precedents and doctrine, an unduly belated withdrawal of a decision may constitute abuse of power. Decisions taken long ago (*fatti avvenuti de lunga data*) should remain in force, even if [unlawful], unless reasons of major importance require their withdrawal in the public interest.

" The withdrawal of an administrative decision tainted with illegality is thus accepted by all Member States.

" In conformity with the submission of the Advocate-General, the Court recognizes the principle of withdrawing unlawful decisions within a reasonable period such as that within which the decisions appealed against in the present case were withdrawn.

" IV. *On the Legality of the Orders of December* 12, 1955.—

" 1. The orders of December 12, 1955, were validly made according to the rules which determine competence within the Common Assembly; they were signed by the President of the Common Assembly and by its Secretary-General. The President was acting within the scope of the decisions of the Officers of the Common Assembly of November 25, 1955. The orders were therefore validly made under the provisions laid down in the Rules of Procedure of the Common Assembly (*Official Journal of the Community*, 1954, p. 402), particularly Rule 43 (3) thereof, and in the Internal Administrative Regulations of the Common Assembly of November 25, 1955, particularly Articles 1, 2 and 14 thereof.

" Even if the Secretariat and the President had not chosen an appropriate time to issue the orders to those concerned (the Officers having provided that they should be issued ' in good time ') and if the obligations laid down in Rule 43 (3) of the Rules of Procedure of the Common Assembly, and Article 2 (4) of the Internal Administrative Regulations had not been observed, this would not have invalidated the orders of December 12, 1955, from the point of view of the internal procedure of the Assembly.

" 2. With regard to the provisions of the Treaty constituting the European Coal and Steel Community, the present dispute in respect of the orders of December 12, 1955, raises the question whether the Respondents could validly admit the Claimants to the advantages of the Staff Code and fix their grading without the authority or opinion of the Commission of Presidents set up by Article 78 of the Treaty, or whether this could only be done with such authority or opinion. In these conditions there is no occasion to decide as to the extent of the other powers which the said Commission derives from the Treaty, or the authority which it would have to draw up the Staff Code under Section 7 (3) of the Convention containing Transitional Measures.

" (a) Admission to the advantages of the Staff Code is a matter for the Institutions, and no provision is made in the Treaty for the Commission of Presidents to take any part in it. If the orders of December 12, 1955, amount to an effective admission of the Claimants to the benefits of the Staff Code, a question which is considered in para. VI below, that part of the said orders is lawful and valid.

" (b) With regard to the grading laid down in the orders of December 12, 1955, the position is not so clear. It follows from these orders that the Claimants were appointed to certain grades and were given rank at steps in that grade which were determined by length of service. This assignment had the effect, among other consequences, of determining the emoluments of the Claimants in accordance with the text of the decision taken by the Officers of the Assembly on November 25, 1955. Thus the examination of the question whether the Common Assembly was competent to determine the emoluments of its officials on its own authority, or whether it could only do this with the concurrence of the Commission of Presidents provided for in Article 78 of the Treaty, leads to the following considerations:

" (i) The Institutions are autonomous ' within the framework of their own powers and responsibilities ' (Article 6 of the Treaty, last paragraph). Thus in its decision 1–55 (*In re Kergall*[1]), the Court recognized that the Common Assembly was competent to organize its Secretariat at its own discretion and in the best interests of the service.

" Further, the second part of Article 78 (3) merely lays down an exception to the rule of autonomy as there provided, and must be strictly interpreted. That, however, does not preclude Article 78 (3) from recognizing the special competence of the Commission of Presidents with regard to the number of employees and the scales of their salaries, allowances and pensions; these questions must be ' determined in advance ' by the Commission.

" This provision is explained by the fact that it is only the Community, and not its Institutions, which has legal personality. Hence the need to harmonize the activities of the four institutions and to provide for financial and budgetary control, a task which is

[[1] Given on July 18, 1955: see *International Law Reports*, 1956, p. 628 (*sub nom. Kergall* v. *Common Assembly of the European Coal and Steel Community*).]

entrusted by Article 78 of the Treaty to the Commission of Presidents. It is desirable to stress that no organ is invested with a power of preliminary control in financial matters.

" (ii) The power to determine the number of employees and the scales of their salaries, allowances and pensions is only given to the Commission of Presidents by the second part of Article 78 (3) to the extent that they are not fixed by virtue of another provision of the Treaty or an implementing regulation. That does not apply in the present case.

" The control provided by the Treaty would be ineffective if each of the Institutions had the power to issue internal regulations fixing the number or scales of emolument of its employees. Such an interpretation would lead to an absurd result. The exception provided in the second part of Article 78 (3) is directed only to cases where the Treaty lays down a special method for fixing emoluments, such as an implementing regulation assumed to be based on some provision in the Treaty. Any other interpretation would deprive Article 78 of its meaning, and must therefore be rejected.

" The autonomy of the Common Assembly as a parliamentary assembly equally cannot be set up against the power given to the Commission of Presidents by Article 78 of the Treaty. This Article in effect applies to all the Institutions of the Community without distinction; the fact that the Common Assembly has special attributes does not make any difference; its autonomy is exercised only within the framework of its own powers and responsibilities (last paragraph of Article 6).

" (iii) The power recognized in the Commission of Presidents by Article 78 of the Treaty therefore applies in the present case. With regard to the extent of this power, however, two arguments have been put before the Court.

" (a) According to the first argument, in order to exercise effective control the Commission of Presidents must have the power to make decisions in financial matters. Both the letter and the spirit of Article 78 were relied upon in support of this argument.

" With regard to the letter, Article 78 (3) gives the Commission of Presidents the responsibility of determining, before estimates of expenditure are drawn up, the number of employees and the scales of their emoluments. The use of the word ' determine ' in the text clearly indicates the existence of a power of decision.

" With regard to the spirit of Article 78, which is manifestly intended to establish financial control, it implies that the competence of the Commission is clearly not limited to drawing up a theoretical ladder or scale of emoluments. If the power is in fact to be effective, the Commission must be competent to determine the emoluments provided in the abstract for an employee carrying out specific duties the description of which (' job description ') is worked out by each Institution. If this competence did not exist there would be nothing to prevent an institution from grading all its staff members on the highest step in the ladder, and control would be evaded.

" Moreover, the text speaks of determining the number of employees and the scales of ' their ' emoluments and not the scale ' of ' emoluments. According to this interpretation, the second part of Article 78 (3) must be regarded as conferring implied powers which would allow the exercise of financial control in matters of staff expenditure on the same lines as the third and fourth parts, which set up budgetary control, and Article 78 (6), which sets up accounting control. The preliminary determination of the number of employees is designed to prevent the staffs of the Institutions from becoming unduly swollen, and the determination of the scales of their emoluments is designed to prevent the grant of excessive emoluments.

" (b) According to another view, the theory of implied powers does not necessarily lead to the conclusion that the Commission of Presidents must have the right of decision in the sense indicated above, in view of the fact that it still has available other means of exercising effective control. There is no text which gives the Commission of Presidents sufficiently explicit powers of decision which go beyond the competence of a co-ordinating body. Specifically, the duty to ' determine ' the number of employees and the scale of their emoluments does not deprive the Institutions of their administrative autonomy, any more than it could confer upon the Presidents of the Institutions, meeting as a Commission of Presidents, powers which they did not possess in their capacity as Presidents of the Institutions.

"According to this argument the Commission of Presidents must be informed and consulted, the power of decision being reserved to the Institutions, whose good faith must be assumed.

" (iv) It appears that the Commission of Presidents itself, without having taken up a definite position, is inclined to accept this second interpretation. Thus, having decided at its meeting of December 12, 1955, that, with regard to procedure for drawing up the Annexes,' the administrations of the Institutions should make contact with each other', the Commission declared at the same time that ' these contacts should be aimed at harmonizing the texts but that they must not prejudice the optional character of the Annexes '. In the same way, at its meeting of January 28, 1956, the Commission of Presidents said: ' The Annexes to the Staff Code being submitted to the Commission of Presidents for their opinion only, the amendments on which the Commission has agreed amount merely to proposals made to the Institutions, and not to decisions '.

" The Staff Code is inspired by the same ideas; it merely provides that the Commission shall be informed of the number of posts in each grade, laid down by the Institutions in accordance with the establishments determined by the Commission of Presidents (Article

25 (2)), and declares in Article 62 of the Code that the Annexes to the Code ' shall be drawn up by each Institution . . . and submitted to the Commission of Presidents for their opinion before coming into effect '. The first paragraph of Article 25 refers in quite general terms to Article 78 of the Treaty with regard to the comparative table of grades and posts.

"According to this argument, the Commission of Presidents should therefore merely be consulted and give its opinion on the grading of staff members, but would have no power of decision proper, except as to the number of employees in each Institution.

" (v) According to Article 31 of the Treaty, the function of the Court is to ensure the rule of law in the interpretation and application of the Treaty and of its implementing regulations. The Court would therefore not be bound either by the point of view adopted by the Commission of Presidents or by the wording of the Staff Code if it appeared that it was necessary to make a choice between the two arguments previously mentioned in order to determine the present dispute. The present dispute, however, does not make it necessary to settle this controversy.

" In effect, the grading of the Claimants as provided in the orders of December 12, 1955, is clearly unlawful according to the first argument as well as according to the second; according to the first, because the Common Assembly has not obtained the preliminary consent of the Commission of Presidents; according to the second, because it did not previously submit the grading for the opinion of the Commission of Presidents, which it should have done under Article 2 (4) of its Internal Administrative Regulations as well as under Rule 43 (3) of the Rules of Procedure. But the Respondents do not dispute the fact that they neither received nor even requested, before December 12, 1955, the agreement or opinion of the Commission of Presidents.

" In these circumstances, the Respondents were not entitled to fix, within the framework of the Staff Code, the grading of the Claimants, and that portion of the orders of December 12, 1955, is therefore tainted with illegality.

" V. *Consequences of the Illegality of that portion of the Orders of December* 12, 1955, *containing the Grading of the Claimants.*—

" 1. *Void or voidable*? In the opinion of the Court the fact that an individual administrative act is illegal only makes it absolutely void in certain cases which have no relation to the present dispute. Apart from these exceptional cases, the principles of law and judicial decisions in Member States recognize such acts as voidable only and capable of being annulled. The performance of an administrative act is presumed to be valid. This presumption can only be set aside by the annulment or withdrawal of the act, so far as such a measure is permissible.

" 2. *Are the orders of December* 12, 1955, *voidable in their entirety or only as to the portion which is tainted with illegality*? The learned Advocate-General, in his conclusions, contended that the different elements of the orders could not be severed, and relied upon Article 59 of the Staff Code, which provides that ' staff members may become established in any grade of a category or class referred to in Article 24 of the Code '. According to him, since the fact of ' becoming established ' involves a staff member renouncing his contractual rights, such members are entitled, in order that they may exercise their option with full knowledge of the facts, to know the grade and step of seniority to which the administration proposes to appoint them and not merely the decision of principle that they are suitable to become established staff members.

" It is true that each of the Claimants declared that he agreed to be admitted to the benefits of the Staff Code under the conditions offered to him. At the same time, the essential and predominant element in this declaration consists of being admitted to the Code and thus being assured of steady employment with pension rights. With regard to emoluments, it is well known that they may be subsequently modified by means of regulations, but the fact of becoming established under the Code cannot be affected by that. Following the interpretation accepted in most modern legal systems, according to which the illegality of a portion does not make an act voidable in its entirety, the Court rejects the argument that the various elements in the orders cannot be severed.

" This decision is also warranted by the fact that it has already been found (III above) that it is only illegal administrative acts which are voidable, lawful acts being irrevocable. In the present case, the Common Assembly was competent to admit the Claimants to the benefits of the Staff Code with the result that this is valid and irrevocable, whereas assignment to a grade and classification in certain steps was unlawful and voidable. In these circumstances the admission to the benefits of the Staff Code which has been validly pronounced cannot be revoked.

" This decision does not conflict with the wording of the Staff Code. The question here, moreover, is not to apply the Staff Code —which was not yet in force at the time when the Orders were issued—but to apply the Treaty. But, according to the Treaty, admission to the benefits of the Staff Code, as such, fell within the exclusive competence of the Common Assembly, whereas the Common Assembly was not entitled to proceed to grading without the previous consent or opinion of the Commission of Presidents. The very fact that the Treaty has regulated competence in these two matters in different ways leads to the conclusion that the relevant portions of the orders can and even must, from the legal aspect, be severed.

" For the rest, if it is true that admission to the advantages of the Staff Code is accompanied by becoming established in a grade of a category or a specific class (Article 59 of the Transitional Provisions), it is worth recalling that the Staff Code draws a distinction between admission to the benefits of the Code and grading (see, *e.g.*, Article 27, which deals only with admission to the benefits of the Code, and Article 36, which provides for a report recommending that the staff member should ' become established ').

" There are still further arguments in favour of the severable character of the elements of the orders. Thus, it would hardly be equitable to allow the Assembly to disregard the right to the benefits of the Staff Code which they wished to confer on the Claimants in appointing them as established staff members, merely because it also made them unlawful promises which it was not entitled to do. With regard to the question whether the parties to the case would have been equally in agreement on an appointment accompanied by a lawful grading, the representative of the Respondents has, in the course of oral argument, answered this question in the affirmative. It must be admitted that the wishes of the Claimants are more difficult to interpret, but the Court considers that it cannot, on the grounds of attributing to them wishes which they might perhaps not have felt, deprive them of the benefits of admission to the Staff Code, validly pronounced. For the rest, the fact of their admission to the benefits of the Staff Code gives them an effective opportunity of answering the question indicated above; they may hand in their resignation if they think the position offered to them is inadequate.

" VI. In the grounds so far given for the decision of the Court it has been assumed that the admission of the Claimants to the benefits of the Staff Code is valid and irrevocable, provided that the orders of December 12, 1955, effectively contained such a decision. But that, though very probable, is not certain.

" The circumstances in which the orders of December 12, 1955, were issued to the Claimants clearly show that the Respondents had the intention of admitting the Claimants to the benefits of the Staff Code in a steady employment and that the Claimants had agreed to be so admitted. The wording of the orders, which provides for admission to the benefits of the Staff Code without any reservation, the preliminary declaration that the admission is accepted, signed by the Claimants, as well as their acknowledgement of the receipt of the Orders, all prove this. The issue of the orders took place only after the Commission of Presidents had, on December 12, 1955, decided that the Staff Code had been ' finally adopted ', at any rate so far as the Common Assembly was concerned, so that its President, Mr. Pella, could consider that the Code was definitely accepted and would very shortly come into force, and that he could therefore admit to its benefits those staff members who had expressed the wish for admission.

" Some doubts may, however, arise from the fact that the true definitive text of the Code was not really established until afterwards, on January 28, 1956, and that it was not brought into force by the Common Assembly until October 1956, with retrospective effect from June 1, 1956. In view of the fact that paragraph 4 of the orders of December 12, 1955, expressly contemplates the Staff Code and its Annexes coming into force at a later date and that the Claimants accepted the risk of its content, the Court interprets the declarations of the Claimants and the wording of the orders of December 12, 1955, in the sense that they referred to admission to the future Staff Code, whatever its content.

" For the rest, even if it is accepted that admission would be to a non-existent Staff Code and that it would for this reason be null and ineffective, even on this assumption, the letter of Mr. Vanrullen and the refusal of the Common Assembly to admit the Claimants to the benefits of the Staff Code must be annulled because this decision disregarded the right vested in staff members to be admitted to the benefits of the Staff Code (Decision 1–55: *In re Kergall* [*supra*]). In effect, if the Court recognized that Mr. Kergall was entitled to be admitted to the benefits of the Staff Code, notwithstanding that no formal or solemn promise to this effect had ever been made to him, and although the coming into force of the Staff Code was then more remote in time, it is *a fortiori* bound to recognize an analogous and even stronger right in the Claimants to be admitted to the benefits of the Staff Code.

" VII. So far as the decision contained in Mr. Vanrullen's letter of July 12, 1956, withdrew from the Claimants their admission to the benefits of the Staff Code, it must be annulled for the reasons already given.

" Further, the decision contained in the same letter to put the Claimants back under the terms of their former contracts must also be annulled, since, without express fresh consent on their part, the contract, which was terminated in consequence of their renunciation, accepted by the issue of the orders of December 12, 1955, could not be revived and a new contract could not be imposed upon them. The Common Assembly, which could validly withdraw the grading assigned to the Claimants, could, on its own authority, have regraded the Claimants at the appropriate level, following the measures of harmonization, but it had no right to reimpose upon them their former contractual terms.

" On the first ground of the appeal, calling for the annulment of the decisions contained in Mr. Vanrullen's letter of July 12, 1956, the Court decides that it is well founded.

" With regard to communication No. 56–13 of October 15, 1956, this must also be annulled, so far as it refers to the withdrawal of admission to the benefits of the Staff Code and the renewal of temporary contractual employment, which is inconsistent with admission to the benefits of the Staff Code, in steady employment, declared to have been validly conferred. On the other hand, the said communication is valid so far as it refers to the cancellation of the grading and the appropriate emoluments.

" For these reasons the Court allows the appeal so far as the said decision refuses the Claimants the right to retain the benefits of the Staff Code and places them again under contract; on the other hand, the appeal against the refusal to grant the emoluments provided in the said orders is rejected, for the reasons given above."

[Report: *Recueil de la Jurisprudence de la Cour*, III (1957), p. 89.]

NOTE.—See also *Kergall* v. *Common Assembly of the Coal and Steel Community* (*International Law Reports*, 1956, p. 628).

For comments on the constitutional aspects of the case, see Langavant, " L'Arrêt Algera et autres du 12 juillet 1957 de la Cour de Justice de la CECA", in *Clunet*, 85 (1958), No. 2, pp. 373–404. See also the submissions of the Advocate-General in *Recueil de la Jurisprudence de la Cour*, III (1957), pp. 136–178, particularly at p. 154 with respect to the withdrawal of administrative decisions and at p. 159 with respect to the extent of the autonomy of the Institutions of the Community.

International Organization—European Coal and Steel Community—Power of Organization to Impose a Fine—Failure of Plaintiff to Put His Case—Interpretation of Pleadings—Evidence—Proof of Receipt of Letter—The Law Applicable—Jurisdiction of Court over Appeals Heard *de pleine juridiction*.

ACCIARIERIE LAMINATOI MAGLIANO ALPI (A.L.M.A.) *v.* THE HIGH AUTHORITY OF THE EUROPEAN COAL AND STEEL COMMUNITY.

Court of Justice of the European Coal and Steel Community.

(Pilotti, President; Hammes, Serrarens, Riese, Delvaux, Rueff, van Kleffens JJ.)

December 3, 1957.

THE FACTS.—By Article 60, para. 2, of the Treaty establishing the European Coal and Steel Community, price lists and conditions of sale applied by enterprises within the Common Market are to be published to the extent, and in the form, prescribed by the High Authority. By Decisions No. 31–53 and 2–54, the High Authority specified, *inter alia*, that these price lists and conditions of sale were to be communicated to itself within a specified time of their coming into operation. Article 64 provides that the High Authority may impose fines upon enterprises which violate this provision or Decisions taken in application thereof, of up to twice the value of the irregular sales. In the event of a second offence, this maximum may be doubled.

The plaintiffs in this action were an ironworks whose head office was in Turin, but whose factory was situated in the small village of Magliano Alpi, about 60 miles away.

On November 4, 1955, the High Authority posted a registered letter to the plaintiffs informing them that they had failed to send to the High Authority their price lists and conditions of sale and that they had thus violated Article 60, para. 2, of the Treaty and also Decisions No. 31–53 and 2–54. The letter went on to state that the plaintiffs were liable to be fined under Article 64 of the Treaty, but that they were given eleven days in which to make a statement to the High Authority.

The plaintiffs did not reply to this letter, and on October 24, 1956, that is to say, nearly a year later, the High Authority passed a decision imposing a fine of 800,000 lire (about £500) upon the plaintiffs. This decision was notified to them on November 9, 1956, and on December 10, they lodged an appeal against it.

The plaintiffs at first denied that they had even received the registered letter of November 4, 1955, which they declared must have gone astray, because the High Authority had addressed it to "Magliona Alpi" and not to "Magliano Alpi" and to "Corso Regiodarco Turino" and not to "Corso Regio Parco Turino" However, in face of a photostat copy of the acknowledgement of receipt which was produced by the High Authority, they later admitted receiving the letter, but contended that it had never been forwarded from Turin to Magliano Alpi.

Secondly, the plaintiffs alleged that as they had merely broken an obligation to send certain information to the High Authority, they were liable to be punished under Article 47 of the Treaty, which provides for fines and daily penalty payments for a failure to supply information; they were not liable to be punished under Article 64, as that was a provision which, they argued, applied to a failure to publish any price lists at all. If Article 64 were to apply to the present case, it would lead to what they contended was the absurd situation that for a failure to forward their price lists to the High Authority they could be subjected to a fine of from one to two hundred million lire.

Held: that the appeal should be rejected. The mode of addressing the letter was irrelevant. The Court applied a provision which it said was accepted in all the countries of the Community, namely, that a document has legal effect from the time that it is duly received at the head office of an enterprise by a duly authorised employee, and has the same effect as if it had reached the directors. Article 64 applied in terms to any breach of Article 60, para. 2, or of any decisions taken in application thereof. The amounts specified in

Article 64 were maximum sums only, and up to that limit the High Authority had full discretion.

The Court said: " 1. *On the Ground of Violation of Article* 36 *of the Treaty.*—The plaintiffs accuse the High Authority of having imposed upon them the sanction in question without having previously given them an opportunity to present their observations in compliance with Article 36, paragraph 1, of the Treaty. They further maintain that the High Authority's registered letter, dated November 4, 1955, which clearly amounted to such an opportunity in accordance with the requirements of that provision, never arrived at Magliano Alpi, where the plaintiff company is situated, because the address on the letter contained spelling mistakes. Without needing to examine whether this allegation amounts to a violation of a substantial procedural requirement, the Court holds that it is not well-founded.

" The High Authority has submitted to the Court a photostat copy of the notice of receipt of the above-mentioned letter, which bears the stamp of ' Alma ', the authenticity of which has not been challenged. It has also shown that the letter was delivered to an employee of the plaintiffs at the building known as 33, Corso Regio Parco, Turin, the address which the plaintiffs in their Request give as their administrative office. It is therefore of little importance to know whether—as the plaintiffs allege—the letter was sent from Turin to Magliano Alpi. It having been established that it has properly reached the administrative office of the plaintiffs, one must apply the rule of law generally accepted within the countries of the Community, by which a written document comes into effect from the time when it is duly received by the administrative department of the addressee.

" The ground of violation of Article 36 of the Treaty must therefore be rejected."

" 2. *On the Ground of Violation of Article* 64 *of the Treaty.*—According to the plaintiffs, the High Authority has misinterpreted the meaning of Article 64 of the Treaty: in order to sanction the breach that has been committed it ought to have proceeded under Article 47. This contention must be rejected.

" By the terms of Article 64, sanctions may be imposed upon enterprises which violate the provisions of Chapter V of the Treaty or a decision of the High Authority taken in application of that Chapter. This Article deals with infractions of the provisions concerning the publication of price lists and conditions of sale, set out in paragraph 2 (a) of Article 60, as well as breaches of the rules of non-discrimination. The plaintiffs having violated the obligation to publish their price-lists, as well as having violated the Decisions of the High Authority Nos. 31–53, 2–54 and 37–54, which define the extent and the form of these publications, the High Authority has correctly applied Article 64.

" Contrary to the plaintiffs' contention, there was no violation of the Treaty when the High Authority determined, under Article 60, para. 2 (a) of the Treaty, the extent and the form of the publication of lists, by prescribing, among other things, that these were to be communicated to itself. Thus, from this point of view, as their agent declared, Article 60, para. 2 (a) appears to be a special provision when compared with Article 47.

" The plaintiffs are wrong to hold that the contention submitted by the High Authority would lead to absurd consequences, in the sense that it would allow very heavy fines to be imposed for breaches of provisions of a purely preventative nature. In effect, Article 64 does not specify a minimum. It allows and requires the High Authority to determine the amount of the sanction in relation to the character of the regulation that has been broken. Moreover, the regulations concerning the publication of prices are not merely of a minor character—on the contrary, they constitute a fundamental principle of the Common Market.

" The ground of violation of Article 64 must, therefore, also be rejected.

" 3. *On the amount of the Fine.*—The Court has considered the question whether there is occasion to reduce the amount of the fine. It holds that it has been seized with an appeal *de pleine juridiction* and that, by this fact, it is given the power not merely of annulling, but also of amending, the decision that has been taken.

"Although the plaintiffs have not made any formal submissions to this effect, the Court, in agreement with the advocate general, holds that the paragraph of the Request which sets out the plaintiffs' modest size, may be interpreted as incidentally requesting such a reduction. Moreover, even in the absence of any formal request, the Court is authorized to reduce the amount of an excessive fine when to do so would not go beyond the limits of the Request but, on the contrary, would have the result of partially fulfilling the Request.

" In agreement with the statements of the advocate general, the Court holds that the amount of the fine in this case is not excessive. With respect to the gravity of the breach, account must be taken, on the one hand, of the importance of the principle of the publication of prices, and, on the other hand, of the fact that the plaintiffs have persisted for more than three years in their failure to observe the regulations in question, which denotes at least considerable negligence. As far as concerns, on the other hand, the financial position of the plaintiffs, the Court refers to the figures cited by the advocate general in his Conclusions. These figures show, moreover, that entries ' Funds to the extraordinary reserve ' occur in the payments column of the balance sheets for 1955 and 1956 and that these sums amount respectively to 18,043,659 and 18,621,034 lire. Under these conditions, no manifest wrong being established, the Court does not intend to substitute its assessment for that made by the High Authority.

"The Court has not overlooked the difficulties which are likely to arise for the plaintiffs from the joining of the respective obligations to pay the fine as well as the arrears of tax. The Court leaves to the good sense of the High Authority the question of the means of payment of the fine."

[Report: *Recueil de la Jurisprudence de la Cour*, vol. III, 1957, p. 181.]

NOTE.—This case is of general importance for two reasons. First, the Court, when faced with a matter which was not dealt with by the Treaty, namely, the legal effect to be given to the receipt of a letter at the head office of an enterprise, felt itself empowered to turn to the national laws of the member States of the Community in order to find what was the generally accepted solution in the laws of those States and to apply that solution. Secondly, the Court stated what it believed were its powers when, under the Treaty, an appeal against a Decision of the High Authority was brought *en pleine juridiction*. In that event, it held it could amend a Decision if the merits of the case justified it. In all other appeals concerning a Decision of the High Authority the Court is concerned merely with the legality of that Decision, and its powers are only to annul the Decision, either in whole or in part.

E—INTERNATIONAL OFFICIALS

International Organization—Officials—Termination of Appointment — Municipal Courts — Absence of Jurisdiction — United Nations Administrative Tribunal—Competence of—Officials of United Nations Relief and Works Agency for Palestine Refugees—Whether Members of United Nations Secretariat—Whether International Officials—Right of Officials to Have Recourse to Municipal Tribunals.

HILPERN *v.* SECRETARY-GENERAL OF THE UNITED NATIONS.

Administrative Tribunal of the United Nations. September 9, 1955.

(Madame Paul Bastid, President; Lord Crook, Petrén, Lashly.)

THE FACTS.—In an appeal against the allegedly improper termination of the appointment of a former employee of the United Nations Relief and Works Agency for Palestine Refugees (U.N.R.W.A.), the defendant challenged the competence of the Tribunal *ratione personnae*, and both parties requested an interlocutory decision. (The merits of the case, therefore, were not dealt with in the present decision.)

The complainant entered the service of the United Nations Relief for Palestine Refugees (U.N.R.P.R.) in February 1949 in a voluntary capacity. On May 1, 1950, U.N.R.P.R. was replaced by

U.N.R.W.A. and an undated "notice of employment" indicated that the complainant was employed by U.N.R.W.A. from May 1, 1950, as "Administration and Liaison Officer" in Cairo. On March 8, 1951, the complainant was granted a "mission contract" with retrospective effect to January 15, 1951, by which he was appointed Manager of the Cairo office of U.N.R.W.A. On November 19, 1951, the Administrative Division of U.N.R.W.A. notified the complainant that, as a result of the elimination of the category of "assimilated internationals" (*i.e.*, officials assimilated to internationally recruited headquarters officials), officials belonging to this category had been granted either international or area status, depending upon criteria set out in an administrative instruction, and that "thus, inasmuch as you are from the area, locally recruited and your salary established in local currency, you have been designated as an area staff member".

On April 15, 1952, the Acting Personnel Officer of U.N.R.W.A. notified the complainant of the termination of his appointment on May 31, 1952, on the ground that his post had become redundant. The complainant protested against this decision, and took sick leave, and thereafter claimed various indemnities and extensions of sick leave. The defendant organization refused some of the indemnities and offered cash payments in lieu of notice and extension of sick leave. The complainant subsequently instituted proceedings in the Egyptian courts, but recognition by the Egyptian Government of U.N.R.W.A.'s immunity from jurisdiction was requested by the Secretary-General of the United Nations. The complainant's counsel thereupon withdrew his case before the Egyptian courts and suggested in a letter to U.N.W.R.A. dated January 29, 1953, that the case be referred to arbitration. Further communications on the matter were addressed to U.N.W.R.A. on April 9, May 11 and September 18, 1953. On September 26, 1953, the Acting Director of U.N.R.W.A. wrote to the complainant's counsel proposing that the dispute should be referred to an Appeals Board to be established in accordance with United Nations practice. Such Appeals Boards comprise, in addition to the Chairman, an equal number of members designated by the administration and the Staff Association, respectively, and as their functions are advisory in character they formulate recommendations for the settlement of the disputes submitted to them, on which the Secretary-General takes the final decision. The Acting Director also stated that if the Director's final decision were unfavourable to the complainant, it would be "open to him to appeal to the Administrative Tribunal in New York". On January 20, 1954, the Chairman of the Appeals Board notified the complainant of the Board's rules, which specifically provided for a final appeal to the Administrative Tribunal in accordance with the rules of the Tribunal. On February 22, 1954, the complainant submitted a written statement to the Joint Appeals Board and on

June 23, 1954, the Board recommended that the appeal be rejected. On June 30, 1954, the complainant's counsel cabled to the Chairman of the Board to request a copy of the decision and on July 13, cabled a similar request to the Director of U.N.R.W.A. On the following day, the complainant's counsel was handed a copy of the Board's recommendations by U.N.R.W.A.'s General Counsel. On July 19, the complainant's counsel cabled to the Director of U.N.R.W.A.: " Please send decision Hilpern officially ". By letter of August 2, 1954, the General Counsel of U.N.R.W.A. confirmed the Director's acceptance of the recommendation of the Joint Appeals Board of June 23, 1954. On October 18, 1954, the complainant instituted proceedings before the Tribunal.

The defendant organization contested the competence of the Tribunal to hear and pass judgment on this case, and the complainant and the defendant organization agreed to request the Tribunal to give a preliminary judgment on the question of its competence. At the same time, the defendant organization contended that the complainant had filed his complaint out of time.

The following main contentions were made by the complainant:

(a) The Acting Director of U.N.R.W.A. clearly recognized the jurisdiction of the Tribunal in his letter to the complainant's counsel of September 26, 1953, stating that " if your client is not satisfied with the decision adopted [by the Director, after considering the report of the Appeals Board] it is open to him to appeal to the Administrative Tribunal in New York ".

(b) The Chairman of the Joint Appeals Board established by U.N.R.W.A. to consider the complainant's case communicated to the complainant's counsel the rules of the Board which provided that decisions taken by the Director of U.N.R.W.A. after consideration of the Board's recommendations, " may be the subject of appeal to the Administrative Tribunal ".

(c) In the light of the foregoing, the onus of proving that the Tribunal had no jurisdiction in the case rested on the defendant organization.

The defendant organization first drew the attention of the Tribunal to the alleged failure of the complainant to comply with the provisions of the Statute of the Tribunal in that his complaint had been filed after the expiry of the ninety days' time-limit provided for in Article 7, para. 4, of that Statute. The defendant organization then prayed the Tribunal to declare itself without competence to hear and pass judgment upon the complaint on the following main grounds:

(a) Under Article 2, para. 1, of its Statute, the jurisdiction of the Tribunal extended only to the staff members of the Secretariat of the United Nations, who were appointed by the Secretary-General under the terms of Article 101 of the Charter of the United Nations. The staff of U.N.R.W.A. were appointed by the Director of the

Agency and could not be regarded as members of the United Nations Secretariat.

(b) U.N.R.W.A. was a subsidiary organ of the United Nations, created by the General Assembly of the United Nations under Article 22 of the Charter to deal with an emergency situation. It was an autonomous and operational organ with a separate budgetary and financial organization.

(c) When it established U.N.R.W.A., the General Assembly of the United Nations recognized the special position of the Director and the staff of the Agency in Resolution 302 (IV) of December 8, 1949, which provided, *inter alia*,

> "The Director shall be the chief executive officer of the United Nations Relief and Works Agency for Palestine Refugees in the Near East responsible to the General Assembly for the operation of the programme.
>
> "The Director shall select and appoint his staff in accordance with general arrangements made in agreement with the Secretary-General, including such staff rules and regulations of the United Nations as the Director and the Secretary-General shall agree are applicable, and to the extent possible to utilize the facilities and assistance of the Secretary-General."

(d) In accordance with the above-cited provisions of Resolution 302 (IV), an agreement regarding the staff of the Agency was concluded by an exchange of letters between Mr. Byron Price, Assistant Secretary-General of the United Nations in charge of administrative and financial services (letters of June 28 and August 16, 1950) and Major-General Kennedy, Director of U.N.R.W.A. (letter of September 15, 1950). This Agreement provided that Chapter 15 of the United Nations Staff Rules, and the interpretations and conditions thereof, as prescribed in the draft *Mission Manual* issued on January 19, 1950, should, except when otherwise specified, be generally applicable to the staff of U.N.R.W.A. Chapter 15 of the Rules contained a reference to another Chapter (Chapter 10) which provided for access to the Administrative Tribunal (Staff Rule 149). When the Director of U.N.R.W.A. gave his consent on September 15, 1950, the right of appeal to the Tribunal for mission staff had, since August 17, 1950, been deleted from the Rules, and although this right was restored on July 1, 1951, the complainant's appointment of March 8, 1951, was granted at a time when the Staff Rules did not entitle him to appeal to the Tribunal.

(e) The Director of U.N.R.W.A. never intended to grant to the staff of the Agency the right to appeal to the Administrative Tribunal. The Staff Rules issued by the Director on January 23, 1952, contained no reference to the right of appeal to the Tribunal and it must be presumed that the body of rules then issued were agreed to by the Secretary-General of the United Nations. The mere statement made by the Acting Director of U.N.R.W.A. in his letter of September 26, 1953, to the complainant's counsel indicating the possibility of an appeal to the Tribunal was not in itself sufficient to confer jurisdiction upon the Tribunal.

(f) The complainant never enjoyed the status of an internationally-recruited staff member, either in fact or in law. The fact that he was regarded for a time as an " assimilated international " gave him only certain benefits in connection with leave and indemnities.

Held: that the Tribunal was competent to hear the complaint. Access to the Tribunal was not restricted to officials of the Secretariat of the United Nations *stricto senso*, and provision had been made to give the complainant access to the Tribunal.

As to the alleged tardiness of the complaint, the claimant was not out of time. The ninety days' time-limit for the submission of complaints should not run from the date of the communication of an Appeals Board recommendation, which is purely advisory, but should run from the date of the communication of the decision of the executive head, which is final; and that the complaint was submitted within the prescribed time-limit.

The Tribunal said: " [1. *Competence of the Tribunal.*] The Respondent has argued at length that the Administrative Tribunal of the United Nations is not competent to hear the application submitted to it by a former staff member of U.N.R.W.A. for the reason that the Statute of the Tribunal does not give it jurisdiction in such cases.

" This application is against the decision of the Director of the Agency of which the Applicant was informed by letter dated August 2, 1954. The Director accepted the recommendation of the Joint Appeals Board, rejecting the Applicants' requests for additional sick leave, for a termination indemnity and for a special indemnity for unjustified termination.

" The Applicant has sought the Tribunal's decision on this question, pointing out that, in a letter dated September 26, 1953, the Acting Director of the Agency had informed Applicant's counsel that he could appeal to the "Administrative Tribunal in New York". Furthermore, the Applicant relies upon the fact that the Agency's rules concerning the Joint Appeals Board, communicated to Applicant's counsel by letter of January 20, 1954, specifically mentioned under Section C, Procedures, (e), that appeals against decisions taken by the Director of the Agency after consideration of the Board's recommendation may be submitted to the Administrative Tribunal in accordance with the rules of this Tribunal. Article 2, para. 3 of the Statute of the Tribunal provides that ' In the event of a dispute as to whether the Tribunal has competence, the matter shall be settled by the decision of the Tribunal '.

" In challenging the Tribunal's competence, the Respondent first maintained that under the provisions of its Statute the Tribunal can pass judgment only upon application from staff members of the United Nations Secretariat. The Respondent made a lengthy and detailed statement in support of his contention that the staff of the Agency, while attached to the United Nations, nevertheless could not be regarded as staff members of the United Nations Secretariat. It was furthermore argued that, even if it could be claimed that those members of the Agency's staff who were recognized as internationally recruited under the terms of the Agency's Administrative Instruction 106, were staff members of the United Nations Secretariat, in no event would it be possible to assimilate locally recruited staff to staff members of the United Nations Secretariat. The Respondent contends that the Applicant has never, either in fact or in law, enjoyed the status of an internationally recruited staff member; the fact that he was regarded as an ' assimilated international ' until November 19, 1951 gave him only certain benefits in connexion with leave and indemnities.

" The Respondent bases his argument on the premise that the Tribunal is competent to hear applications from staff members of the United Nations Secretariat only, and that a person who cannot legally be regarded as a member of that Secretariat has no right to appeal to the Tribunal. It is clear, however, that it was not the General Assembly's intention to limit the jurisdiction of the Administrative Tribunal in this way.

" The Tribunal observes that the jurisdiction of the Tribunal may be extended under Article 12 of the Statute to any specialized agency, upon the terms established by a special agreement to that effect between such agency and the Secretary-General of the United Nations.

"Again, Article 2 of the Statute provides that the Tribunal is competent to hear disputes concerning the non-observance of staff pension regulations. As the pension scheme covers both the staff of the Secretariat of the United Nations and the staffs of certain specialized agencies, the General Assembly in Resolution 678 (VII) of December 21, 1952 recommended that ' the appropriate governing organs of the specialized agencies concerned accept the jurisdiction of the United Nations Administrative Tribunal in matters involving applications alleging non-observance of Pension Fund regulations ", Thus the General Assembly has recognized that in certain situations staff members who are not members of the United Nations Secretariat may have access to the Tribunal.

" The Tribunal notes that in Resolution 302 (IV), para. 9 (b), the General Assembly provided that the Director of the Agency should select and appoint his staff in accordance with general arrangements made in agreement with the Secretary-General, including such of the staff rules and regulations of the United Nations as the Director and the Secretary-General should agree to be applicable. In this Resolution the General Assembly did not specify any particular form for such an agreement between the Secretary-General and the Director.

" It would appear that the exchange of letters between Mr. Byron Price, Assistant Secretary-General, in charge of Administrative and Financial Services, and Major-General Howard Kennedy, Director, U.N.R.W.A., dated June 28, 1950 and September 15, 1950, constituted a written agreement. The staff rules proposed by Mr. Price in the said letter included provision for access to the Administrative Tribunal. Even if serious doubts arose subsequently as to the exact rules applicable to the staff of the Agency, the Tribunal is not aware of any modification of para. 9 (b) of Resolution 302 (IV), whereby any of the Staff Rules and Regulations agreed between the Director and the Secretary-General are of full effect.

" The Tribunal notes that, in a telegram addressed to the Minister for Foreign Affairs of Egypt, the Secretary-General formally requested jurisdictional immunity for the Agency in the matter of a claim for damages which the Applicant had presented to the Egyptian courts in connection with his termination by the Agency. The Secretary-General also stated in his telegram:

> ' Resort to local courts by Hilpern on internal question involving terms of his service with the United Nations not only violates principle of international employment but is further unjustified because internal appellate recourse is available to him.'

This was a clear indication of the Secretary-General's formal recognition of the existence of an appeals procedure to which the Applicant could have recourse. Furthermore, the Acting Director of U.N.R.W.A. wrote to the Applicant's counsel on September 26, 1953 in part as follows:

> ' Mr. Hilpern has asked that his case be considered in accordance with U.N. practice. I am sure that you will agree with me that in so doing, we cannot depart from the procedure which has been laid down by the United Nations for dealing with personnel matters, namely, that any dispute or complaint should in the first instance be considered by an Appeals Board, which, after considering the case, makes its recommendations to the Director. Should the decision adopted by the Director on the strength of those recommendations not prove acceptable to the appellant, he may appeal to the Administrative Tribunal . . .'

Near the end of the same letter the Acting Director added ' If your client is not satisfied with the decision adopted, it is open to him to appeal to the Administrative Tribunal in New York.' Thus it appears to the Tribunal that the Acting Director of the Agency was at that time in no doubt that the entire appeals procedure established by the United Nations Staff Regulations and Rules was available to the Applicant.

" Finally, the Tribunal notes that the Chairman of the Appeals Board informed the Applicant's legal counsel by letter of January 20, 1954 that the Agency's rules concerning the Board ' are closely modelled on those of the United Nations '. The final paragraph of these rules provides as follows:

> ' Appeals against such decisions may be submitted to the Administrative Tribunal in accordance with the rules of this Tribunal.'

Thus the Director of the Agency, in drawing up the rules, provided to the Applicant the right of appeal to the Tribunal. It is clear, therefore, that at this stage at least the Secretary-General and the Director of the Agency were in agreement that the United Nations Staff Regulations and Rules concerning the right of appeal to the Tribunal were available to the Applicant.

" In view of the foregoing, the Tribunal, without making any findings on other issues, decides that it has jurisdiction to consider the merits of this case."

" [II. *Tardiness of the Complaint.*] The competence of the Tribunal to hear this case has been challenged [on the ground] . . . that it was not receivable because filed too late . . .

" The Respondent contends that the unfavourable recommendation of the Joint Appeals Board of U.N.R.W.A. was communicated to the Applicant on July 14, 1954, and that, by filing his application to the Tribunal on October 18, 1954, the Applicant exceeded the time limit of 90 days prescribed in paragraph 4 of Article 7 of the Statute of the Tribunal. The Respondent draws the attention of the Tribunal to the failure on the part of the Applicant to comply with the procedural requirement and offers to leave it to the Tribunal to decide whether to apply the provisions of para. 5 of Article 7 of the Statute, which states:

> ' In any particular case the Tribunal may decide to suspend the provisions regarding time limits.'

" The record shows that the Applicant, through his counsel, received the recommendation of the Appeals Board on the date indicated, but did not receive the decision of the Director of U.N.R.W.A. thereon until some time after August 2, 1954, which was the date of the letter in which the Director confirmed the original decision. In accordance with the Staff Rules and practices of the U.N. on which the rules of the U.N.R.W.A. Board were modelled the Board does not take a decision but merely advises the Head of the Organization who then communicates his final decision to the staff member concerned. Accordingly, the Tribunal rules that the application was made within the time limit required by Article 7 of the Statute of the Tribunal."

[Report: *Judgment No.* 57 *of the Administrative Tribunal of the United Nations*: *U.N. Document AT/DEC/*57.]

NOTE.—See, to the same effect, *Morrow* v. *Secretary-General of the United Nations* (*International Law Reports*, 1952, p. 491) and *Desgranges* v. *International Labour Organization* (*ibid.*, 1953, p. 523).

International Organization—Officials—Dismissal of—Competence of Officials—Periodic Reports—Review by Personal Selection Committee or Appeals Board—Necessity for.

CHATTOPADHYAY *v.* SECRETARY-GENERAL OF THE UNITED NATIONS.

Administrative Tribunal of the United Nations. September 9, 1955.

(Madame Paul Bastid, President; Lord Crook and Petrén, Vice-Presidents; Lashly, Alternate.)

THE FACTS.—This was an appeal by Kamal Kumar Chattopadhyay, former Deputy Director of the Information Centre of the United Nations at New Delhi, against a decision dated July 25, 1953, of the Secretary-General to terminate his temporary-indefinite appointment. He also claimed compensation for wrongful dismissal.

The applicant entered the service of the United Nations on January 1, 1947, under a temporary-indefinite appointment, as Acting Chief of the New Delhi Information Centre. He had previously served in the New Delhi Office of the League of Nations and, at the time of his engagement by the United Nations, held the post of Principal Secretary. From September 5, 1948, the applicant served under fixed-term appointments for a period of three years. On September 5, 1951, he again received a temporary-indefinite appointment. By letter dated November 21, 1952, the applicant was advised that his within-grade increment, due on January 1, 1953, would be withheld. By letter dated December 16, 1952, the Department of Public Information informed the applicant that "final decision consequent on the Report 'below standard' for 1951 has not been taken inasmuch as the Review of the staff by the Personnel Selection Committee is contemplated and final decision will be forthcoming when this Review in respect of yourself has been completed."

On July 25, 1953, the Director of Personnel notified the applicant orally of the decision to terminate his appointment. This decision was confirmed by the Bureau of Personnel by cable and letter dated August 13, 1953, and the termination was stated to be effective from September 15, 1953. On August 18, 1953, the applicant cabled to the Director of Personnel asking for reasons for the termination. He also wrote on August 31, 1953, to the Assistant Secretary-General in charge of Administrative and Financial Services, requesting that the decision to terminate his appointment be reviewed. On the same day the Director of Personnel cabled to the applicant stating that the decision had been taken in the interests of the United Nations, in accordance with Staff Regulation 9.1 (c), on the ground of unsatisfactory services as shown by the periodic reports for 1951 and 1952. On September 3, 1953, the applicant wrote to the Assistant Secretary-General in charge of Administrative and Financial Services pointing out that the periodic report for 1952 had never been communicated to him, and appealing against dismissal. On September 7, 1953, the applicant received his periodic report for 1952, and on October 3 he filed an appeal with the Joint Appeals Board at Headquarters. The Board reported to the Secretary-General on November 12, 1954, that it found no grounds upon which to recommend reconsideration of the termination, but mentioned that the procedure followed by the Administration was open to some criticism. The Secretary-General wrote to the applicant under date of November 16, 1954, confirming the decision to terminate the appointment. On February 23, 1955, the applicant instituted proceedings before the Tribunal.

The applicant's principal contentions were:

1. The decision to terminate his appointment and the reasons alleged for it were improper and motivated by prejudice. The applicant's adverse periodic report for 1952, which was given as one of the reasons for dismissal, was not in existence on August 13, 1953, when the applicant was given notice. It was, in fact, signed by the applicant's supervisor on August 18, 1953, and communicated to the applicant on September 7, 1953.

2. The applicant's periodic report for 1951, signed by the Director of the Information Centre on December 20, 1951, contained favourable remarks about the applicant's work. On Feburary 25, 1952, at the request of the Director of Management and Circulation, Department of Public Information, and without the applicant's knowledge, the Director of the Centre sent to Headquarters certain explanations in which he reversed the position taken by him in the periodic report. Reference was also made to earlier reports which were never brought to the applicant's notice.

3. The reasons for dismissal advanced by the Administration, namely, unsatisfactory service and the interests of the United Nations, were not true reasons. The applicant's dismissal was brought about as a result of personal prejudice entertained against him by the Director of Management and Circulation, DPI, and by the Director of the Information Centre.

4. The procedure followed by the Administration in terminating the applicant's appointment was irregular. Staff Rule 112.6 prescribed that periodic reports containing adverse remarks should be shown to the staff member concerned. The periodic report for 1951, in which the Director of the Centre rated the applicant as " above average—taking the local standards as basis for judgment ", was signed by both the Director and the applicant on December 20, 1951. On February 25, 1952, the Director of the Centre sent a memorandum to Headquarters containing adverse comments in explanation of the periodic report without the knowledge of the applicant. The memorandum also alluded to previous adverse reports which were never communicated to the applicant, in violation of the above Staff Rule.

5. The applicant contended that he was entitled to have his case considered by a special appeals board before which he could appear. The Administration refused the request of the Staff Committee that the Personnel Selection Committee should consider the applicant's case at New Delhi and also declined to appoint an *ad hoc* committee locally, as provided in Staff Rule 111.4 (b).

6. After receiving notice that his within-grade increment for 1953 was being withheld, the applicant was informed by the Administration, by letter dated December 16, 1952, that final action on his case would be communicated to him as soon as his case had been reviewed by the Personnel Selection Committee. The applicant contended that respondent was obliged to submit his case to the Committee referred to before terminating his appointment.

The respondent's contentions were:

1. The termination was in strict accord with the terms and conditions of the applicant's temporary appointment. Under Staff Regulation 9.1 (c), a temporary appointment was subject to termination when such action was in the interests of the Organization, and it was clear that the Secretary-General was the sole judge as to whether or not the interests of the Organization justified the termination. In the present case, the Secretary-General reached the conclusion that the applicant's services had been unsatisfactory and that he did not measure up to the standards required for a permanent career in the Secretariat.

2. The Secretary-General's judgement of the applicant's qualities and performance was not reviewable by the Tribunal as such review would be contrary to the clear wording of Staff Regulation 9.1 (c) and to the interpretation given to it by the Tribunal itself (Judgments No. 14,[1] 21,[2] 24[3]). Even if the applicant had been able to produce a uniform record of good service with the Secretariat—which was not so in the present case—the Secretary-General would still have had the power, under Regulation 9.1 (c), to terminate his temporary appointment if, in his opinion, " such action would be in the interest of the United Nations " (Judgment No. 26[4]).

3. The applicant's charge of prejudice was unfounded and was not substantiated by any evidence. The applicant cited and exaggerated certain incidents which could not, by their importance or by the date of their occurrence, have created the prejudice alleged.

4. The respondent denied any violation of Staff Rule 112.6, which prescribed that periodic reports containing adverse comments be shown to the staff members concerned. The 1952 periodic report was received at Headquarters on August 25, 1953, after the

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[1] *Vanhove* v. *Secretary-General of the United Nations.*

[2] *Rubin* v. *Secretary-General of the United Nations* (see *International Law Reports,* 1953, p. 509).

[3] *Saperstein* v. *Secretary-General of the United Nations* (*ibid.*, p. 510).

[4] *Marjorie Zap* v. *Secretary-General of the United Nations* (*ibid.*, p. 510, at p. 512).

applicant had been given notice, and reference was made to it in the Director of Personnel's cable of August 31, 1953, to the applicant, in which he stated the reasons for the termination. The applicant was, however, shown his adverse periodic report for 1951 upon which his dismissal was based, and he was further made aware of the intentions of the Administration by the withholding of his within-grade increment for 1953.

5. The respondent denied any violation of Staff Rule 111.4 (b) in referring the applicant's appeal to the Joint Appeals Board at Headquarters. The wording of the Rule permitted the Secretary-General to choose between the Board at Headquarters, the Board at the European Office, or an *ad hoc* committee. The Secretary-General therefore acted within his discretion under Staff Rule 111.4 (b), as well as Staff Regulation 11.1, in referring the appeal to the Board at Headquarters. In any case, the applicant failed to avail himself of the right, under Staff Rule 111.3 (f), to have his appeal presented to the Board by another staff member.

6. The respondent denied that the Administration was under any obligation to submit the applicant's case to a Selection Committee before terminating his appointment. Alternatively, if the Tribunal should hold that such an obligation existed in the present case, then he would rely on the Tribunal's finding in Judgment No. 55,[1] which was to the effect that non-observance of the obligation to submit a case to a review board could not be held to affect the Secretary-General's decision to terminate the appointment of the staff member concerned.

Held: that the appeal must be rejected. The decision to terminate the applicant's appointment had been made on proper grounds and without irregularity.

The Tribunal said: " 1. The application is directed against a decision of the Secretary-General of the United Nations dated 16 November 1954 confirming the termination of the Applicant's appointment effective on 15 September 1953.

" The notification of termination, communicated by cable and letter dated 13 August 1953, does not indicate any reason for the decision. In response to an inquiry from the Applicant, the Director of Personnel cabled on 31 August 1953 as follows:

> " ' Termination deemed in interest United Nations accordance Regulation 9.1 (c) on grounds unsatisfactory service as evidenced periodic report for 1951 and 1952 which will be communicated shortly to you and by withholding salary increment due January 1953.'

Consequently the temporary-indefinite appointment of the Applicant was terminated on the basis of Article 9.1 (c) of the Staff Regulations and the grounds given were ' unsatisfactory service '.

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[1] See *Russell-Cobb* v. *Secretary-General of the United Nations* (*International Law Reports*, 1954, p. 379).]

" The Staff Rules in force at the time of the termination were those applicable as from 1 January 1953.

" 2. The Applicant contends that the periodic reports on the basis of which the decision of termination was taken were not communicated to him and were irregular. As regards the periodic report for 1951, it is clear that the Applicant at the date on which he signed the report (20 December 1951) had knowledge of only paragraphs 1 to 6 inclusive; on that date paragraphs 7 and 8 had not been completed. Nevertheless, it appears from the Applicant's memorandum, dated 5 September 1952, that at that time the periodic report was shown to him in its ' full and final form '.

" As to the periodic report for 1952, mentioned in the telegram received by the Applicant on 1 September 1953, the Tribunal notes that this report was completed after the decision of termination and was communicated to the Applicant three weeks after the date of notification of termination. Notwithstanding that the requirements concerning periodic reports had not been fulfilled, the Secretary-General was entitled to decide on termination under Staff Regulation 9.1 (c).

" 3. The Tribunal notes that the Applicant has been aware of the opinion of his supervisors since July 1952. The Director of the Management and Circulation Division, Department of Public Information, wrote to him on 15 July 1952 that the ' marking of a report as " below standard " carried with it serious consequences '. In his memorandum of 5 September 1952 to the Director of the Management and Circulation Division, the Applicant discussed at length this opinion and expressed his views upon it.

" The action in December 1952, denying a within-grade salary increment as at January 1953, was based on the periodic report for 1951. In a memorandum dated 16 December 1952, the Director of the Management and Circulation Division stated that ' final decision consequent on the Report " below standard " for 1951 has not been taken'. Thus the Applicant was warned that new unfavourable developments could arise.

" 4. The Applicant contends that the respondent was obliged before termination to submit the case to a Personnel Selection Committee. The Tribunal observes that in his memorandum, dated 16 December 1952, the Director of the Management and Circulation Division wrote:

" ' I should like to add that final decision consequent on the Report " below standard " for 1951 has not been taken inasmuch as the Review of the staff by the Personnel Selection Committee is contemplated and final decision will be forthcoming when this Review in respect to yourself has been completed. The Personnel Selection Committee is expected to resume its activities in January. As soon as the decision is reached I will immediately communicate it to you.'

" It is possible that this communication might have given the Applicant the impression that the Personnel Selection Committee would examine his case and that the decision taken by the Respondent without the recommendation of such Committee was irregular. Nevertheless, under the Staff Rules then in force, the Secretary-General had no obligation to present the case to a Selection Committee before taking a decision.

" 5. The Applicant contends that he was entitled to have his case considered by a special Appeals Board before which he could appear.

" The Tribunal notes that, under Staff Rule 111.4 (b), the Secretary-General has full discretion in deciding whether the case of a staff member who is attached to an office outside Headquarters and the European Office may be brought before the Joint Appeals Board at Headquarters, the Board at the European Office, or a board specially constituted for the purpose.

" It is regrettable that there was a delay of thirteen and a half months before the Applicant was given any knowledge of the decision taken on the recommendation of the Appeals Board.

" 6. Finally, the Tribunal must determine whether the decision of termination was vitiated by improper motive resulting from the animosity of the Applicant's supervisors.

" The record shows that there were certain difficulties between the Applicant and his supervisors, but it appears that these difficulties arose as a result of differences of opinion on questions concerning the transaction of business within the Office. Before taking the decision of termination, the Secretary-General had at his disposal a full statement of the Applicant's point of view. The Tribunal finds that the decision of the Secretary-General was not vitiated by improper motive. . . ."

[Report: *Judgments of the United Nations Administrative Tribunal*, 1950–1957, Judgment No. 58, p. 306.]

International Organization—Officials—Termination of Contract of Employment—Necessity to Prove Impossibility of Performance —Finding that No Other Suitable Post Available—Effect of Hastily Taken Decision—Compensation for Wrongful Dismissal.

BULSARA *v.* SECRETARY-GENERAL OF THE UNITED NATIONS.

Administrative Tribunal of the United Nations. August 22, 1957.

(Madame Paul Bastid, President; Lord Crook and Petrén, Vice-Presidents; Venkataraman, Alternate.)

THE FACTS.—This was an appeal by Jal Feerose Bulsara, former Social Services Expert of the United Nations Technical Assistance Administration, against three decisions of the Secretary-General relating to the applicant's employment. The applicant entered the service of the United Nations on June 24, 1949, under a fixed-term appointment for one year (later extended to two years) as Far Eastern representative of the Division of Social Activities, stationed at Bangkok. On June 24, 1951, he received a temporary-indefinite appointment as Far Eastern Social Welfare Representative–Technical Assistance Administration at Bangkok. In the latter part of 1952, the applicant was appointed Chief of a Technical Assistance Social Services Mission to Burma and occupied that post until July 1953, when the Mission concluded its work. On January 1, 1953, the applicant was transferred to the United Nations Technical Assistance Administration as Regional Social Welfare Adviser (still stationed at Bangkok.)

On February 1, 1954, the applicant was detailed, as a Social Services Expert, to the United Nations Technical Assistance Administration in Burma. The applicant's employment position was reviewed in December 1954 by the Review Board, which, in its report of December 30, 1954, stated that it was " not in a position to judge whether Dr. Bulsara possesses all the requirements for career service in the Secretariat and is therefore unable to recommend a permanent appointment. The Board would like to add that probably only an assignment of a certain duration at Headquarters would furnish sufficient evidence on which to base a final appraisal." On March 8, 1955, the Bureau of Personnel notified the applicant that the Secretary-General " has decided that he is unable to offer you a permanent appointment and . . . instructed that your temporary appointment be terminated upon the completion of your present assignment as an expert to the Government of Burma, *i.e.*, with effect on December 31, 1955."

On March 19, 1955, the applicant requested reconsideration of the decision to terminate his appointment and on April 14, 1955, submitted the matter to the Joint Appeals Board. On November 28, 1955, the Technical Assistance Administration cabled to the applicant offering him an extension of his services for one year after December 31, 1955. Having been informed that the proposed appointment was a fixed term one (the termination of his temporary-indefinite appointment being maintained), the applicant rejected the terms but stated that he was prepared to continue his service in Burma for three months on certain conditions. This offer was not accepted by the Technical Assistance Administration, and the applicant left Burma at the end of December 1955. In the meantime, the Joint Appeals Board, in its report of December 22, 1955, recommended to the Secretary-General that " Appellant might be granted a fixed-term appointment in the Secretariat extending until the normal retirement age and carrying financial benefits at least equal to those attaching to a permanent appointment or, if such an appointment is not feasible, a project personnel appointment on the same basis in a post where his valuable knowledge of Far Eastern conditions may be utilized." On January 17, 1956, the Director of Personnel sent to the applicant a copy of the report of the Joint Appeals Board and stated that the Secretary-General had decided to adopt the Board's suggestions and recommendations and proposed an offer of a fixed-term appointment effective from January 1, 1956, until the date on which the applicant would reach retirement age (August 31, 1959), for service as a Technical Assistance Expert in the field of Social Services in Burma or in another country in the Far East. The Director of Personnel also pointed out that should such an assignment prove not to be feasible in the near future, the applicant would receive proper notice of termination and indemnity under the Rules governing project personnel appointments and under a special term of appointment made in his case. The applicant, by letter of February 17, 1956, advanced counter-proposals which were rejected on March 2, 1956, by the Director of Personnel who, at the same time, re-affirmed his previous offer, setting March 19, 1956, as the date-line for acceptance by the applicant. On March 17, 1956, the applicant accepted the offer of the Director of Personnel. By letter of March 20, 1956, the applicant asked the Director of Personnel to return him to the post of Regional Social Welfare Adviser in Bangkok from which he had been detailed to Burma. On April 11, 1956, the Director of Personnel informed the applicant that the post in Bangkok did not exist at the time, but that it had been decided in consultation with the Technical Assistance Administration to submit the applicant's name as a candidate for the post of Adviser in Social Welfare in the Philippines. On May 10, 1956, the applicant was put on special leave with full pay, since his annual leave was exhausted. On July 11, 1956, the Administration wrote to the applicant that the Philippines Government had selected another candidate and that " In view of this decision by the Philippines and in the absence of any other vacancies for which we could propose your candidature, we have no alternative but to terminate your project personnel appointment." At the request of the applicant the Secretary-General agreed that his application should be submitted directly to the Tribunal in accordance with Article 7 of the Statute. On August 28, 1956, the application was filed, but without the supporting documents, which were received on September 24 and completed on October 16, 1956.

The applicant's principal contentions were:

1. The notice of termination of the applicant's Technical Assistance project personnel appointment given in the letter of the Deputy Director of Personnel of July 11, 1956, was *mala fide* and invalid in law and equity.

2. The Administration accepted but failed to carry out the recommendation of the Joint Appeals Board of December 22, 1955, for the applicant's further employment on a fixed-term appointment

in the Secretariat or, alternatively, on a project personnel appointment. It could have done so by retaining the applicant in his post as Social Welfare Consultant to the Burmese Government throughout 1956 on his temporary-indefinite contract or returning him, as he requested, to his former post as Far Eastern Social Welfare Adviser at Bangkok.

3. After the Joint Appeals Board had given its favourable opinion in December 1955, the Administration had no intention of retaining the applicant's services and deliberately contrived to prevent him from obtaining any United Nations post in South-East Asia.

4. The Administration issued on October 19, 1954, a periodic report on the applicant's services containing adverse comments upon his work as Chief of the United Nations Social Services Mission to Burma. The report was made fifteen months after the termination of the Mission's work, and the applicant had received no previous indication of dissatisfaction with his services. The report was based on letters written to Headquarters in 1953, without the knowledge of the applicant, by members of the Mission and by Technical Assistance officials. These letters were not disclosed to the applicant until their production by the Administration before the Joint Appeals Board in November 1955.

5. The Administration failed to comply with Staff Rule 112.6 by not making a periodic report on the applicant's services between June 1951 and October 1954.

6. The Administration recommended to the Review Board that the applicant's services should be terminated, but failed to advise him of this decision prior to his appearance before the Board in December 1954.

7. In its report on the applicant dated December 30, 1954, the Review Board failed to comply with Staff Rule 104.13 by making none of the recommendations prescribed, *viz.*, permanent appointment, one year's probation or termination of service.

8. In the letter of March 8, 1955, terminating the applicant's appointment, the Administration purported to act in the light of the Review Board's report, whereas before the Joint Appeals Board in November 1955 it denied that the termination was connected with the report in question.

9. In spite of the Joint Appeal Board's favourable recommendation to the Secretary-General, the Administration continued to show prejudice towards the applicant by offering him on January 17, 1956, a one-sided and conditional offer which the applicant at first refused. The applicant only accepted this offer after the Permanent Representative of India to the United Nations had obtained an assurance from the Secretary-General's office and from the Director of Personnel that the offer was one of uninterrupted tenure until the age of retirement.

10. The Administration's action in taking the second termination decision of July 11, 1956, was part of a premeditated scheme to get rid of the applicant by making a fictitious offer of employment.

11. The applicant having accepted the offer of an appointment on March 17, 1956, the Administration failed to comply with Staff Regulation 4.1 and Annex II thereof and Staff Rules 204.1, 204.2 and 204.6 by not issuing a letter of appointment to the applicant and by not giving him a medical examination.

12. The treatment accorded to the applicant during the last three and a half years of his service with the United Nations clearly proved that the Administration was motivated by prejudice in its dealing with him.

The applicant requested:

(a) rescission of the Secretary-General's decision of March 8, 1955, not to grant him a permanent appointment and to terminate his temporary-indefinite appointment;

(b) rescission of the Secretary-General's decision of April 11, 1956, not to return the applicant to his former post of Regional Social Welfare Adviser at Bangkok;

(c) rescission of the Secretary-General's decision of July 11, 1956, terminating the applicant's project personnel appointment;

(d) that the Secretary-General be ordered to implement the unanimous recommendation of the Joint Appeals Board of December 22, 1955, which had been approved by the Secretary-General, " that Appellant might be granted a fixed-term appointment in the Secretariat extending until the normal retirement age and carrying financial benefits at least equal to those attaching to a permanent appointment, or if such an appointment is not feasible, a project personnel appointment on the same basis in a post where his valuable knowledge of Far Eastern conditions may be utilized "—the latter appointment being clearly feasible by the applicant's appointment as Regional Social Welfare Adviser or Chief of the Social Welfare Division in the ECAFE region at Bangkok;

(e) that the Secretary-General take disciplinary action or arrange for such action to be taken against certain officials of the United Nations Secretariat, the World Health organization, and the Technical Assistance Administration who allegedly conspired against the applicant;

(f) in the event that the Secretary-General should avail himself of the option given to him under Article 9 of the Statute of the Tribunal, and as an alternative to orders under (d) above, the applicant requested payment of compensation as follows:

(i) full salary for the applicant's remaining months of service until the date of retirement (August 31, 1959), exclusive of the termination indemnity, repatriation grant and other payments and perquisites accruing to him under Staff Rules and Regulations; or

(ii) lesser compensation but, in any case, not less than the equivalent of two years' net base salary, exclusive of other payments and perquisites due to him under the Staff Rules and Regulations; or

(iii) lesser compensation but, in any case, not less than an amount equivalent to

1. termination indemnity of five months' net base salary due under Staff Rule 109.3, Annex III (a), for termination of the applicant's temporary-indefinite appointment on December 31, 1955; plus
2. repatriation grant of sixteen weeks' net base salary to which the applicant was entitled under Staff Regulation 9.4; plus
3. termination indemnity under Staff Rule 209.4 (a) of thirty-six weeks' net base salary for thirty-six months of uncompleted service by reason of the termination of the applicant's project personnel appointment on July 20, 1956; plus
4. compensation for mental anguish, injury to reputation and loss of professional opportunity outside the United Nations.

(g) that the Tribunal adjudge whether a week in the Rules for Indemnity Payment and Repatriation grant was correctly construed by the respondent as a week of five days, or whether payment should be made for a week of seven days.

The respondent's principal contentions were:

1. The decision of termination dated July 11, 1956, was taken strictly in accordance with the terms of the applicant's fixed-term appointment, which expressly provided that the applicant's appointment would be terminated (with a generous special indemnity) if an assignment as a Technical Assistance Expert in the field of Social Services in the Far East proved not to be feasible. As the applicant did not wish to continue to serve in Burma, the Administration made a diligent search to find an assignment suitable to the applicant's qualifications elsewhere. Thus there was no improper motive in this decision or any other decision taken by the Administration with respect to the applicant's employment.

2. The Administration's evaluation of the applicant's services on the Burma Mission was made known to him in proper time, and particularly in June and July 1953 and in February 1954, as well as in the periodic report of October 19, 1954. This evaluation was wholly free from any improper motive, as was proved by the fact that the applicant remained in the service of the United Nations for three years after the Mission and that serious efforts to place him were continued down to October 1956.

3. There was no legal irregularity in the Administration's decision of March 8, 1955, not to grant the applicant a permanent appointment and to terminate his temporary-indefinite appointment as from December 31, 1955, after the Review Board had made no specific recommendation. The Review Board was not compelled by the Staff Rules to advise the Secretary-General on a course of action when it found itself unable to make any sound recommendation by reason of some circumstance such as long absence of a staff

member from Headquarters. The applicant held a type of appointment which the General Assembly desired to have abolished. It was therefore necessary to review his contractual status. While the Secretary-General's Bulletin ST/SGB/94/Amend.1 had been fully complied with by the submission of the applicant's case to the Review Board, the respondent's wide discretionary authority in the matter of appointments and terminations of appointments remained unimpaired under Staff Regulation 9.1 (c).

4. The decision taken by the Administration on March 8, 1955, had no direct causal connection with the report of the Review Board. During a part of the applicant's career, his services had been evaluated as unsatisfactory on the ground of lack of leadership and failure to make effective use of his colleagues. This constituted a reasonable ground for not giving him a permanent appointment, especially in view of his senior grade where such qualities were particularly important.

5. Evidence of absence of any personal hostility against the applicant was demonstrated by the fact that he was offered a further appointment in Burma on November 29, 1955, during the pendency of the proceedings before the Appeal Board.

6. Following the applicant's acceptance on March 17, 1956, of the appointment offered to him on January 17, 1956, no Letter of Appointment was prepared because, in spite of the Administration's efforts, no post could be found for the applicant. He suffered no injury by reason of the absence of a Letter of Appointment, because the terms of his appointment were perfectly clear from the Staff Rules (which had been sent to him) and from the correspondence which the applicant had exchanged with the Director of Personnel and the Technical Assistance Recruitment Services.

7. There was evidence that the applicant sought to involve at least one Government in his employment problems, a course which was difficult to reconcile with full compliance with Staff Regulations 1.4 and 1.5.

8. As to the applicant's request for rescission of the Secretary-General's decision not to grant him a permanent appointment, the respondent referred the Tribunal to Judgment No. 46 in which it was stated that, in view of the provisions of Staff Regulation 4.1, it was not for the Tribunal to decide what kind of contract a staff member was entitled to receive. This ruling would also be applicable to the applicant's claim to be assigned to his former post as Regional Social Welfare Expert at Bangkok.

9. This was not a case of prejudice of the Administration against the applicant, but one of prejudice on the part of the applicant against the Administration.

Held: that the appeal must succeed. The termination of the applicant's appointment would have been justified only if the contract became impossible of performance or an assignment did not prove feasible, which the respondent had failed to establish. Since the name of the complainant was submitted for one post only, the decision that no other suitable post was available was taken in haste and without due regard to his qualifications, and that decision was influenced by impressions formed on conflicting evidence and unverified confidential correspondence. The complainant was awarded one year's salary as compensation.

The Tribunal said: " 1. In order to determine the claims of the Applicant, it is necessary to ascertain the nature of the contract and the terms and conditions therof subsisting between the Applicant and the Respondent as of 20 July 1956 when the final separation [dismissal] of the Applicant took effect.

" 2. The Applicant's contention that he continued on a temporary-indefinite appointment till 20 July 1956 is untenable for the following reasons:

" (a) the letter of termination of the Applicant's temporary-indefinite appointment dated 8 March 1955 effective from 31 December 1955, was not withdrawn, waived or rescinded at any time;

(b) there was no compromise between the Applicant and the Respondent before the Joint Appeals Board having any kind of contractual force as pleaded by the Applicant.

" 3. The Tribunal therefore holds that the Applicant's temporary-indefinite appointment came to an end on 31 December 1955.

" 4. On 17 January 1956, the Respondent made an offer of a fixed-term appointment under the rules governing project personnel appointments and extending to 31 August 1959. The offer further stated that the appointment would be effective from 1 January 1956. The Respondent further clarified the salary entitlement under the offer in Annex No. 29. On 17 March 1956, the Applicant accepted the offer. The Tribunal therefore concludes that the subsisting contract between the Applicant and the Respondent on the date of separation was the one created by the aforesaid offer and acceptance.

" 5. It follows that the Applicant's contractual status, as well as his entitlements, are governed by the terms and conditions contained in Annexes Nos. 27 and 29 and 31.

" 6. The contract spelled out from the correspondence set out above, provided as follows:

> " (i) That the Applicant was not entitled to a permanent appointment in the Secretariat;
>
> " (ii) That the Applicant was granted a fixed-term appointment effective from 1 January 1956 till 31 August 1959 under the rules governing project personnel appointments;
>
> " (iii) That if such an assignment proved not to be feasible in the near future, the Applicant was entitled to an indemnity in conformity with the rules governing project personnel appointment[s];

> " (iv) That if, after resuming duty, it became necessary to terminate the appointment of the Applicant, the Applicant would be entitled to an indemnity not less than the amount due to him on 31 December, 1955;
>
> " (v) That, on final separation from the services of the United Nations, the Applicant would receive repatriation grant based on the temporary-indefinite appointment ending on 31 December, 1955;
>
> " (vi) That the annual leave accrued to the Applicant would be carried over to his account under the fixed-term appointment;
>
> " (vii) That the Applicant would be allowed to continue as a member of the Joint Staff Pension Fund;
>
> " (viii) That the salary would be the same as under the temporary-indefinite appointment including within-grade increment due to the Applicant on 1 January 1956.

" 7. Pursuant to the above agreement, it is stated by the Respondent, and denied by the Applicant, that form P-5 relating to the employment of the Applicant was transmitted. The Tribunal considers that the receipt or otherwise of the said document by the Applicant does not in any way materially affect the decision in this case. Regulation 4.1 applicable to the present case provides:

> " Upon appointment each staff member shall receive a letter of appointment in accordance with the provisions of Annex II to the present regulations."

Rule 204.1 provides that all contractual entitlements of project personnel shall be strictly limited to those contained expressly or by reference in their letters of appointment. Rule 204.2 provides that the appointment of project personnel shall take effect from the date on which they may enter into official travel status to assume their duties or from the date on which they start to perform their duties.

" 8. The Applicant was not given any letter of appointment in accordance with the above provisions as he was not appointed to any post. On a reading of the letters exchanged and the relevant provisions of the rules, it would appear that there was a contract *for* employment of the Applicant by the Respondent but there was no appointment as such of the Applicant.

" 9. In the absence of any such appointment as contemplated under the Rules, the purported termination of that appointment . . . should be deemed to be void. The result of this legal position is that the Respondent's obligation to specify a duty station consequent on reinstatement of the Applicant, as provided for in the Respondent's letters dated 11 April 1956 . . . and 30 April 1956 . . . would remain valid and effective and in force, unless the Respondent can show that the contract had become impossible of performance at any particular time.

" 10. The agreement for employment also provides that if an assignment proved not to be feasible in the near future, the Applicant would be entitled to proper notice of termination and to indemnity.

The burden of proof that either the contract became impossible of performance or that an assignment did prove not to be feasible, is on the Respondent. The Respondent has to establish objectively that the appointment of the Applicant was ' not feasible '. In this respect, this case would differ from the cases in which the Secretary-General has a discretion to offer or not, employment to a person and also from the line of cases in which the Tribunal has held that it will not interfere unless there has been prejudice or improper motivation in termination of an appointment.

" 11. Even on the footing that there was an appointment according to the terms of the letters exchanged between the parties, (though there was no formal letter of appointment) as contended by the Respondent, the said appointment being one for a fixed term, could be terminated only according to Regulation 9.1 (*b*) applicable to the Applicant. Regulation 9.1 (*b*) provides that

> " The Secretary-General may terminate the appointment of a staff member with a fixed-term appointment prior to the expiration date for any of the reasons specified in paragraph (a) above, or for such other reason as may be specified in the letter of appointment."

It is nobody's contention that the termination in this case was for reasons specified under Regulation 9.1 (*a*) such as abolition of post, reduction of staff or unsatisfactory service.

" 12. The only ground on which such termination could be justified was the one specified in Annex 27 that such an assignment did ' prove to be not feasible in the near future '.

" 13. The abovesaid question is a question of fact. It is not merely a question whether a bona fide endeavour was made to find a suitable assignment for the Applicant. The Tribunal has to be satisfied on the evidence placed before it whether it was not feasible to find a suitable assignment for the Applicant when the Respondent decided to ' terminate ' the Applicant's services.

" 14. The Respondent pleads that long and sincere efforts were made to place the Applicant and it was a matter of regret to the Administration that no placement was possible in his case. The Respondent stated that his efforts to place the Applicant unfortunately did not result in success. In any event, these efforts were made in good faith and therefore the Respondent claims he is absolved of any obligation to place the Applicant in a suitable position.

" 15. According to the evidence placed before the Tribunal, the name of the Applicant was forwarded only for one post, namely, that of the Social Welfare Adviser in the Philippines and it was ultimately rejected by the Philippines Government. The Applicant contends that this attempt to place the Applicant in the Philippines post was not *bona fide* and that, by adding private information, the Respondent clearly intended to spoil his chances of selection. In respect of the Philippines post, the Tribunal finds some lacunae in the evidence. In Annex No. 37, it was stated, as early as 11 April 1956, that it had been decided to submit the name of the Applicant to the Government of the Philippines. Letter No. 286 subsequently produced before the Tribunal shows that the submission was not made until 4 May 1956. There is no explanation for the delay in presentation of the candidature of the Applicant. Secondly, it is not clear from Annex No. 107 how, after the Philippines Government had expressed a preference for Bulsara, further information regarding smooth working relations between Mr. Bulsara and officials came to be requested. It is not clear whether the Government of the Philippines asked for that information. It is also not explained how the Personnel Officer, Miss Betty Whitelaw, comes to the conclusion in Annex 112 that the non-availability of Miss McCord for the Philippines post would not change the Philippines Government's reaction towards Mr. Bulsara when the Philippines Government had expressed earlier, in Annex 107, their preference for Bulsara.

" 16. The Respondent contends that the Applicant's suitability for about 28 posts in the Technical Assistance Administration was considered and that it was found that it was not possible to fit him into any one of them. On the basis of this evidence, Respondent contends that the appointment of Mr. Bulsara was found not to be feasible.

" 17. Information regarding rejection of Mr. Bulsara's candidature by the Philippines Government was received on 9 July 1956. The Personnel Officer of the Technical Assistance drew up a list of 28 posts and rejected the Applicant as unsuitable for each one of them on 10 July 1956 (Annex 112). This action was put up for approval to the Deputy Director of Personnel and [was] approved on the same day (10 July 1956—*vide* endorsement in Annex No. 112).

" 18. The Respondent's contention that even before 10 July the Applicant's suitability for these posts was long and carefully considered and that only the decision was taken on 10 July does not accord with the practice explained by the Counsel for Respondent. Counsel stated that in order to save an embarrassing situation of the person proposed not being available, the Administration proposed a person for only one assignment. Respondent pleaded this as the explanation for not proposing the Applicant to post No. 20, Social Welfare Expert in Bangkok, even though it was the considered opinion of the Administration that the Applicant was well suited to the requirements of this post and the post was uncommitted at that time, as the Administration had proposed the Applicant to the Philippines post in all good faith. It would follow therefore that the need for examination of the Applicant's suitability for other assignments would arise only after his proposal for the Philippines post was rejected. The Tribunal concludes that the alleged examination of the Applicant's suitability was made only after rejection by the Philippines.

" 19. In considering the qualifications of the Applicant, sweeping generalizations have been made which are not warranted by the facts relating to the Applicant's qualifications. The Tribunal cannot help coming to the conclusion that the decision that the appointment of the Applicant was not feasible in the near future was taken in haste and without due care and consideration.

" 20. In considering the suitability of the Applicant for the post of Regional Social Welfare Adviser at Bangkok, one of the reasons for rejection of the Applicant is stated as follows: ' Unfortunately, there is considerable evidence that Dr. Bulsara's relationships with staff are not satisfactory '. This obviously relates to his work in the Burma Mission about which the Joint Appeals Board had found that the ' evidence regarding the mission has been contradictory '. At the time when the new contract had been entered into Mr. Robertson, the Director of Personnel, stated as follows:

> " ' I very much hope that if and when you resume active duties, you will not allow events of the past to affect your attitude and work, and I sincerely welcome your assurances in this respect. There is no question that Mr. Keenleyside and myself, as well as the staff of the Technical Assistance Administration, will take the same attitude in our dealings with you and we all hope that a *new start*[1] in your relationship with the Organization will be successfully launched.'

It is apparent from the above that the Administration desired to draw a veil over the happenings in Burma and not allow the impressions of the past to influence the future course of dealings. Nevertheless, the Technical Assistance Administration based its decisions regarding the suitability of the Applicant for the post of Regional Social Welfare Adviser in the Far East on the impressions formed out of uncorroborated, *ex parte*, confidential reports of doubtful validity, to disqualify the Applicant.

" 21. The Tribunal holds that under the agreement for employment between the Applicant and the Respondent, the Respondent could have recourse to termination and payment of compensation only if an assignment proved to be not feasible. On the evidence set out above, the Tribunal holds that the Respondent has not established that the assignment did not prove to be feasible for the following reasons:—

" (a) That the name of the Applicant was submitted only for one post, and even in respect of this the evidence is incomplete and full of gaps.

" (b) That the decision that no other post was available to suit the qualifications of the Applicant was taken in haste and without due regard to the qualifications of the Applicant.

" (c) That the decision was coloured by certain impressions formed on conflicting evidence and untested confidential correspondence regarding the Burma Mission.

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[1] Emphasis supplied by the Tribunal.

" 22. From the submission of the Applicant's name for a single post and in circumstances which are not fully explained, the Tribunal cannot come to the conclusion that the Respondent had reasonably done all he could to find a position for the Applicant. The Tribunal holds that the obligation undertaken by the Respondent has not been fulfilled with due diligence.

" 23. If there was a breach of obligation undertaken by the Respondent, the question arises as to what relief is the Applicant entitled.

" 24. The Applicant's claim that he is entitled to re-instatement effective from 20 July 1956 under his temporary-indefinite appointment came to an end on 31 December 1955. Nor can the Applicant claim re-instatement as project personnel as he was never appointed as such.

" 25. The Applicant could claim specific performance of the obligation by the Respondent, namely to find a suitable assignment for the Applicant as Technical Assistance Expert. On the conclusions reached in this case, the Tribunal has no alternative as per the language of Article 9 of the Statute of the Administrative Tribunal but to order specific performance of the obligation undertaken by the Respondent, namely to find a suitable assignment for the Applicant. However, in view of the fact that the obligation undertaken under Annex 27 . . . [Secretary-General's letter dated 11 April 1956] was circumscribed by a time limit, namely the ' near future ', the parties cannot be restored to *status quo ante*. The Tribunal therefore holds that compensation, in lieu of specific performance, is the adequate and proper relief that can be granted to the Applicant.

" 26. Applicant contends that he is entitled to an indemnity based on his service up to 31 December 1955 when his temporary-indefinite contract came to an end, in addition to the indemnity provided for in the agreement for employment as project personnel and further compensation by way of damages for mental anguish, injury to reputation etc. consequent on wrongful termination.

" 27. Considering that there was no separation of the Applicant from the United Nations on 31 December 1955 but that there was only a change in the nature of his relationship with the organization;

" Considering further that the agreement for appointment as project personnel provided that compensation for loss of employment would be paid at the rate of one week for every month of unexpired service, but not less than the indemnity due to the Applicant if he were separated on 31 December 1955 and thereby absorbed the two indemnities into one obligation as set forth in Annex 27;

" The Tribunal rejects the claim for an indemnity based on the Applicant's service with the United Nations under the temporary-indefinite appointment till 31 December 1955 in addition to any other indemnity due to him.

"28. If the Tribunal had held that the Respondent had performed his obligations under the agreement, the compensation granted to the Applicant at the rate of one week for each month of service till 31 August 1959, would conclude his rights.

"29. Since the Tribunal has come to the conclusion that the Respondent has not performed his obligations, the damages would be the normal consequence of such action, the outside limit of which is the chance of employment till 31 August 1959. Taking into account the temporary nature of the appointment of Technical Experts, it would not be unreasonable to set the inside limit of such employment at one year. It is not always easy to determine precisely the actual amount of compensation to be awarded in cases of this nature. The Tribunal therefore awards compensation of the sum equivalent to one year's salary from 20 August 1956 to the Applicant 'as the true measure of compensation and the reasonable figure of such compensation' (Advisory Opinion of October 23, 1956: International Court of Justice Reports, 1956, p. 77 (at p. 100)[1]).

"30. The Applicant was on accrued leave from 1 January 1956 to 10 May 1956 and on special leave with pay from 11 May to 20 July 1956 and on pay in lieu of notice from 20 July to 20 August 1956. The Applicant has been paid compensation at the rate of one week for every month of uncompleted service for three years from 20 August 1956 to 31 August 1959. Since the Tribunal awards compensation for one year as the reasonable expectation of service, the compensation calculated and paid at the rate of one week for each month of service for that period of one year for which compensation is herein awarded (amounting to 12 weeks' salary), has to be deducted from the amount payable to the Applicant. In the result the Tribunal awards salary for nine months as compensation in addition to what has already been paid to him. Calculation of salary shall be on the same basis on which compensation has already been paid to the Applicant."

[Report: *Judgments of the United Nations Administrative Tribunal* (1958), p. 398; Judgment No. 68.]

[[1] *Judgments of the Administrative Tribunal of the International Labour Organization upon Complaints Made against the United Nations Educational, Scientific and Cultural Organization*: see *International Law Reports*, 1956, p. 517, at p. 537.]

International Organization—Officials—Termination of Appointment for Health Reasons—Absence of Provision for Recourse to Medical Referee—Decision of Secretary-General Based on Recommendation of Medical Director—Exclusion of Review of Decision by Administrative Tribunal.

COUTSIS *v.* SECRETARY-GENERAL OF THE UNITED NATIONS.

Administrative Tribunal of the United Nations. August 22, 1957.

(Madame Paul Bastid, President; Lord Crook and Petrén, Vice-Presidents; Venkataraman, Alternate.)

THE FACTS.—This was an appeal by Miss Sophy Coutsis, former Community Development Expert of the United Nations Technical Assistance Administration at Haiti, against the Secretary-General's decision not to renew her fixed-term appointment beyond August 17, 1956, on grounds of health. The applicant entered the service of the United Nations on January 11, 1954, as a Community Development Expert employed by the Technical Assistance Administration in Haiti, under a six months' fixed-term appointment. In conformity with Staff Rule 204.6, the applicant underwent a medical examination in Greece before being recruited and, on her way to Haiti, she was re-examined by the United Nations Health Service in New York; the results of both examinations were satisfactory. On June 7, 1954, in reply to an enquiry from the Technical Assistance Recruitment Office, the Medical Director of the United Health Service stated that there did "not seem to be any medical contra-indication to extending Miss Coutsis' appointment for a period of eighteen months". On July 11, 1954, the applicant's fixed-term appointment was renewed for a period expiring on December 31, 1955. In June 1955, the applicant contracted dysentery accompanied by other intestinal disorders and was treated by her private doctor in New York from June 17 to July 5, 1955. In reply to the applicant's request for reimbursement of her private doctor's fees, in accordance with Staff Rule 206.3 (a) (ii), she was informed by letter of September 1, 1955, from the Acting Chief of the Office for Latin America, Technical Assistance Administration, that the Health Service did not approve the medical expenses in question because " it appears that she was treated . . . for . . . an intestinal and liver condition which is a recurrence of the dysentery she had between 1941 and 1951 ". The applicant thereupon presented further documents from her private doctor stating that the intestinal trouble occurred during her stay in Haiti and was not a recurrence of the dysentery she had had before. On October 13, 1955, following a request from the Government of Haiti for an extension of the applicant's contract for a period of one year. the Acting Chief of the Office for Latin America, Technical Assistance Administration, informed her that the Technical Assistance Recruitment office had been asked to extend her contract after December 31, 1955. On November 2, 1955, however, he informed her that, for medical reasons, her contract would not be extended. In response to her request for an explanation, the Medical Director of the United Nations Health Service wrote to the applicant, on November 21, 1955, that his " conclusions were based on the episodes of colitis, hepatitis, vaginitis, urethritis and cystitis, as certified by your physicians, which caused you a considerable amount of ill-health during your past mission assignment ". By letter dated December 29, 1955, the Administration informed the applicant that the Medical Director of the United Nations Health Service had agreed to a four months' extension of her appointment and that, in accordance with a request she had made on November 21, 1955, she would be re-examined by the Health Service during her forthcoming visit to New York. The applicant was examined by the Health Service on January 9, 1956, and classified in category "C", which meant that, in the Medical Director's opinion, she should no longer work in the tropics. Her own private doctor, however, gave her a certificate on January 11, 1956, stating that, in his opinion, there was no medical contra-indication for her for performing her usual active duties. The applicant asked that a third medical opinion be sought, but this request was refused. She was told, however, by the Deputy Director-General of Technical Assistance Administration in January 1956 that there was no difference between the opinion of the Health Service and that of her doctor as far as her health was concerned. In February 1956 the applicant was reimbursed for her above-mentioned medical expenses, in accordance with Staff Rule 206.3 (a). On Feburary 17, 1956, the applicant signed two letters of apointment for fixed-term contracts, effective from January 1 to April 30, 1956, and from May 1 to June 30, 1956, respectively. During May 1956, the Government of Haiti requested an extension of the applicant's appointment for a further period of six months or one year. Although this request was supported by the Technical Assistance Administration Resident Representative in Haiti, the Haitian Government was advised that the applicant's state of health made it impossible to accede to it. After two further extensions of her appointment, covering the periods July 1 to August 3 and August 4 to August 17, 1956, the applicant was suspended from duty by the Organization. On August 8, 1956, the applicant underwent a final medical examination and was found by the Chief Medical Officer of the Health Service to be in good health. On August 15, 1956, the applicant asked the Secretary-General to reconsider his decision of non-renewal of her fixed-term contract as an expert in Haiti. In reply, on August 27, 1956, the Technical Assistance Recruitment Services wrote to the applicant that

> " the United Nations Medical Director has reported that there would be no present medical objection to your re-employment by the United Nations for work in a *non-tropical* area, but that he could not now

recommend your further employment by the United Nations in Haiti or in any other tropical area. I am sorry that in these circumstances we cannot ask you to accept a new appointment in Haiti, and that at present we have no suitable vacancies in non-tropical areas."

On September 18, 1956, the applicant submitted an appeal to the Joint Appeals Board, which, on January 7, 1957, decided that it would make no recommendation in support of the appeal.

On April 10, 1957, the applicant commenced the present proceedings. She requested

1. that the Tribunal, as preliminary measures:
   - (a) obtain communication of the applicant's medical file in order to
     - (i) establish, on the basis of the number of days of sick leave she had taken, whether the bacillary dysentery she contracted in Haiti in June 1955 had any ill effects on her health and her work;
     - (ii) ascertain the medical findings of the United Nations doctors who, in January and August 1956, examined the applicant and reported to the Medical Director;
   - (b) take the evidence of the applicant's doctor and of the Chief Medical Officer of the United Nations Health Service in order to establish whether they considered that the applicant was, at the time of their examinations (January and August 1956 respectively), in a condition to continue her normal duties in Haiti;
   - (c) if necessary, designate a medical expert or a panel of doctors to settle the conflict between the Medical Director's opinion and the opinions of the other doctors and ascertain whether the bacillary dysentery the applicant contracted while in United Nations employment in Haiti was an obstacle to her future employment in the tropics;
2. If the Tribunal found that the illness contracted by the applicant while in United Nations employment in Haiti was not an obstacle to her future employment in the tropics, to rescind the Secretary-General's decision not to renew her contract for health reasons and to award her compensation commensurate with the moral and material injury sustained, namely, double the salary she would have received during the period covered by a further contract of one year;
3. If the Tribunal found that the applicant's health was affected by service-incurred illness contracted while employed in Haiti and that she could not work in the tropics for a period of two years, to award her compensation as provided in Staff Rule 206.3 (b), corresponding to the salary she would have received during the period of one year.

The applicant's principal contentions were as follows:

(1) While the applicant admitted that her fixed-term contract did not entitle her to re-employment after its expiration date, she contended that the letter of October 13, 1955, in which the Acting Chief of the Office for Latin America, Technical Assistance Administration, informed her that the Technical Assistance Recruitment Office had been asked to extend her contract constituted an offer of further employment. This offer was certainly made subject to the condition precedent that the Medical Director would agree, but as the Medical Director's negative recommendation was erroneous and arbitrary, the offer of further employment must be considered as binding.

(2) The Medical Director's persistent refusal to give the applicant medical clearance was erroneous. Thus in November 1955 he was obviously still under the wrong impression that the applicant's illness in 1955 was a recurrence of a chronic dysentery and not of an acute service-incurred nature. It was also wrongly stated in the Medical Director's letter of November 21, 1955, that the applicant had suffered a considerable amount of illness during her past mission assignment. Contrary to the Medical Director's opinion, the applicant was fit for further service in Haiti at the date of her suspension from duty. The Medical Director's erroneous findings were challenged by the applicant's own doctor, with whose views the Chief Medical Officer of the United Nations Health Service concurred.

(3) When the case came before the Joint Appeals Board it was not possible to obtain production of the applicant's medical file, or to take the evidence of the applicant's doctor and of the Chief Medical Officer of the Health Service, or to secure the appointment of a panel of doctors to pronounce upon the conflict of opinion.

(4) The Medical Director claimed before the Joint Appeals Board that it was his established practice not to recommend the employment in tropical areas for at least two years of individuals who had been suffering from dysentery. This reason, however, which was only applicable to chronic dysentery, had not been advanced earlier by the Medical Director when he opposed the applicant's re-employment in his recommendations to the Secretary-General. This was another indication of the arbitrary nature of the Medical Director's action.

(5) The decision of the Secretary-General not to renew the applicant's contract for health reasons was therefore contested on the ground that it was based upon an arbitrary medical opinion without taking into consideration the contrary opinion of other doctors.

(6) If, however, the Secretary-General's decision were upheld by the Tribunal, this would presuppose that the applicant had not been re-appointed because of a service-incurred illness. She then would be entitled to compensation on that basis.

The respondent's principal contentions were:

1. As to the letter of October 13, 1955, to the applicant from the Acting Chief of the Office for Latin America, Technical Assistance Administration, this officer had no authority to offer the applicant a new contract, since the decision not to reappoint was an act completely within the Secretary-General's administrative discretion. In this connection, the respondent pointed out that it was well established in the jurisprudence of the Tribunal that the review of an act within the administrative discretion of the Secretary-General could in no circumstances go beyond the questions of arbitrary action or improper motivation.

2. The decision of the Secretary-General was not arbitrary merely because he accepted the recommendations of the Medical Director, based on general practice, that individuals who had suffered from dysentery should not be assigned to tropical areas for at least two years. A review of the Secretary-General's decision would be inconsistent with his authority under Staff Regulation 4.6 to establish and apply medical standards. Furthermore, whatever differences of opinion existed between the Medical Director and other persons, the Secretary-General was entitled to rely upon the recommendation of the Medical Director, and his action in this case was no more open to question than his acceptance of recommendations of the Walters Committee.[1] In Judgments No. 46[2] and 47[3], the Tribunal had held such reliance to constitute a valid reason for withholding new appointments, and in Judgment No. 63[4] the Tribunal itself had stated that it " cannot enter into the relative merits of the medical reports, but accepts the final decision of the Chief of the Medical Division ".

3. As regards the applicant's alternative request based on Staff Rule 206.3 (b), the respondent pointed out that the applicant had not filed a claim with the Advisory Board on Compensation Claims provided for in Staff Rule 206.3 and Appendix D to Staff Rules and that she did not raise the question before the Joint Appeals Board. Consideration of the question by the Tribunal was therefore precluded by Article 7, paragraph 1, of its Statute.

Held: that the appeal must fail. Even if the applicant had been informed that the technical service to which she reported had requested an extension of her appointment, no offer had been made and the decision of the Secretary-General—who alone had competence in the matter—came before the Tribunal only for review as to whether it was caused by prejudice or other improper motivation. This was not the case, since, in the absence of provision for recourse to a medical referee in cases of conflicts of medical opinion, the Secretary-General followed the recommendation of the Medical Director.

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[1] As to which see *International Law Reports*, 1953, p. 521, or *ibid.*, 1954, p. 360.

[2] *White* v. *Secretary-General of the United Nations* (see *International Law Reports*, 1953, p. 520).

[3] *Carter* v. *Secretary-General of the United Nations* (*ibid.*).

[4] *Hilpern* v. *United Nations Relief and Works Agency for Palestine Refugees in the Near East* (*ibid.*, 1956, p. 613).

The Tribunal said: " 1. The Applicant has advanced that she received a letter of 13 October 1955 in which the Acting Chief of the Office for Latin America, Technical Assistance Administration, told the Applicant that he had asked the Technical Assistance Recruitment Office for an extension of her contract. This letter, however, did not constitute a valid offer of new employment, but only meant that the Applicant was informed that a proposal to that effect would be made to the Secretary-General, with whom lay the decision in the matter.

" 2. Therefore the decision of the Secretary-General not to renew the Applicant's appointment comes before the Tribunal only for review as to whether this decision was caused by prejudice or other improper motivation.

" 3. The Secretary-General, in taking the contested decision, followed the recommendation of the Medical Director of the United Nations Health Service, who had found that the Applicant did not at the material date meet the medical standards for employment in a tropical climate. An examination of the Staff Regulations and Rules discloses no provision for recourse to the employment of a medical referee by the Administration in cases of conflict of medical opinion. It therefore must be considered to be the normal course for the Secretary-General under Staff Regulation 4.6 to let himself be guided by the Medical Director's recommendations as to which staff members should be deemed fit for appointment.

" 4. The Tribunal could not regard itself as a body competent to express views on the accuracy of the diagnosis or conclusions of the medical profession. The Tribunal therefore cannot proceed to a review on medical grounds of the Secretary-General's decision based upon the Medical Director's recommendation merely because of the Applicant's contention that the Medical Director's findings were erroneous and conflicting with the opinions of other doctors.

" 5. The Tribunal finds no evidence of prejudice or improper motivation in the decision taken by the Secretary-General.

" 6. The Tribunal accordingly rejects the Applicant's requests both for further medical evidence and for rescission of the Secretary-General's decision not to renew her appointment or for compensation.

" 7. As to the Applicant's alternative request for compensation under Staff Rule 206.3 (b) for service-incurred illness, the procedure for submitting claims of this nature prescribed in Staff Rules has not been observed. There is, therefore, no decision of the Secretary-General before the Tribunal for adjudication on such a claim made by the Applicant. Accordingly the Tribunal rejects the request."

[Report: *Judgments of the United Nations Administrative Tribunal* (1958), p. 413; Judgment No. 69.]

International Organization—Officials—International Labour Organization—Technical Assistance Personnel—Competence of Administrative Tribunal—Law to be Applied—General Principles of Law—Termination of Appointment of Official—Powers of Director-General—Views of Authorities External to the Organization.

In re WAGHORN.

Administrative Tribunal of the International Labour Organization.

(Devèze, President; Scelle, Forster.)

July 12, 1957.

THE FACTS.—The complainant was appointed for a period of twelve months, from March 20, 1955, for the purposes of the Expanded Programme of Technical Assistance, as instructor in the vocational training centre established by the International Labour Organization at Bandung, Indonesia. Following a series of incidents in which the complainant displayed insubordination and an uncooperative attitude, which were deemed prejudicial both to the success of the training project in which he participated and to the prestige of the I.L.O., the I.L.O. official responsible for the supervision of technical assistance projects in the area (Mr. Walker), acting on his own authority as well as on the basis of the representations of the United Nations Technical Assistance Resident Representative in Indonesia (Mr. Ansgar Rosenborg) and of the Director of the Centre (Mr. Kilby), recommended to Headquarters the immediate withdrawal of the complainant. By a cable of September 10, 1955, Headquarters instructed the Director of the Centre to terminate the complainant's appointment; he was to be given one month's notice and granted a termination indemnity amounting to six weeks' salary, and was to proceed forthwith to London, where he had been recruited. This decision was notified to the complainant in a letter from the Director of the Centre dated September 10, 1955. The complainant was to leave Indonesia on September 14, 1955. On that same day the Resident Representative informed Headquarters by cable that the Chief of the Employment and Vocational Training Service in the Indonesian Ministry of Labour had asked him to endeavour to obtain a postponement of the complainant's departure until such time as his successor could be designated. Meanwhile, the Indonesian Ministry of Labour had made a similar request to Headquarters by a cable sent on the same date. By a cable dated September 16, 1955, Headquarters informed the Resident Representative that it stood by its decision, and requested him to advise the Indonesian Government accordingly. Having made his own arrangements, the complainant left Indonesia on September 30, 1955, and, after a two-day stay in Singapore, arrived in Geneva on October 4, 1955. Here, on October 6, 1955, he had a conversation with the competent official of the Personnel Office (Mr. Sobels), in the presence of the chief of the Manpower Division (Mr. F. Blanchard), the Headquarters official responsible for the technical operation of the Bandung centre. In view of what had occurred, the notification of September 10, concerning the termination of the complainant's employment was cancelled by a letter of October 7, 1955, and replaced by a new notice of termination taking effect as from September 30, the date on which the complainant had actually left Indonesia. By a letter dated October 8, the complainant pointed out that the notice of termination did not specify the reason for the decision. In reply, he was informed by a letter dated October 10 that the reason for termination had been deliberately omitted in his own interest, although it had been mentioned to him verbally in the course of previous conversations; in view of his request, however, he was advised that the termination was based on unsatisfactory services. The complainant requested reconsideration of the decision to terminate his appointment and complained publicly that no means of redress were available to him. The I.L.O. replied that it was not in a position to reconsider a decision which was final and, moreover, amply justified; however, it offered to set up an *ad hoc* joint committee of appeal which would consider his complaint, since neither the I.L.O. Staff Regulations nor the Personnel Manual of the Technical Assistance Board made provision for appeals by technical assistance staff. This offer remained without reply and the complainant lodged a complaint before the Administrative Tribunal.

In support of his claim for rescission of the decision to terminate his appointment and for damages, the complainant advanced the following arguments:

The law applicable was English law, owing to the fact that the contract was drawn up in English, that it was concluded by correspondence in England, and that the complainant was domiciled in England. The termination of the complainant's employment as from September 30, 1955 was null and void owing to the fact that it was notified on October 7, 1955, with retrospective effect and hence was contrary to English law. The termination of the complainant's employment was null and void owing to the fact that the allegation of unsatisfactory service was unjustified and hence had no legal basis; that it was for the Organization to supply proof of the unsatisfactory nature of the services rendered by the complainant, and that, far from supplying such proof, the Organization allowed itself to be deceived by the false and mendacious reports of the Chief of the Vocational Training Centre and ignored the favourable opinion of the Indonesian Government concerning his work; and that this unwarranted dismissal was damaging to the professional reputation of the complainant.

The defendant Organization first requested a preliminary ruling on the competence of the Tribunal, since the complainant was not an official of the International Labour Office and, under the Statute of the Tribunal, only such officials had access to it, while the rules of the Technical Assistance Board governing the complainant's appointment did not provide for access to the Tribunal. However, in the circumstances of the case, the defendant Organization was prepared to submit voluntarily to the Tribunal's jurisdiction on an *ad hoc* basis should the Tribunal be willing to assume jurisdiction.

On the merits, the following contentions were advanced on behalf of the defendant Organization:

The law applicable was not English law but the Technical Assistance Board *Manual*, Article 242 of which made explicit provision for the termination of contracts of employment in the case of unsatisfactory services, subject to one month's advance notice and the payment of an indemnity of six weeks' salary. This provision was applied in the present case. Although the complainant's professional incompetence was demonstrated and although his insubordination alone was such as to warrant his dismissal, the evaluation of the services of I.L.O. officials and employees fell within the discretionary powers of the Director-General and the complainant's arguments in this connection did not therefore call for examination. The termination of the contract with effect from September 30, 1955, was valid inasmuch as English law did not apply and the decision of October 7 merely confirmed a valid decision of September 10, 1955, while retarding its effective date. The complainant's request for an indemnity for damage to his professional reputation was unjustified owing to the facts that his contract was terminated in conformity with the rules applicable and could not therefore give rise to the payment of an indemnity; that the Organization endeavoured, in terminating the contract, to avoid damage to the complainant's reputation; and that it was solely on the complainant's insistence that it stated in writing that the reason for termination was unsatisfactory service, after having previously given this information to the complainant orally. The relevant correspondence would have remained confidential had it not been voluntarily disclosed and publicised by the complainant and had he not submitted the present complaint, the risks of which he must now assume.

Held (1) *On competence:* that the Tribunal would accept arbitral competence as conferred upon it by both parties, subject to the arbitral decision being arrived at and issued in conformity with the Statute of the Tribunal and the relevant statutory provisions governing the complainant's conditions of employment.

(2) *On the merits:* that the complaint must be dismissed. The Tribunal was bound exclusively by the internal law of the Organization and by general principles of law. The Director-General had the right to terminate the complainant's appointment for unsatisfactory service, the assessment of such services falling within his

discretionary powers, subject to review in the event of an abuse of power. The Organization had discharged all its obligations to the complainant. The views of authorities external to the Organization, whether governmental or otherwise, could not be opposed to those of the complainant's superiors.

The Tribunal said: (1) *On competence.*—" Having heard the parties at a public hearing held on July 3, 1957, concerning the questions of competence and receivability, . . . the competence of the Tribunal and the receivability of the case as brought before it are contested by neither of the parties; and . . . both parties declare that they agree to accept the arbitral decision of the Tribunal, which shall be arrived at and issued in conformity with the Statute of the Tribunal and the Staff Regulations of the I.L.O. . . . Therefore . . . no useful purpose can be served by attempting to determine whether the competence of the Tribunal and the receivability of the complaint may be validly contested in the present case, since no precedent affecting the interpretation of the rules concerning competence and receivability can arise out of the present decision; . . . The Tribunal, accepting arbitral competence as conferred upon it by both parties and subject to the legal conditions set out above, decides to deal with the present complaint and orders the parties to present their arguments on the merits of the case."

(2) *On the merits.*—" . . . The complainant wrongly alleges that English law is applicable as being his national law, whereas the Tribunal is bound exclusively by the internal law of the Organization and in particular by the provisions of the Technical Assistance Board administrative manual as well as by general principles of law. The Director-General had the right to terminate the complainant's employment on the ground of unsatisfactory services, the evaluation of such services falling within his discretionary powers, subject to review in the event of an abuse of power. This principle has been consistently reaffirmed in past decisions, such as Judgments No. 2 and 4 of the League of Nations Administrative Tribunal, Judgment No. 17 (*McIntire*[1]) of the present Tribunal, Judgments No. 14 (*Van Hove*) and 52 (*Zimmett*[2]) of the United Nations Administrative Tribunal, and the decision of the Court of Justice of the European Coal and Steel Community in *Kergall's* case.[3] [Furthermore,] the unanimous consensus of opinon reflected in the reports received by the Headquarters administration from Mr. Kilby, Mr. Walker and Mr. Rosenborg excludes any possibility that the Director-General may have been insufficiently informed, as well as any possibility of concerted prejudice towards the complainant, whose oral insinuations are totally unsubstantiated. It is for the complainant to supply evidence of his allegations concerning the false and fraudulent

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[1] See *International Law Reports*, 1954, p. 356.]
[2] *Ibid.*, p. 360.]
[3] *Ibid.*, 1956, p. 628.]

character of these reports. In the absence of such evidence, all such allegations must be rejected. The Organization has, on the contrary, continuously given proof of its fairness and generosity; the complainant was offered a possibility of appeal before an *ad hoc* joint committee but this offer remained without reply until the Tribunal had before it the complaint and the reply of the Organization, by which time it was too late for the offer to be accepted. The faults attributed to the complainant might have justified more summary and severe sanctions, under Article 206 of the T.A.B. *Manual*, than the procedure by way of ' honourable dismissal ' which was in fact applied. The Administration gave a further proof of leniency when it accepted the accomplished fact and delayed the official cessation of the complainant's duties until the date on which he had actually left Indonesia, contrary to the instructions received and with a view to his private convenience, and when it extended his salary for one month beyond the said date. The decision of October 7, 1955, confirming that acceptance was not rendered irregular by its retrospective character, since it merely postponed until September 30, 1955, the effective date of a valid decision, dated September 10, 1955, to terminate the complainant's appointment. Still further proof of generosity on the part of the Organization lies in its recognition of the competence of the Tribunal and in its acceptance, as the point of departure of the case, of an alleged decision of November 19, 1956, notwithstanding that no actual decision can be said to have been taken on that date. Finally, by accepting on several occasions and without reservation the generous payments made to him by the Organization, the complainant may be considered under general principles of law as having accepted good and valuable consideration and as having relinquished the remainder of his claims.

It results from the foregoing that the decision to terminate the complainant's employment did not violate any provision of his contract of employment or of the statutes, and was in no way irregular. As to the financial claims put forward by the complainant —apart from the three and a half months during which, he claims, he was entitled to the continuation of his contract—they are of such proportions and of such a nature that their lucrative purpose is obvious; this is also true of the sum of $6,000 which the complainant claims as compensation for prejudice to his professional reputation, notwithstanding that the procedure followed by the Organization was particularly discreet and that it was the complainant himself who, for the avowed purpose of undermining the prestige of the International Labour Organization, endeavoured during many months to discredit it in the eyes of its staff and of world opinion, and contemplated using the press for this purpose. Finally, at the time of the International Labour Conference he approached the Chairman of the Governing Body of the I.L.O. and the President and members of the Conference itself with the same objectives in mind. It is immaterial that the complainant mentions the steps taken by the Ministry of Labour of Indonesia to request, not the rescinding of the decision to terminate his employment, but merely his temporary retention pending the arrival of a replacement; it is further immaterial that he refers to the petition presented by his pupils for a similar purpose. Neither of these interventions may be placed in opposition to the opinions expressed by his competent superiors."

[Report: Preliminary Judgment of the Administrative Tribunal of the International Labour Organization of July 3, 1957, and Judgment No. 28 (Arbitral Competence), to be published in the *Official Bulletin* of the International Labour Office.]

International Organization — Officials — International Labour Organization—Staff Regulations—Amendment of—Termination of Appointment—Acquired Rights.

In re SHERIF.

Administrative Tribunal of the International Labour Organization.

(Devèze, President; Scelle, Forster.)

July 13, 1957.

THE FACTS.—The complainant was appointed to the professional staff of the International Labour Office on September 5, 1948, and was originally assigned to the Agricultural Division of the I.L.O. His probationary period of one year was extended by six months, with a corresponding postponement of salary increment, but his appointment was thereafter confirmed and the complainant transferred to the External Services Division. Subsequently, the complainant was transferred to the Industrial Law and Labour Relations Divisions, and was regularly awarded annual salary increments on the basis of favourable reports by his superior. On the occasion of his five-yearly report, supplemented by reports by his previous superiors, his annual increment was withheld. The complainant was then transferred to the Economic Division, and on the occasion of his next two annual reports, which were unfavourable, the annual increments were again withheld. The complainant did not appeal against the decisions to withhold salary increments; he did, however, object before the internal Joint Committee to the proposal to terminate his appointment for unsatisfactory services, to which Committee the proposal had been referred on the basis of the last unfavourable report. On the unanimous recommendation of the Joint Committee, the appointment was terminated for unsatisfactory services, and the complainant thereupon instituted proceedings before the Tribunal.

The complainant submitted that at the time of his appointment the Staff Regulations provided for termination only as a disciplinary measure after the successive application of progressive sanctions, and that the termination of his appointment on the basis of a rule providing for termination as an administrative measure, adopted after his appointment as Article 52 *bis* of the Staff Regulations, was made in violation of his acquired rights. The frequent transfers, which did not take into account his qualifications, were, he alleged, effected in violation of the Staff Regulations. The favourable reports made on the complainant's services should have outweighed the unfavourable reports when the value of his services was assessed. There were irregularities in the administrative procedure applied to him which caused him prejudice and, moreover, the complainant alleged that personal hostility was shown towards him on personal and political grounds, which he offered to prove in the course of oral proceedings.

On behalf of the I.L.O., it was argued that the complainant's appointment was properly terminated in accordance with the Staff Regulations and that the application of the Regulations in this case did not constitute a sanction but an honourable termination. Consequently, the progressive application of sanctions was not in issue. The complainant received ample warning that his services were unsatisfactory. There was no violation of the complainant's acquired rights, the provisions of the Staff Regulations governing termination for unsatisfactory services introduced after the date of the complainant's appointment being statutory and not contractual. The complainant must have known that when he was appointed his services, if unsatisfactory, could be terminated under the Regulations in force at that time. Moreover, his transfer within the Organization was based on qualifications which the complainant himself had put forward at the time of his appointment. The determination of the quality of an official's services was a discretionary power of the Director-General, this being amply recognized by precedent. The evaluation of the complainant's services considered as a whole fully justified the termination of his appointment. Such procedural irregularities as may have taken place did not affect the substance of the matter and did not cause any prejudice to the complainant, and the complainant had failed to produce any evidence that there was personal hostility towards him.

Held: that the complaint must be dismissed. (1) The rul relating to termination of employment for unsatisfactory service was validly enacted after the appointment of the complainant; (2) the preservation of acquired rights, provided for under the Staf Regulations, pertained only to rights acquired under existing Regulations prior to their amendment, but did not extend to the provisions of the Regulations, which could themselves be amended withou retrospective effect; and (3) the Tribunal was not competent to review the assessment of the complainant's services or the justification of his various assignments to various duties.

The Tribunal said: " The Director-General would have grounds for acting within his discretionary powers in terminating the complainant's appointment for unsatisfactory services after having attempted for almost eight years to make use of his talents; the five varying and successive postings during this period, and against which the complainant does not show that he made objection, were based also on the same discretionary power and could also have arisen as a result of efforts of the Administration to take account of the qualifications of the complainant rather than from a desire to harass him. The hearing of the witness called by the Tribunal on the request of the complainant, as a result of which the complainant purported to show that there was a concerted hostile attitude of a political nature against him, has not resulted in any such proof but has only shown that certain frivolous and slanderous allegations were brought in issue. No misuse of authority has been proved; on the contrary, the said testimony has shown that a particular administrative procedure set up to advise the Director-General on the technical ability and services of officials may in certain cases [require scrutiny] as a result of the friendship which may arise between supervisors and their subordinates and the resulting tendency to be over-favourable in the drawing up of reports . . . [Nevertheless] after a period of five years' service, during which, with the exception of the extension of the probationary period, the reports of the supervisors were favourable or in any case normal and increments [were] regularly granted, the complainant was the subject at the time of his first five-yearly report in 1953 of a series of reports which were either unfavourable or did not disclose a full appreciation. [This entailed] in two successive years a refusal to grant the increment to which the complainant would otherwise have been entitled under the Regulations; arising therefrom the complainant contends that he has suffered damage in that, following a series of favourable appreciations, he has been deprived of the certitude, which he submits he had acquired, of security of employment. It is, however, with surprise that the Tribunal notes that despite the continuing unfavourable reports and refusals to grant increments the complainant systematically abstained from taking recourse against the recommendations of the Reports Board and that he did not take advantage of his right of appeal within a stipulated time against the Joint Committee; he introduced his complaint only after it was proposed that his appointment be terminated and that in the event of his objection thereto he would be threatened with dismissal for unsatisfactory services; he adduces as a reason for failing to exercise his rights of recourse a somewhat unusual respect for his professional duty and discipline; it is far more probable that he had good reason to fear the intervention of the Joint Committee and its appreciation of his work since this Committee in the last resort decided unanimously to uphold the decision taken against him; at this point he suddenly altered his tactics and brought his complaint before the Administrative Tribunal on grounds which were quite different from those on which he relied in order to justify his earlier abstention from acting, particularly the allegations of a private and political nature to which reference is made above; it is to no purpose that similarly he has made every effort to try and persuade the Tribunal to investigate the professional value of the work which was given to him or the postings of which he was the subject, which is neither within the jurisdiction nor the possibility of this Court; he submits that the insertion into the revision of the Staff Regulations in 1955 of Article 52 *bis* was illegal, whereas this revision was fully in conformity with the provisions for amending the Regulations which had already taken place twice, this insertion modifying the rules applying to sanctions and in particular Article 99 of the existing Regulations by the abolition of the disciplinary nature of the termination of an appointment for unsatisfactory services; he went so far as to assume that this amendment of the Regulations was done for the sole purpose of legitimating his termination, such an allegation being singularly presumptuous; he maintains that the provisions relating to acquired rights in Article 24 and 114 of the Staff Regulations prohibited any modification of pre-existing contracts, that is to say barring almost any eventual modification of the Regulations since the appointment of all officials of the Organisation is by contract; in fact the term ' acquired rights ' has no other import than that, up to the date of amending the Regulations in force, there shall be no interference with the application of the said Regulations to an official and that the amended Regulations shall have no retrospective effect; finally he has borne at great length on certain irregularities which took place at the time of the procedure for examining the five-yearly report in 1953 and which were referred to by the Joint Committee, whereas this matter is not in issue in the case and is not subject to review since the statutory periods relating to the introduction of an appeal have long since run out and cannot be reopened; in any event these were minor irregularities, with the exception of one which the defendant organization has never sought to deny; the only decision which is before the Tribunal for examination as to its validity is the decision of the Director-General dated 14 April, 1956 and that the complainant has adduced no arguments challenging the validity of this decision."

[Report: Judgment No. 29 of the Administrative Tribunal of the International Labour Organization; to be published in the *Official Bulletin* of the International Labour Office.]

International Organization — Officials — International Labour Organization—Change in Title of Officials—Law to be Applied—*Non Liquet.*

In re SHARMA.

Administrative Tribunal of the International Labour Organization.

(Devèze, President; Scelle, Forster.)

July 13, 1957.

THE FACTS.—Article 116 (c) of the Staff Regulations of the International Labour Office provides that officials of Branch Offices shall be subject to conditions to be determined by the Director-General after consultation with the Administrative Committee of the International Labour Office. At the material time, however, no such rules had been established. The complainant was engaged as a shorthand typist in the I.L.O. Branch Office at New Delhi on November 15, 1928. In 1930 he was promoted to Head Clerk, in 1944 he was designated Private Secretary of the Director of the Branch Office, and finally, as from January 16, 1945, he was appointed Secretary of the Branch Office. By a letter dated November 7, 1947, Mr. Rens, then an Assistant Director-General of the I.L.O., established on behalf of the Director-General a new salary scale for the staff of the New Delhi Branch Office, with retroactive effect as from January 1, 1947. In this scale, which included the names of the persons assigned to each grade, the complainant was listed as one of the two holders of the grade of Secretary. It was specified that this designation was made *intuitu personae* inasmuch as the relevant salary scale would not be automatically applicable to future holders of the post. As a result of recommendations made jointly by Mr. Rens, now Deputy Director-General, and Mr. Rao, an Assistant Director-General of the I.L.O., following a visit to New Delhi, new salary scales came into effect on November 1, 1953. This decision left the designation of the complainant unchanged. By an office order dated August 17, 1956, the Director of the New Delhi Branch Office assigned to the complainant the designation of "Administrative Assistant" and indicated that the post of Secretary of the New Delhi Branch Office was vacant and would be filled at a later date. The complainant appealed against this decision to the Director-General of the I.L.O.; the latter confirmed the decision of the New Delhi Branch Office; and the complainant thereupon instituted proceedings before the Tribunal.

The complainant requested that the decision to substitute the title of Administrative Assistant for that of Secretary be rescinded; that the Tribunal be pleased to order that he should be given the title of Secretary with retrospective effect as from the date of the impugned decision; that his salary, hierarchy and status as the official ranking immediately below the Director of the Branch Office be upheld; and that effect be given to the recommendations for his promotion made in 1951 and 1952 by his then superior, on which no action was taken by the Director-General.

In support of his claims, the complainant maintained that the decision depriving him of the title of Secretary was illegal and adversely affected his prestige, and submitted that the terms of service of the staff of the New Delhi Branch Office were established by analogy with those governing Indian Government officials; in India, the title of Secretary corresponded to a high rank in the Administration, whereas that of Assistant was reserved for lower-grade employees entrusted with clerical duties. While his designation as Administrative Assistant affected neither his salary not his position in the New Delhi Branch Office, it had conveyed the impression of a demotion; a demotion constituted a sanction and could be ordered only as a result of disciplinary proceedings. The complainant had never been subjected to any sanction and his designation as Administrative Assistant was not preceded by disciplinary proceedings, and therefore the substitution of the new title for that of Secretary was illegal and unwarranted.

On behalf of the International Labour Organization, it was argued that the complaint should be dismissed on the grounds that, in the absence of any violation of the terms of his contract of employment or of the relevant provisions of the Staff Regulations and in the absence of any prejudice to the complainant, there was no cause of action. The complainant was not demoted, since neither his salary nor the nature of his responsibilities, which were the essential criteria on which the concept of grade was based, had been altered by the decision impugned. Officials did not enjoy a right to retain a title. When the title described a function, assignment to another function entailed loss of the right to bear the title corresponding to the earlier function. When the title described a grade, it could be changed for all officials of the grade concerned. The terms " Secretary " and "Assistant " by themselves had no distinct meaning, either etymologically or administratively, since the former referred to a high official in India and to a clerical employee at the headquarters of the I.L.O., whereas the reverse was true in the case of the latter term. These terms had meaning, therefore, only within a given administrative context. In so far as the complainant ceased to act as personal assistant of the Director of the New Delhi Branch Office, he lost his claim to the title of " Secretary ", whereas the title of "Administrative Assistant " was conferred upon him by virtue of the fact that it had been used in other Branch Offices to designate the official ranking immediately after the Director. The titles used in the New Delhi Branch Office had never corresponded with those of Indian public officials performing similar duties. These titles therefore had no meaning outside of the service in which they were used, and the loss of prestige alleged by the complainant was imaginary. No disciplinary procedure was required for a change in title which did not constitute a demotion.

It was further argued that no right to promotion existed, that the promotion of the complainant was not warranted by his abilities and qualifications, and that the complaint should be dismissed in respect of these claims also.

Held: (1) that in the absence of rules of positive law, officials should not be exposed to arbitrary action by the Director-General and that their conditions of employment were governed primarily by general decisions of the Director-General and, in a subsidiary way, by general principles of law, in particular, administrative law; (2) that the decision to change the complainant's title modified without justification a former decision which had been in the nature of a personal reward, and should therefore be rescinded; (3) that there could be no acquired rights as regards the relative position of an official within the administrative hierarchy, nor any right to promotion, and any claims on such grounds must be dismissed.

The Tribunal said: " . . . Article 116, paragraph (c), of the Staff Regulations provides that officials of branch offices shall be subject to conditions of service to be determined by the Director-General after consulting the Administrative Committee. The Tribunal has already deplored in Judgment No. 11 (*Desgranges*[1]) the absence of regulations laying down the conditions of employment of such officials. It is regrettable that such regulations have still not been drawn up and that consequently there are no rules of positive law governing the conditions of employment of such officials. Although the Staff Regulations exclude officials of branch offices from the scope of their provisions, it does not follow that such officials should be exposed to arbitrary action by the Director-General or the directors of branch offices. In consequence, the conditions of employment of such officials are governed primarily by general decisions of the Director-General and rules resulting from the partial assimilation of the conditions of service of such officials to those of public servants in the country where the branch office is located and, in a subsidiary way, by general principles of law, in particular, administrative law.

" The complainant was personally appointed Secretary of the New Delhi Branch Office by a decision of the Director-General dated November 7, 1947, which was confirmed by a further decision of the Director-General dated November 1, 1953. These decisions were of a definitive nature and could be modified to the disadvantage of the complainant only by way of a sanction. However, the decision to modify the title of the complainant was not described as a sanction; it did not entail a reduction in salary; the duties subsequently assigned to him were not incompatible with his professional dignity; and consequently no sanction was implied. Although the said title

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[1 See *International Law Reports*, 1953, p. 523.]

does not have the same meaning in the Organization as in the Indian Civil Service, it was natural that the complainant should set great store by a distinction granted to him after 25 years of service, and . . . nothing in his behaviour had justified the withdrawal of such a distinction, nor that he should be deprived of the prestige which it carried in his eyes. The decision to change the complainant's title unjustifiably modified a former decision which had been in the nature of a personal reward. However, there can be no acquired rights as regards the relative position of an official within the administrative hierarchy, nor any right to promotion, the latter being within the exclusive authority of the official's superiors; and . . . with regard also to the remaining heads, the complaint is therefore unfounded."

[Report: Judgment No. 30 of the Administrative Tribunal of the International Labour Organization; to be published in the *Official Bulletin* of the International Labour Office.]

NOTE.—*Cf. Desgranges* v. *International Labour Organization*, cited *supra*.

PART X

DISPUTES

A—ARBITRATION

I.—In General

ii.—The Law Applied by Arbitral Tribunals

Arbitration—Law Applied by International Tribunals—Administrative Tribunal of the International Labour Organization—*Non Liquet*.

See p. 757 (*In re Sharma*).

iii.—The Arbitration Treaty. Appointment and Withdrawal of Arbitrators

Arbitration—In General—Arbitration Clause in Contract between Commercial Firm and State—Binding Force on Arbitrators of Exchange of Letters between that State and Government of the Firm—Effect of Such Exchange of Letters—Effect of Devaluation of Currency—Award as " *amiables compositeurs* "—Appointment of Arbitrator in Default by Court of Third State.

SOCIÉTÉ EUROPÉENNE D'ÉTUDES ET D'ENTREPRISES *v.* PEOPLE'S FEDERAL REPUBLIC OF YUGOSLAVIA.

Ripert and Panchaud, Arbitrators. July 2, 1956.

THE FACTS.—On January 3, 1932, the Société Européenne d'Études et d'Entreprises (hereinafter called " the Company ") entered into a contract with the Yugoslav Government under which the Company undertook to construct a railway line from Veles to Prilep and to deliver certain equipment and supplies, and the Yugoslav Government undertook, for its part, to pay the Company in the course of the progress of the work by means of bonds maturing successively from the seventh half-yearly period after the conclusion of the contract. Article 17 of the contract provided for the settlement of all disputes by arbitration. It further provided that the arbitrators " shall be exempt from all formality ", that they " shall judge as *amiable compositeurs* " and that their decision shall be " final and binding " for both parties.

The Company now claimed from the Yugoslav Government the sum of 8,336,060,075 French francs, consisting partly of moneys due under the contract of January 3, 1932, partly of damages for the failure of the Yugoslav Government to carry out its part of the contract, and partly of losses alleged to have been caused by successive devaluations of the Yugoslav dinar during the pendency of the bonds. Against the Company's claim the Yugoslav Government set up an agreement concluded on November 18, 1950, between representatives of the French and the Yugoslav Governments respectively by means of an Exchange of Letters, which is said to have fixed at 145,621,307 French francs, to include both principal and interest, the sum owed by the Government to the Company either under the contract of January 3, 1932, or by reason of the partial non-execution of the contract.

The Yugoslav Government did not appear and were not represented.[1]

Held: that the agreement comprised in the Exchange of Letters was binding on the arbitrators; its effect, however, was limited to the payment of the bonds issued by the Yugoslav Government. The latter must pay to the Company a sum calculated in such a way as to take account of the devaluation of the dinar.

The Arbitrators said: " [*As regards the binding force of the Exchange of Letters*] During the year 1950 negotiations took place between the Yugoslav Government and the French Government, the latter acting with a view to the diplomatic protection of the private French interests involved. An agreement resulted from these negotiations which was embodied in an Exchange of Letters between the two delegations. The Yugoslav Government was aware of the negotiations which preceded the Exchange of Letters, and did not contest before the Arbitrators either the fixing of the sum due ' on account of bills falling due between July 1941 and January 1946 ' (both principal and interest) or the reduction agreed between the negotiators. Consequently, the Arbitrators consider themselves bound by the agreement as it results from the Exchange of Letters of November 1950.

" [*As regards the effect of the Exchange of Letters*] If the agreement has as its object the settlement of the Company's claim for breach of the contract of January 3, 1932, the claim would have had to be dismissed. It is necessary, however, to distinguish between the claim of the Company for breach of the contract of 1932, and the claim based on the bonds, which is that of the bearers. The bonds were issued with a view to the [eventual] payment of the claim, but not by way of payment; consequently, there was no discharge by payment (*dation en paiement*). It is universally admitted that neither the issue of such bonds nor the issue of any other negotiable instruments constitutes novation of the original debt; the claim continues to subsist. The debt in this case was discharged as and to the extent that the payment of the bonds was effected, but not as to the balance. The agreement of November 1950 between France and Yugoslavia concerns only the payment of the bonds issued by the Yugoslav Government with a view to the payment of claims resulting from the contract of January 3, 1932; this results from the wording of the Exchange of Letters, which refers to the ' bills falling due between July 1941 and January 1946 '. It also results from the very nature of the claims put forward by the Company, which, on the one hand, are based on the bonds issued by the Yugoslav Government, which were held at that time by various French bearers, and, on the other hand, arises out of the contract itself, either in respect of alterations in the rates of exchange which occurred between the issue and the maturity of the bonds, or in connection with the partial non-execution of the contract. Moreover, the French Government, which was being urged by the Yugoslav Government to grant a State-guaranteed credit to its nationals for their exports to Yugoslavia, had a special interest in requesting the settlement of the French claims first, thus exercising diplomatic protection in favour of the bondholders. If the French Government granted such protection in respect of liquidated claims, it did not do so in respect of unliquidated claims, or even rights under litigation; it by no means appears that that Government intended to dispose of such rights, and such an intention connot be presumed.[1]

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[1] Under Article XVII (Arbitration) of the contract of 1932, all disputes, etc., arising thereunder were to be submitted to arbitration (the arbitrators to act " *en qualités d'arbitres amiables compositeurs* "). Each party was to nominate an arbitrator within 15 days of receiving from the other party notice to do so. On default of such nomination, the arbitrator was to be nominated by the President of either the Tribunal of Commerce or the Civil Tribunal of Lausanne.

The present dispute having arisen, the Company served notice on the Yugoslav Government, at the same time nominating M. Georges Ripert as arbitrator. The Yugoslav Government refused to make a nomination and on March 6, 1956, the President of the Civil Chamber of the District of Lausanne, on the application of the Company, nominated M. André Panchaud as second arbitrator.

The arbitration took place in Lausanne. (The foregoing is taken from the judgment of the Lausanne Cantonal Tribunal: see the Note *infra*, at p. 766.)

" [*As regards the losses caused to the Company by the devaluation of the dinar*] As a result of the intervention of the French Government, the bonds in circulation, amounting to 118,131,461 French francs, were honoured by the Yugoslav Government, with interest for delay reduced from 48,213,015 to 27,499,846 French francs. The settlement thus concluded by the diplomatic delegations, and entirely carried into effect since, does not, however, constitute the object of the dispute submitted to the Arbitrators—which concerns the payment for the work done and goods supplied so far as that payment was not secured by the settlement of the bonds. It is, consequently, necessary to examine whether the delivery and the payment of the bonds issued by the Yugoslav Government have exhausted the rights of the Company as they result from the contract of January 3, 1932, or from the non-execution thereof.

[[1] By a Note dated December 10, 1956, addressed to the Yugoslav Ambassador in Paris, the French Government confirmed that it considered the Exchange of Letters of November 18, 1950, to have definitively settled Yugoslav obligations *vis-à-vis* the Société Européenne d'Études et d'Entreprises in respect of the contract of January 3, 1932.]

" In this respect the Company alleges that Article VIII of the contract guaranteed the parties against all loss resulting from any devaluation either of the franc or of the dinar which might occur before the making of the payments (*prestations*) mutually agreed upon. The French franc having been devalued between the conclusion of the contract and the payment of the bonds, the Company bases its present claims on the depreciation of the bonds resulting from that devaluation.

" By the terms of the contract of 1932, the Company undertook to carry out certain works for Yugoslavia and to supply that country with goods amounting to 160,000,000 French francs at 1932 values. During the years 1932 to 1937, the works were completely carried out and the goods duly delivered to the full satisfaction of the Yugoslav Government, as proved by two certificates dated July 6, 1939. The totality of the works and supplies as acknowledged by the two certificates amounted to more than 165,000,000 French francs, exclusive of interest; this figure was based on the value of the French franc not in 1939, but in 1932, at least so far as concerns the works carried out in Yugoslavia and the supplies invoiced in dinars (Article VIII of the contract). The same rate was taken for the calculation of the interest due under the contract. The bonds issued by the Yugoslav Government, including that interest, were honoured only after many delays and postponements of maturity; these bond payments, spread over the years 1935 to 1953, and to which were added the interest for delay, amount to a total of 266,000,000 French francs in round figures.

" However, the actual value of these payments does not correspond to the value of what was supplied by the Company; in fact, between the beginning and the end of the payments by instalments there occurred in successive stages the devaluation of the French franc, which fell from the gold-index figure of 58.95 mg. for one franc in 1932 to the figure of 2.542 mg. in 1950; this devaluation reduced considerably the economic value of the payments made subsequent to these various stages of devaluation; concerted into terms of economic value, at the date of each of the instalments, the sum paid, *i.e.*, 266,000,000 French francs, represents only 76,000,000 French francs at the 1932 value, so that there exists a difference of 190,000,000 French francs (at the 1932 figure) between the value of what was supplied by the Company and the value of the payments made by the Yugoslav Government.

" The Arbitrators have to decide whether this difference of 190,000,000 French francs (1932 value) ought to be paid to the Company, as the latter claims, or whether, on the contrary, the Yugoslav Government is entitled to take advantage of that difference in reliance on the contractual obligations which are binding on the parties, after having paid in partly depreciated francs for something the economic value of which was full and entire. In order to determine this point, the Arbitrators propose to decide as friendly arbitrators (*amiables compositeurs*), as provided for in the arbitration clause (Article XVII) of the contract.

" When examining the contract, the Arbitrators note first of all that, although it does not expressly give a guarantee to the Company against the risk of a devaluation of the franc, it nevertheless attempts, by Article VIII, to reduce the prejudicial consequences which might result to the parties from variations in the value of the dinar and the franc respectively. Taken as a whole, however, the contract of January 3, 1932, is not at all of a contingent nature (*aléatoire*), but aims to secure, on the one hand, to the Yugoslav Government the performance of certain works and the delivery of certain equipment and, on the other hand, to the Company a payment corresponding to the value of such works and equipment. The intention of the parties, at the moment of concluding the contract, was clearly to provide for economically equivalent dealings (*prestations*). Moreover, it is consistent with equity that the payment, having been delayed for a considerable number of years, should correspond to the actual value of that by which the Yugoslav Government benefited. Patent confirmation of the intention of the parties on this point is to be found in the rôle of ' *amiables compositeurs* ' which has been conferred on the Arbitrators in case of disagreement between the parties.

" The attitude of the parties after the conclusion of the contract shows the same. In fact, when a depreciation of the dinar took place in 1933/1934, the Yugoslav Government, by letter of October 25, 1934, in particular, asked for compensation for the disequilibrium which this fall in value had brought about; such compensation was amicably granted by the Company under clauses of which the Arbitrators do not have to take further cognizance. Moreover, at the beginning of 1936 the parties agreed that a certain number of the bonds transferred by the Government in French francs at the rate fixed by Article VIII of the contract should be reconverted into dinars, because of the difficulty which the Yugoslav Government was experiencing in obtaining sufficient quantities of currency to meet their liabilities under the bonds issued; the reconversion was to be made at the same rate, it being, however, specified that the amount would be paid in dinars representing the value of the original bond, made payable in French francs and calculated in dinars ' on the basis of the Stock Exchange rate with option (*primé*) on the date of payment '.

" Furthermore, as we are dealing with an international contract, concluded without speculative intention, there is reason to admit, as has been held, that, in the absence of any agreement to the contrary, the guarantee against devaluation was what was intended by the parties. It would, moreover, be contrary to good faith that the Government of a State should refuse to pay the full value of what it has ordered and received and should intend to make a profit from the considerable devaluation of the currency of payment.

" Finally, the losses resulting from the devaluation arise to a great extent from the fact that the Yugoslav Government was in the position of a debtor in default and, according to the common law rules, is obliged to pay, in addition to interest for delay, damages for the wrong caused by that delay.

" It results from the foregoing that the Yugoslav Government will have discharged the whole of its contractual obligations in respect of what it has received only when it has paid the Company the difference between the economic value of its payments already made and the economic value of what it has received, expressed, in accordance with the contract, in French currency at 1932 rates.

" As regards the calculation of such payments, the Yugoslav Government owes, as shown above, a capital sum amounting in round figures to 190,000,000 French francs, taking the value of that currency as in 1932, and it is necessary, in order to arrive at the amount due, to convert this sum into French francs at the current value of the franc.

" Moreover, we are here dealing with a contractual obligation which should have been met successively in addition to each of the payments effected by the Yugoslav Government at the various dates of maturity of the bonds, between the month of January 1937 and the month of September 1952; consequently, we are concerned with payments which ought to have been made at the times fixed therefor, so that each delay in performance involved, in this regard, the payment of interest at 5 per cent. per annum.

" A calculation made by the Arbitrators of the sums that the Yugoslav Government still owes to the Company gives a total of 4,439,770,521 French francs for principal and 1,744,758,000 French francs for interest, that is, in all, 6,184,528,521 French francs.

" On these grounds: The . . . Arbitrators, pronouncing their decision as ' *amiables compositeurs* ', hold and decide:

" 1. The Government of the People's Federal Republic of Yugoslavia owes the Société Européenne d'Études et d'Entreprises, in settlement of the obligations resulting from the contract of January 3, 1932, the sum of 6,184,528,521 French francs.

" 2. The Government of the People's Federal Republic of Yugoslavia is ordered to pay to the Société Européenne d'Études et d'Entreprises said sum within three months from the notification of this decision, with interest at 5 per cent. per annum from the date of expiration of the above term."

[Report: *Journal du Droit international*, 1959, No. 4 (October-December), p. 1074 (in French).]

NOTE.—On September 10, 1956, the Yugoslav Government lodged an appeal against the Award with the Lausanne Cantonal Tribunal on the grounds that the arbitration agreement was irregular; that the Award dealt with matters other than those contained in the agreement, notably the interpretation of the agreement of November 1950 between the French and Yugoslav Governments; that the Award did not comply with the essential requirements as to form of any judgment, notably in that the operative part was incomplete and unintelligible and also inconsistent with the recitals; that the Arbitral Tribunal was improperly constituted; and that the Yugoslav Government had not been made aware during the preliminary proceedings of either the precise nature of the dispute or the amount claimed by the Company. The Company opposed the appeal on the grounds, *inter alia*, that the Award was not appealable both under the terms of the arbitration agreement and because the Arbitrators had decided as *amiables compositeurs*; and that the Swiss Court was in any event without jurisdiction as there was no legal nexus between the dispute and Swiss territory. The Court *held*, on February 12, 1957, that the arbitral award was not subject to the public law or the sovereign jurisdiction of the Canton of Vaud; that it could not be lodged in the Canton; that it should be handed back to the party which had deposited it with the District Court; and that the Court had no jurisdiction to hear any other aspect of the appeal.

The Company appealed against this judgment to the Swiss Federal Tribunal (Public Law Chamber) on the ground that the Cantonal Tribunal, instead of limiting itself to a declaration that it was without jurisdiction to hear an appeal against an arbitral award which was not connected with the law or the courts of the Canton, had partially allowed the claim of the Yugoslav Government in ordering the Registrar of the District Court to restore the award to the party which had deposited it. In dismissing the appeal, the Federal Tribunal said that it could not find that any legal interest of the appellant had been injured by the judgment appealed against. Any suggestion that the Cantonal Tribunal had partially annulled the arbitral award in a manner which could affect its enforceability outside the Canton could be met by a careful examination of the reasons given by the Cantonal Tribunal for its conclusions. In particular, the Cantonal Tribunal had said that it did not in any way judge the validity or the binding force of the arbitral award, which was a matter to be settled before the appropriate judge. (Judgment No. P.399/GG of September 18, 1957. Unreported.)

Arbitration—Appointment of Arbitrators—Appointment on Refusal of Arbitrator to Act—Treatment of Refusal as Resignation—Mixed Franco-Tunisian Tribunal under Convention of June 3, 1955—Refusal of Tunisian Arbitrators to Act.

Re FRANCO-TUNISIAN ARBITRATION.

Franco-Tunisian Arbitral Tribunal. April 2, 1957.

(Georges Vedel, President.)

THE FACTS.—On June 3, 1955, France and Tunisia concluded a number of Conventions providing for the internal autonomy of Tunisia. One of these Conventions provided for a mixed arbitral tribunal (*Conseil arbitral Franco-Tunisien*) to determine disputes between the two countries. On March 20, 1956, France and Tunisia signed a Protocol providing for the complete independence of Tunisia. The Protocol contained, however, a clause to the effect that for the time being the Conventions of June 3, 1955, were to remain in force, with the exception of those provisions which were incompatible with the status of Tunisia as an independent sovereign State. In December 1956, the French Government filed an application with the Tribunal to determine a dispute between the two countries. The Tunisian Arbitrators took the view that the Convention providing for the jurisdiction of the Tribunal had become inapplicable by reason of the Protocol of March 20, 1956, which set up an independent sovereign State of Tunisia, and they refused to take their seats on the Tribunal. As a result, the Tribunal was unable to function.

Held (by the French President of the Tribunal): that, in the absence of a formal notification by the Tunisian Government that it regarded the Convention as no longer valid, the abstention of the Tunisian Arbitrators must be treated as a resignation and dealt with in accordance with Article 16 (2) of the General Convention of June 3, 1955, which provided that, in the event of the resignation of a member of the Tribunal, his successor must be appointed in accordance with the provisions governing the appointment of the original member. Accordingly, both Governments were requested to apply the procedure laid down in Article 16 (2) for the appointment of arbitrators. Meanwhile, the proceedings were suspended, pending such appointment.

The President of the Tribunal (Professor Georges Vedel) said: " As matters stand, the Arbitral Tribunal is unable to sit or adjudicate. According to the wording of Article 21 of the Convention,

> " ' the presence of at least four members is required for the validity of the deliberations of the Tribunal; of these, two must be Frenchmen and two Tunisians.'

In order to resolve the difficulty, it is not possible to have recourse to the member of the Tribunal ' who is chosen without regard to nationality ', as provided in Article 16 (1) (*b*) of the Convention. In fact, according to para. 3 (1) of this Article, this member ' shall be called upon to take part in the deliberations of the Tribunal when, after the first deliberation, the Tribunal is equally divided '. In the present case there has as yet been no deliberation of the Tribunal, and the member of the Tribunal referred to in Article 16, para. 1 (*b*), cannot be asked to intervene in the proceedings as they now stand. On the other hand, the Arbitral Tribunal is a permanently constituted tribunal and cannot therefore be regarded as no longer seised of the matter. Nor can the office of its President be regarded as at an end, in particular as far as concerns the application submitted by the French Government on December 4, 1956. The Convention of June 3, 1955, has not been terminated by the High Contracting Parties, and the French Government, by making two applications to the tribunal, has indicated in the clearest possible manner that it regards the Convention as being still operative. As far as the Tunisian Government is concerned, to whom the applications of the French Government were transmitted by the President in accordance with Article 18 of the Convention, there has been no reservation of any kind. The fact that M. Ahmed Mestiri (one of the Tunisian Arbitrators) became Minister of Justice after his appointment as arbitrator does not give him authority to acquaint the Tribunal with the view of the Tunisian Government on the validity of the Convention of June 3, 1955. Moreover, M. Mestiri has made it clear that he was speaking in his own name and in the names of the other Tunisian Arbitrators, and not in the name of the Tunisian Government. It follows from what has been said that the legal difficulty resulting from the state of affairs which has been described is not the extent to which an arbitral tribunal remains the judge of its own competence where a defendant State denies the legal validity of the Treaty which provides for the jurisdiction of the tribunal, but the result which must follow the refusal of some of the members of a permanent arbitral tribunal to take their seats because in their opinion the treaty providing for the tribunal is invalid or no longer operative. Such refusal, in the absence of the termination of the Convention by one of the Contracting Parties, must be regarded as a resignation from the tribunal. If every member of an arbitral tribunal has the right and the duty to put forward any argument which in his view tends to show that the tribunal lacks jurisdiction, then the refusal of a member of a permanent arbitral tribunal to comply with a request to sit cannot, whatever the reasons given and even if his refusal to sit paralyses the tribunal, result in dissolving the tribunal or putting an end to its mission. The resignation of arbitrators produces its effect irrespective of its acceptance by any other authority. Such resignation must therefore simply be recorded, and the duty so to record it rests with the President. This is all the more necessary in the present case because, according to Article 18 (3) of the Convention of June 3, 1955, the Tribunal must, as a rule, deal with the merits of the case within four months of its being seised of the proceedings. This time-limit must be observed where the Tribunal is concerned with a legislative enactment or an administrative act of general importance, which is the case here, seeing that the French Government has asked for the invalidation of certain provisions of the Decree of November 7, 1956. The fact that the Tribunal is unable to adjudicate upon the merits within this time-limit must be recorded before its expiration, in order to preserve the rights of the parties. It is for the President of the Tribunal to take all necessary measures to enable the Tribunal to function, because this is a permanent tribunal which must at all times be in a position to operate. The replacement of arbitrators who have resigned is provided for in Article 16 (2) (iii) of the Convention of June 3, 1955, which is in the following terms:

> " ' In the event of the resignation or death of the President, the Vice-President or any other member of the Tribunal, before the expiration of his term of office, his substitute shall be appointed in accordance with the same conditions as his predecessor and the substitute shall serve until the end of his predecessor's term of office. The substitute, except in the case of paragraph 1 (*b*), shall have the same nationality as his predecessor.'

It follows that the Tunisian and French Governments must be requested to set this procedure in motion. Until such time as the appointment of new members permits of sittings of the Tribunal, the case brought by the French Government is suspended, and the rights of the parties are reserved.

" For the reasons stated, I, the President, hold as follows: " (1) The resignations of . . . [the Tunisian members of the Tribunal] are hereby recorded.

" (2) The replacement of the members who have resigned shall take place in accordance with Article 16 of the General Convention of June 3, 1955, and devolves upon the Governments of France and Tunisia.

" (3) The proceedings instituted by an application of the French Government, dated December 3 and filed on December 4, 1956, are suspended until after the appointment of members of the Arbitral Tribunal who will replace the members who have resigned. The rights of the parties are reserved.

" (4) The following shall be notified of this decision: The French and Tunisian Governments, the members of the Tribunal still in office, and the members who have resigned."

[Report: *Annuaire Français de Droit International*, 1957, p. 186.]

IV.—The Award

i.—Scope and Binding Force of the Award

International Arbitration—Award—Binding Effect of—Mixed Arbitral Tribunal as Competent Court—Effect of Award of Mixed Arbitral Tribunal as Evidence of Debt—Award Rendered in 1926 by Germano-Roumanian Mixed Arbitral Tribunal—Non-execution of—Duty of Israel Custodian of German Property as Regards Discharge of Debt.

STEINBERG *ET AL.* *v.* CUSTODIAN OF GERMAN PROPERTY.

Israel, Supreme Court sitting as the High Court of Justice.

(Cheshin, Deputy-President; Agranat and Susmann JJ.)

March 7, 1957.

THE FACTS.—On July 24, 1926, the Germano-Roumanian Mixed Arbitral Tribunal set up by the Treaty of Versailles of 1919 made an award in favour of the (above-named) applicant, by which Germany was ordered to pay him the sum of 48,000.00 gold marks plus costs and interest. It appears that the applicant attempted to collect this debt from the German State—first during the days of the Weimar Republic, later in the days of the Third Reich, and finally from the Federal Republic of Germany—but without success. In 1951 the two applicants emigrated to Israel and in 1956 the first applicant transferred all his rights under the award to his son, the second applicant. During all this period, both before and after the transfer, requests were made to the respondent, the Israel Custodian of German Property, to discharge the debt out of assets of the German State held by him, in accordance with the German Property Law of 1950, but the Custodian repeatedly refused to do so. The applicant now asked for an order calling on him to show cause why he should not discharge the debt due to the applicant under the award of the Mixed Arbitral Tribunal.

The German Property Law, 1950, provides in section 13 (*a*) that the Custodian shall not pay a debt due from a German, subject to the following exceptions: if the debt or obligation is proved to the full satisfaction of the Custodian, or under a judgment of a competent court; and then to the extent that the property of such German held by the Custodian is sufficient for that purpose.

Held: that the application must be dismissed. The Germano-Roumanian Mixed Arbitral Tribunal could not be considered a " competent court " for the purpose of the German Property Law. The issues of fact and of law, including the question of the binding force of the Award and the reason for its non-execution, should be tried in the usual way before the District Court.

The Court said (*per* Cheshin, Deputy-President): " In their first application to the Custodian the applicants based themselves on section 13 (*a*) (2) of the Law, and claimed that the German State owed them a debt; this was evidenced by a document in their possession. They did not at that time stress the force of that document as a judgment. The Custodian refused to admit the claim on the ground that he was not satisfied of the existence of the debt. Surely, no complaint can be made of that. According to section 13 (*a*) (2), the onus is on the claimant to satisfy the Custodian of the existence of the debt, and when the Custodian has weighed in the scales of logic and equity the evidence submitted to him, this Court will not interfere with his conclusion. In this case the Custodian refused to admit the claim on three grounds: (1) he was doubtful if the debt was still outstanding; (2) he was not able to establish its quantum; (3) he was not certain that he held assets of the debtor. It cannot be said with complete certainty that all these reasons are unsound if we take into account all the arguments and counter-arguments laid before the Custodian, namely: (1) The debt dates from the year 1926. It arose out of an international treaty and an international arbitration. Until 1951 the applicants were living in Roumania, that is, in one of the countries party to that arbitration. Is it not possible that the German State would fail to recognize a debt—despite several intervening changes of régime—and would repudiate its international obligations? And if in fact it did so, what were the reasons? And if so again, is that any justification for complaining of the inaction of the Custodian? And as a matter of fact, is it certain that the debt has not in the meantime been discharged? (2) The obligation was fixed in currency which is no longer legal tender. It has no recognized rate of exchange, and it was not explained (even though this is not necessarily impossible) how it would be converted into Israel currency. (3) It is apparently correct that the Custodian retains assets belonging to the German State, but it is not clear to him if and to what extent the German State, the owner of those assets, can be identified with the German State which is the judgment debtor [under the arbitral award]. We cannot at all say that this reasoning is false even though on the last question —that of the identity of the State—the situation is equivocal. Consequently, the applicants would do well to bring their case before the competent court and prove their claim in the usual way.

" When their request based upon section 13 (*a*) (2) of the German Property Law, 1950, was rejected, the applicants sought further support in section 13 (*a*) (3), and contended that what they produced was not a mere document but a judgment; in face of such a judgment the Custodian could not be heard to contend that the debt was not proved to his full satisfaction. In argument before us the interesting question was raised whether the Germano-Roumanian Mixed Arbitral Tribunal can be regarded as a competent court and its award as a binding judgment, but we do not need to decide this question having regard to the interpretation which we give to the expression ' competent court ' in the German Property Law.

" The Law itself does not define the expression ' competent court ' even though it appears in it several times. . . . We must therefore have regard to the Interpretation Ordinance, where ' court ' is defined as ' any court of Israel of competent jurisdiction '. Accordingly, the Custodian is not bound to recognize a debt due from a German otherwise than in accordance with a judgment of a Court of Israel.

" Counsel for the applicants contested this view on the ground that if section 13 (*a*) (3) is to be interpreted as referring only to a court competent in Israel, there is a redundancy in the word ' competent '. The answer is that the legislator was here acting cautiously and intended to refer to the court which was competent *ratione matieriae* and *ratione loci*, and not to any competent court whether in Israel or abroad. . . .

" In short, section 13 (*a*) (3) of the German Property Law does not refer to a judgment of a foreign tribunal even if that court is otherwise competent from all other points of view."

[Reports: *Piskei-Din*, 11 (1957), p. 426; *Pesakim Elyonim*, 27 (1957), p. 414.]

NOTE.—I. In appreciating this judgment the limited jurisdiction of the Supreme Court when sitting as the High Court of Justice has to be borne in mind. Sitting, to some extent, as an administrative tribunal, the Court was here concerned with the performance of his public duties by a public officer, its jurisdiction being limited to issuing an order requiring that public officer to do or refrain from doing something. The High Court is therefore not normally competent to determine issues of fact and law except in so far as they might be *directly* relevant to the performance of those duties. In the above decision the High Court accordingly indicated that the underlying issues of fact—and of law—relating to the award of the Germano-Roumanian Mixed Arbitral Tribunal and the discharge of the debt thereunder arising were properly for determination by the District Court. However, the decision that the Mixed Arbitral Tribunal was not a " competent tribunal " for the purposes of the German Property Law is binding under the rule of *stare decisis*, and can only be overruled by the Supreme Court itself.

II. The award of the Germano-Roumanian Mixed Arbitral Tribunal of July 24, 1926, is not included in the *Recueil des Décisions des Tribunaux Arbitraux Mixtes*, but an interim judgment of the Tribunal appears in volume IV of that collection, at p. 839.

Arbitration—The Award—Scope and Binding Force of—*Res Judicata*—European Commission of Human Rights—Decisions Distinguished.

See p. 391 (*Re Application No.* 202/56 (*X.* v. *Belgium*)).

ii.—Appeal and Revision

Arbitration—The Award—Appeal and Revision—Board for the Validation of German Bonds in the United States—Decisions of —Review in Municipal Courts Pursuant to Treaty—Scope of Review—The Law of the Federal Republic of Germany and of the United States of America.

ABREY *v.* REUSCH *ET AL.*

United States, District Court, Southern District, New York.

March 27 and *April* 12, 1957.

THE FACTS.—This was an action to secure judicial review of a decision of the Board for the Validation of German Bonds in the United States, denying validation of certain debentures of Vereinigte Stahlwerke Aktiengesellschaft (" Steel Works ") which the plaintiff alleged he had acquired in Poland in June 1940 before fleeing to the United States. The Board had been established pursuant to the Agreement between the Government of the United States of America and the Government of the Federal Republic of Germany regarding the Validation of Dollar Bonds of German Issue, signed at Bonn on February 27, 1953 (4 U.S.T. 797 and 5 U.S.T. 1; T.I.A.S. No. 2793; 223 U.N.T.S. 167), and the Agreement between the same parties regarding Certain Matters Arising from the Validation of German Dollar Bonds, signed at Bonn on April 1, 1953 (4 U.S.T. 885 and 5 U.S.T. 1; T.I.A.S. No. 2794; 224 U.N.T.S. 3), for the purpose of invalidating German public and private foreign currency bonds which had been acquired for cancellation and had thereafter, during the Second World War, been looted.

The plaintiff had submitted his debentures to the Validation Board in 1953. The German Examining Agency objected to the validation. Following a hearing held in May 1955, the Board concluded that the plaintiff's debentures had been " on January 1, 1945, located in the vaults of the Reichsbank in Berlin and had been reacquired by the issuer " and therefore were not subject to validation under the German Law of August 25, 1952, for the Validation of German Foreign Currency Bonds (*Bundesgesetzblatt* I, August 26, 1952, p. 553), which was implemented and confirmed by the Agreements referred to above. The plaintiff then brought this action in the United States District Court against the members of the Validation Board, the issuer of the debentures and its successors, and the trustee and paying agent. Resort to the courts of the United States was permitted by Article 33 of the German Law of August 25, 1952. The plaintiff maintained that he was entitled to have the validity of the bonds determined at a full judicial trial before a judge and a jury. The defendants contended, *inter alia*, that the Agreements of 1953 and related Laws provided for review of the Board's decision only in the traditional sense of " judicial review" as understood in the United States—a review of the administrative record in order to ascertain whether there was substantial evidence to sustain the Board's determination.

Held: that the motion of the defendant members of the Validation Board for summary judgment must be denied. The plaintiff was entitled to a full hearing on the question of the validity of his bonds, in which the Court would be required to make an independent evaluation of the evidence. The waiver by the United States of the immunity of the members of the Board from service of process in "proceedings brought to determine whether the requirements for validation of bonds under the Validation Law have been met" implied no limitation on the scope of review by the Court of the Board's decision. The co-ordinate remedies provided to aggrieved persons, namely, arbitration and appeal to the courts of Germany, called for a full examination of the merits of the case. Analogous judicial review in the United States should accordingly be given a like scope.

The Court said (March 27, 1957):

"I

"Where the Validation Board has refused to validate a registrant's bonds, one of the remedial proceedings to which the bondholder may then resort is a proceeding in the United States courts for a full-scale judicial determination of the issue whether the plaintiff has met the requirements for validation of its bonds.[1] Such a proceeding is recognized by the terms of the Treaty and the Validation Law.

"Article 33 of the Validation Law, entitled 'Application to a Court of the Country of Offering,' provides:

> "'(1) If, pursuant to the applicable foreign [American] law, the registrant [plaintiff] may apply to a court of the Country of Offering [United States] for a decision of the issue whether the requirements under this Law for validation by the Foreign Representative [Validation Board] of a registered bond have been met, Article 32 shall apply to the resulting decision if . . .'

"That the plaintiff may apply to a United States court for a decision of 'the issue whether the requirements under this Law of validation by the Foreign Representative [Validation Board] of a registered bond have been met,' refers to a judicial determination of the primary issue whether the *requirements* under the Validation Law have been met. In such proceeding, the 'issue' before the Court is *not* whether the Validation Board's decision that the plaintiff has not met the requirements is sustained by the substantial evidence, but whether—on the basis of the evidence before the Court, independently considered—the plaintiff has met the requirements.

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[1] In its letter dated March 21, 1956, accompanying its decision, the Board advised plaintiff of his legal remedies with respect to its decision. Among the remedies thus described by the Board was the following:

"*Proceedings in a Court in the United States.* You may institute a proceeding in a Court in the United States to determine whether the requirements for validation of your bonds under the Validation Law have been met. . . ."

" Article 24 of the Validation Law provides:

> " ' (1) The registrant [plaintiff] has to prove the *requirements* for validation of the registered bond by the Foreign Representative [Validation Board].' (Emphasis supplied.)

" Whether the plaintiff was able ' to prove the *requirements* for validation ' (Article 24) is to be equated with ' the *issue* whether the requirements . . . have been met ' (Article 33). (Emphasis supplied).

" Article 27 of the Validation Law provides that the Validation Board shall validate the bond if the Board is satisfied that the bondholder ' meets the *requirements* of Article 3 (1) No. 1,' i.e., that the bond is a ' bond held abroad ' in that it was ' located on January 1, 1945, outside the borders of Germany as they existed on December 31, 1937 ' [Article 3 (2); emphasis supplied]. Thus, the *issue* which the plaintiff has to meet and which the Validation Board must resolve, under Articles 24 and 27, is whether the bond registration and its supporting proof establish that the bond was located, on January 1, 1945, outside Germany.

" Article 33 (1), referring to a remedial United States court proceeding, provides—in language paraphrasing Article 27 (1)—that the court shall decide precisely the same substantive ' issue,' that is, whether the plaintiff's bonds were held outside Germany on January 1, 1945 [Article 3(1) No. 1].

" In the cognate provision contained in Article III of the Treaty, members of the Validation Board waive diplomatic immunity from service of process issuing from courts in the United States ' in proceedings brought *to determine whether the requirements for validation of bonds under the Validation Law have been met.*' (Emphasis supplied.) This broad-scope language of Article III of the Treaty is almost verbatim the same as the corresponding provision in Article 33(1) of the Validation Law. Neither the Treaty nor the Validation Law, in defining the *issue* to be decided by a United States court, narrows that issue to a mere determination of the question whether the Validation Board's decision of invalidity is supported by a substantiality of the evidence before that Board.

" II

" That the United States court proceedings envisioned by Article III of the Treaty and Article 33 of the Validation Law were intended to be a plenary trial and an independent decision of the basic issue —whether the bonds were held outside Germany on January 1, 1945 —is persuasively indicated by the cognate provisions of the Validation Law (Article 29) dealing with the alternative legal remedies available to a bondholder whose bonds have been declared invalid by the Validation Board. Under Article 29, if the bondholder does not apply to a United States court for a decision under Article 33, he may (in addition to applying to the Validation Board for a reconsideration of its decision) apply to either (1) the German court, known as the Chamber for the Settlement of Securities, or (2) a statutory arbitration board.

" Under Article 31, ' Application for Court Review,' the plaintiff may apply to a German Court (Chamber for the Settlement of Securities) ' for court review '. Article 31 expressly provides that Article 22 (relating to proceedings before the Validation Board) applies *mutatis mutandis* to such application for German court review. This means that, in the German court review proceedings, as in the Validation Board proceedings, ' *the facts relevant for the registration* shall be set forth together with an indication or submission of the evidence ' (Article 22; emphasis supplied). In addition, the issuer, the trustees and the paying agents of the bonds must be given ' an opportunity to make a statement and to submit evidence.' Article 31 then provides:

> " ' In all other respects, the provisions concerning the proceedings before the Foreign Representative [Validation Board] shall apply mutatis mutandis to the procedure.'

" The foregoing provisions make it abundantly clear that the proceedings before the German court are not confined to the record of evidence adduced before the Validation Board but, on the contrary, the German court has the power to conduct a virtually *de novo* hearing of the evidence and to engage in a full-scale, independent consideration and evaluation of that evidence.

" Article 31 contains the following highly significant provision:

> " ' If the Chamber *finds* that *the application* of the registrant [bondholder] is *justified*, it shall render a *decision holding that the requirements of validation* under this Law have been met.' (Emphasis supplied.)

" The quoted language means that the German court renders a decision expressing its own independent finding on the primary issue whether the bondholder's application, *setting forth the relevant facts and evidence* (Article 22), is ' justified '; and the ' holding ' of its decision is that the requirements for validation have been met.

" We now turn to a consideration of the legal remedy of arbitration. Under Article 34, the parties may resort to proceedings ' in arbitration '. In such proceedings, the arbitration board may ' review ' the Validation Board's decision (Article 35). According to Article 35, ' the arbitration boards may establish their own procedure, applying Article 31 *mutatis mutandis*,' that is, the procedure used by the German court. Under Article 6 of the Agreement on Validation Procedures, the Validation Board must transmit to the Arbitration Board its file concerning the bonds involved, and ' *The Arbitration Board may take such evidence as it deems necessary.*' (Emphasis supplied.) Thus, the arbitration board, like the German court, is authorized to conduct a virtually *de novo* proceeding, hearing the evidence and determining whether ' the application of the registrant is justified,' in which event it renders a decision ' holding that the requirements for validation under this Law have been met.' The arbitration board is not restricted to the record of evidence developed before the Validation Board.

" There is no reason of policy, logic or language which warrants the view that the proceedings in a court of the United States should be substantially narrower in scope than the proceedings in a German court or before an arbitration board. These three proceedings are made coordinate and alternative legal remedies (Article 29).[1] They should be so interpreted by this Court.

" The nature of the proceedings before the German courts and arbitration boards thus furnish a meaningful frame of reference within which to view the scope of the cognate proceedings in a United States Court. Our conclusion is that these coordinate and alternative legal remedies should be interpreted as providing for a full-scale, independent hearing before a German court, an arbitration board or a United States court, as the case may be.

" III

" Defendants' argument that the use of the past tense in the words ' have been met ' in Article 31 (4) and Article 33 (1) is evidence that the review by the German and United States courts should be limited to an examination of the record of the Validation Board's proceedings. This argument overlooks the fact that the same expression, ' have been met,' is also used in Article 28 (1), dealing with the proceedings before the Validation Board:

> " ' . . . the Foreign Representative [Validation Board] shall deny the validation . . . if he [it] is not satisfied . . . that the requirements for a validation by him [it] *have been met*." (Emphasis supplied.)

" IV

" The Validation Law uses the word ' review ' in the literal and generic sense of a ' second hearing.' That word is to be treated as a broad juridical term and not as a word of art peculiar to American administrative law. The Validation Law, unlike the Treaty, was intended for use by the nationals of a number of different countries, not only for the United States. The Validation Law promulgated by the German Government, was designed for use in diverse legal systems. It was not enacted with the particular aspects of American administrative law in mind. Nor was it intended for use exclusively in the courts of the United States. Necessarily flexible language was employed. The word ' review ', as used in the Validation Law, must, therefore, be given a cosmopolitan and not an endemic meaning.

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[1] Upon the oral argument, there was submitted to the Court an eleven-page press release issued by the Department of State (February 26, 1953, No. 108) on the subject of " The Validation of German Dollar Bonds." The release quotes the text of the "Agreement on Validation Procedures " at pages 2 to 8. Under the heading " Background Information," the release describes (pp. 9-11) the genesis and provisions of the Validation Law of August 25, 1952. At page 10, the following appears:

" Where the Validation Board denies validation, the bondholder may at his election file an appeal either with a special Arbitration Board which is established in the United States, or with the German courts or with the United States Courts. In these cases, the Validation Board will retain possession or control over the affected bonds pending the outcome of the appeal."

"V

" In reaching the conclusion that the Treaty (Article III) and the Validation Law (Article 33) call for a plenary judicial hearing, the Court has adopted a view which differs with the defendants' interpretation of the following language: ' the issue whether the requirements under this Law for validation by Foreign Representative [Validation Board] of a registered bond have been met.'

" If, *arguendo*, the Court were to adopt the defendants' interpretation of that language as used in the first proviso of Article 33 of the Validation Law, the Court would reach the same conclusion as that already expressed. Let us assume, as defendants argue, that the language in the first proviso of Article 33 means that, under applicable American administrative law, the plaintiff may apply to a United States Court for a decision of the issue whether the determination of invalidity by the Validation Board is supported by substantial evidence. If the first proviso of Article 33(1) is thus satisfied, the *second* proviso contained in Article 33(1)—items ' 1 ' to ' 4 ' of Article 33(1)—then becomes operative.[1]

" Under the express terms of items ' 1 ' to ' 4 ' (the second proviso) of Article 33(1), the proceeding must be directed against the issuer ' as a party in interest '; the issuer, the trustees and the paying agents must be given an opportunity ' to make a statement and to submit evidence '; and the plaintiff-bondholder has the ' burden of proof. ' It necessarily follows that plaintiff-bondholder has the right to submit counter-evidence. The joint effect of the foregoing provisions is to provide for a plenary judicial hearing.

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[1] The first proviso of Article 33(1) reads:

" (1) *If*, pursuant to the applicable foreign [United States] law, the registrant may apply to a court of the Country of Offering [United States] for a decision of the issue whether the requirements under this Law for validation by the Foreign Representative [Validation Board] of a registered bond have been met, . . ." (Emphasis supplied.)

" The second proviso of Article 33(1) immediately follows the above language and reads:

" . . . Article 32 shall apply to the resulting decision *if*

" 1. the application to such court has been made within the periods set forth in Article 31(2), first sentence;

" 2. the proceeding has been directed against the issuer as a party in interest;

" 3. the issuer as well as the trustees and paying agents have been given an opportunity to make a statement and to submit evidence; and

" 4. Article 24(1) concerning the registrant's burden of proof has been applied at least mutatis mutandis." (Emphasis supplied.)

" Article 33(3) expressly provides that, in a case coming within Article 33(1), neither the Validation Board nor the issuer may object ' to the exercise of jurisdiction by the courts of the Country of Offering,' that is, the United States.

" VI

" If both of the provisos in Article 33(1)—the two ' if ' clauses—have been satisfied, ' Article 32 shall apply to the resulting decision.' Article 32 applies the effect of a German court decision to a decision of a United States court. Article 32 is the bridge which makes clear the precise analogy of the German court proceedings to proceedings in a United States court. Article 32 declares that, if the decision [of the German Chamber for the Settlement of Securities] ' holds ' that the requirements for validation of the bond have been met, the Validation Board must issue a validation certificate. If the decision holds that the requirements for validation have not been met, the prior decision of the Validation Board denying the validation becomes binding as soon as the court decision becomes final.

" The foregoing is additional evidence that the proceedings in a United States court are to be treated substantially the same as German court proceedings.

" The conclusion is that proceedings under Article 33, such as the present action, require the Court to make an independent evaluation of the evidence to be adduced in a plenary judicial hearing.

" Accordingly, plaintiff's motion addressed to the first, second and third defenses of the defendant-Validation Board, and to the second and third affirmative defenses of the defendant-issuer, are granted. The motion by defendant-Validation Board, for summary judgment, is denied.

" Since the plaintiff is entitled to a full judicial trial, the fact that the Validation Board's decision may be supported[1] by substantial evidence is not controlling. . . ."

(The Court then examined and rejected the contention that the plaintiff was entitled to a jury trial. The action was held to be a " statutory action in equity ".)

Upon re-argument, the Court said (April 12, 1957): " The motion of defendant Steel Works for reargument is granted. Upon such reargument the Court adheres to its original decision, dated March 26, 1957. In reality this motion for reargument seeks clarification of the Court's opinion ' on one narrow point,' as stated in the moving affidavit of Mr. Charles C. Parlin, Jr.

" That a trial in the United States District Court under the treaty and related laws should be analogized to the coordinate remedial proceedings before the German court and arbitration boards in respect of the power (1) to obtain and consider any and all relevant evidence de novo and (2) to decide the primary issue as to the merits of the total evidence independently considered is not to be taken to mean that the three procedures are to be equated with each other. They are analogues but only analogues. They have importantly similar but not identical attributes.

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[1] The Court's analysis of the Validation Board's record makes it clear that the Board's decision was amply justified by the substantial evidence, considering the record as a whole; and that the requirements of due process were satisfied.

" The Court's decision means that the opinion and record of the Validation Board may not be considered as substantive proof or evidence with respect to the factual issues to be tried before the Court at the plenary de novo trial of this action.

" The statement that the Court shall conduct an independent trial means that the parties shall present their evidence before the trial court in accordance with the ordinary rules of evidence applicable to regular judicial trials in the District Court. As a general proposition, it may be stated that witnesses' statements, depositions and affidavits submitted to or obtained by the Validation Board do not constitute admissible evidence of the facts contained in such statements, depositions and affidavits.

" However, such statements, depositions and affidavits may be used, in accordance with the ordinary rules of evidence, to refresh a witness' recollection or to contradict a witness by showing prior inconsistent statements or the defendants could introduce into evidence the statements contained in plaintiff Abrey's own affidavits as admissions against interest. . . ."

[Report: 153 F. Supp. 337.]

NOTE.—In 1959 the Board for the Validation of German Dollar Bonds announced that Abrey had signed a stipulation of dismissal with prejudice of his suit against the Board. The stipulation barred him from any future attempt to validate the bonds in issue in the foregoing case and provided that the certificates would be perforated and cancelled by the bank then holding them: see *New York Times*, February 8, 1959, sec. 3, p. 9, col. 4.

Arbitration—Award—Appeal from, to Court of Third State in Which Award Pronounced.

See p. 761 (*Société Européenne d'Études et d'Entreprises* v. *People's Federal Republic of Yugoslavia*).

B. INTERNATIONAL COURT OF JUSTICE

II.—Contentious Jurisdiction

i.—Competence

International Court of Justice—Competence of—Compulsory Jurisdiction—Reservation of Matters Essentially Within Domestic Jurisdiction—As Determined by a State—Application Based on Treaty—Condition of Reciprocity—Compatibility of Reservation with Statute.

CASE OF CERTAIN NORWEGIAN LOANS (FRANCE *v.* NORWAY).

International Court of Justice. Judgment of July 6, 1957.

(Hackworth, President; Badawi, Vice-President: Guerrero, Basdevant, Winiarski, Zoričić, Klaestad, Read, Armand-Ugon, Kojevnikov, Sir Muhammad Zafrulla Khan, Sir Hersch Lauterpacht, Moreno Quintana, Córdova, Wellington Koo, Judges.)

THE FACTS.—Between 1896 and 1905, the Norwegian Government floated six public loans on the French market and on other foreign markets. From 1885 to 1909, various loans were floated on foreign markets, including the French market, by the Mortgage Bank of the Kingdom of Norway, an establishment created by the State and whose capital belonged to the State. In 1904, the Norwegian Small Holding and Workers' Housing Bank floated a loan on the French market and on other foreign markets. The French Government contended that the bonds contained a gold clause which varied in form from bond to bond, but which that Government regarded as sufficient in the case of each bond, this being disputed by the Norwegian Government.

Following the opening of hostilities in Europe in August 1914, the convertibility of notes of the Bank of Norway was suspended on August 5, 1914, During the ensuing period, the Bank of Norway was authorized to resume the convertibility of notes into gold (1916) and to suspend it anew (1920). This latter measure was in turn abrogated (1928), and notes of the Bank of Norway again became convertible. However, in 1931 the obligation of the Bank to convert notes was once more suspended and thereafter remained suspended.

A Norwegian Law of December 15, 1923, provided that if a debtor had agreed to pay a debt in gold and the creditor refused to accept payment in Bank of Norway notes on the basis of their nominal gold value, the debtor might request a postponement of payment for such period as the Bank was exempted from its obligation to redeem its notes in accordance with their nominal value. During the period of suspension, interest was to be paid in banknotes in accordance with their nominal value.

The French Government, in a Note of June 16, 1925, referred to the contradiction which it believed to exist between the Law of

December 15, 1923, and the obligations assumed by the Mortgage Bank of the Kingdom of Norway, which the French Government regarded as subject to a gold clause, and requested that the " Royal Ministry for Foreign Affairs should give its consideration and assistance for the purpose of securing prompt recognition by the Norwegian Government and by the Mortgage Bank of Norway of the rights claimed by the French holders of bonds of the Mortgage Bank of the Kingdom of Norway, the bondholders' claims appearing to the Government of the Republic to be fully justified." The Norwegian Government responded by disputing the assertions concerning the gold clause and by stating that the question had been settled by the Law of December 15, 1923.

Protracted diplomatic correspondence took place between the two Governments. The French representations related to all the Norwegian loans, both the State loans and the loans of the two Banks. In response to proposals by the French Government for settlement of the matter on the international level, the Norwegian Government maintained that the question was solely one of Norwegian law, to be settled by the courts of that country. The French bondholders refrained from submitting their cases to the Norwegian courts.

In its application to the International Court of Justice, the French Government requested the Court to adjudge and declare that the international loans issued by the Kingdom of Norway, by the Mortgage Bank of the Kingdom of Norway and by the Small Holding and Workers' Housing Bank, stipulated in gold the amount of the borrowers' obligation for the service of coupons and the redemption of bonds; and that the borrower could only discharge the substance of his debt by the payment of the gold value of the coupons on the date of payment and of the gold value of the redeemed bonds on the date of repayment.

The further relevant facts are stated in the opinion of the Court (at pp. 20–22) as follows:

" The Application expressly refers to Article 36, paragraph 2, of the Statute of the Court and to the acceptance of the compulsory jurisdiction of the Court by Norway on November 16th, 1946, and by France on March 1st, 1949. The Norwegian Declaration reads:

> " ' I declare on behalf of the Norwegian Government that Norway recognizes as compulsory *ipso facto* and without special agreement, in relation to any other State accepting the same obligation, that is to say, on condition of reciprocity, the jurisdiction of the International Court of Justice in conformity with Article 36, paragraph 2, of the Statute of the Court, for a period of ten years as from 3rd October 1946.'

The French Declaration reads:

> " ' On behalf of the Government of the French Republic, and subject to ratification, I declare that I recognize as compulsory *ipso*

facto and without special agreement, in relation to any other State accepting the same obligation, that is on condition of reciprocity, the jurisdiction of the International Court of Justice, in conformity with Article 36, paragraph 2, of the Statute of the said Court, for all disputes which may arise in respect of facts or situations subsequent to the ratification of the present declaration, with the exception of those with regard to which the parties may have agreed or may agree to have recourse to another method of peaceful settlement.

" ' This declaration does not apply to differences relating to matters which are essentially within the national jurisdiction as understood by the Government of the French Republic.

" ' The present declaration has been made for five years from the date of the deposit of the instrument of ratification. It shall continue in force thereafter until notice to the contrary is given by the French Government.'

" On April 20th, 1956, the Norwegian Government filed four Preliminary Objections. The first Objection consisted of two parts. In the first part the Norwegian Government maintained that the subject of the dispute was within the exclusive domain of the municipal law of Norway, and that it did not fall within any of the categories of disputes enumerated in Article 36, paragraph 2, of the Statute, by reference to which both Parties had by their Declarations accepted the compulsory jurisdiction of the Court. In the second part of that Objection the Norwegian Government relied upon the reservation in the French Declaration with regard to differences relating to matters which are essentially within the national jurisdiction as understood by the French Government. It challenged the jurisdiction of the Court on both grounds.

" The second Objection was based on the fact that the French Declaration limited its acceptance of the compulsory jurisdiction of the Court to ' all disputes which may arise in respect of facts or situations subsequent to the ratification ' of the Declaration. It was contended that the dispute before the Court arose in respect of facts or situations prior to March 1st, 1949, and that, by virtue of the condition of reciprocity, it was excluded from the undertaking subscribed to by the Parties.

" The third Objection was designed to obtain a finding that the Application was inadmissible as rgards that part of the claim which relates to the bonds of the two Norwegian Banks on the ground that they possess a legal personality distinct from that of the Norwegian State.

" Lastly, the fourth Objection sought a finding of the Court that the Application of the French Government was inadmissible on the ground that the French holders of the Norwegian bonds had not previously exhausted the local remedies."

By agreement of the Parties, the Objections were joined to the merits. In its Counter-Memorial, the Norwegian Government abandoned its second Objection.

Held (by twelve votes to three): " that the Norwegian Government is entitled, by virtue of the condition of reciprocity, to invoke the reservation contained in the French Declaration of March 1st, 1949; that this reservation excludes from the jurisdiction of the Court the dispute which has been referred to it by the Application of the French Government; that consequently the Court is without jurisdiction to entertain the Application." (At p. 27).

The Court said: [**22**] " The Court will at the outset direct its attention to the Preliminary Objections of the Norwegian Government. The first of these Objections relates directly to the jurisdiction of the Court to adjudicate upon the dispute submitted to it by the French Application. It is this Objection that the Court will examine first.

"As previously stated, this Objection, as presented by the Norwegian Government, has two aspects. In the first place, it is contended that the Court, whose function is to decide in accordance with international law such disputes as are submitted to it, can be seised, by means of a unilateral Application, only of legal disputes falling within one of the four categories enumerated in paragraph 2 of Article 36 of the Statute and relating to international law. It is urged that the Application of the French Government asks the Court to interpret loan contracts which, in the view of the Norwegian Government, are governed by municipal law and not by international law.

" After presenting the first ground of its first Preliminary Objection on the basis that the loan contracts are governed by municipal law, the Norwegian Government continues in its Preliminary Objections:

> [**23**] " ' There can be no possible doubt on this point. If, however, there should still be some doubt, the Norwegian Government would rely upon the reservations made by the French Government in its Declaration of March 1st, 1949. By virtue of the principle of reciprocity, which is embodied in Article 36, paragraph 2, of the Statute of the Court, and which has been clearly expressed in the Norwegian Declaration of November 16th, 1946, the Norwegian Government cannot be bound, *vis-à-vis* the French Government, by undertakings which are either broader or stricter than those given by the latter Government.'

" It is this second ground of the first Preliminary Objection which the Court will proceed to consider.

" It will be recalled that the French Declaration accepting the compulsory jurisdiction of the Court contains the following reservation:

> " ' This declaration does not apply to differences relating to matters which are essentially within the national jurisdiction as understood by the Government of the French Republic.'

" In the Preliminary Objections filed by the Norwegian Government it is stated:

" ' The Norwegian Government did not insert any such reservation in its own Declaration. But it has the right to rely upon the restrictions placed by France upon her own undertakings.

' Convinced that the dispute which has been brought before the Court by the Application of July 6th, 1955, is within the domestic jurisdiction, the Norwegian Government considers itself fully entitled to rely on this right. Accordingly, it requests the Court to decline, on grounds that it lacks jurisdiction, the function which the French Government would have it assume.'

" In considering this ground of the Objection the Court notes in the first place that the present case has been brought before it on the basis of Article 36, paragraph 2, of the Statute and of the corresponding Declarations of acceptance of compulsory jurisdiction; that in the present case the jurisdiction of the Court depends upon the Declarations made by the Parties in accordance with Article 36, paragraph 2, of the Statute on condition of reciprocity; and that, since two unilateral declarations are involved, such jurisdiction is conferred upon the Court only to the extent to which the Declarations coincide in conferring it. A comparison between the two Declarations shows that the French Declaration accepts the Court's jurisdiction within narrower limits than the Norwegian Declaration; consequently, the common will of the Parties, which is the basis of the Court's jurisdiction, exists within these narrower limits indicated by the French reservation. Following in this connection the jurisprudence of the Permanent Court of International Justice (*Phosphates in Morocco case*, Judgment of June 14th, [**24**] 1938, P.C.I.J., Series A/B, No. 74, p. 22;[1] *Electricity Company of Sofia and Bulgaria* case, Judgment of April 4th, 1939, P.C.I.J., Series A/B, No. 77, p. 81[2]) the Court has reaffirmed this method of defining the limits of its jurisdiction. Thus the judgment of the Court in the *Anglo-Iranian Oil Company* case states:

" ' As the Iranian Declaration is more limited in scope than the United Kingdom Declaration, it is the Iranian Declaration on which the Court must base itself.' (*I.C.J. Reports* 1952, p. 103.[3])

" France has limited her acceptance of the compulsory jurisdiction of the Court by excluding beforehand disputes ' relating to matters which are essentially within the national jurisdiction as understood by the Government of the French Republic '. In accordance with the condition of reciprocity to which acceptance of the compulsory jurisdiction is made subject in both Declarations and which is provided for in Article 36, paragraph 3, of the Statute,

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[[1] See *Annual Digest*, 1938–1940, Case No. 198.]
[[2] *Ibid.*, Case No. 199.]
[[3] See *International Law Reports*, 1952, Case No. 114.]

Norway, equally with France, is entitled to except from the compulsory jurisdiction of the Court disputes understood by Norway to be essentially within its national jurisdiction.

"In its Observations and Submissions on the Preliminary Objections raised by the Norwegian Government, the French Government points to what it regards as a contradiction in the attitude of Norway:

"'Between France and Norway, there exists a treaty which makes the payment of any contractual debt a question of international law. In this connection the two States cannot therefore speak of domestic jurisdiction.'

"The treaty here referred to is the Second Hague Convention of 1907 respecting the limitation of the employment of force for the recovery of contract debts. The French Government invokes it principally against the first ground of the first Objection and as such it does not fall for consideration here; but the passage quoted from the Observations and Submissions purports to show also that the second ground of the first Objection is not valid since both Parties are signatories of the Second Hague Convention of 1907. This calls for but brief observations by the Court.

"The purpose of the Convention in question is that indicated in its title, that is to say 'the Limitation of the Employment of Force for the Recovery of Contract Debts'. The aim of this Convention is not to introduce compulsory arbitration in the limited field to which it relates. The only obligation imposed by the Convention is that an intervening Power must not have recourse to force before it has tried arbitration. The Court can find no reason why the fact that the two Parties are signatories of the Second Hague Convention of 1907 should deprive Norway of the right to invoke the reservation in the French Declaration.

"The French Government also referred to the Franco-Norwegian Arbitration Convention of 1904 and to the General Act of Geneva [**25**] of September 26th, 1928, to which both France and Norway are parties, as showing that the two Governments have agreed to submit their disputes to arbitration or judicial settlement in certain circumstances which it is unnecessary here to relate.

"These engagements were referred to in the Observations and Submissions of the French Government on the Preliminary Objections and subsequently and more explicitly in the oral presentations of the French Agent. Neither of these references, however, can be regarded as sufficient to justify the view that the Application of the French Government was, so far as the question of jurisdiction is concerned, based upon the Convention or the General Act. If the French Government had intended to proceed upon that basis it would expressly have so stated.

"As already shown, the Application of the French Government is based clearly and precisely on the Norwegian and French Declarations under Article 36, paragraph 2, of the Statute. In these circumstances the Court would not be justified in seeking a basis for its jurisdiction different from that which the French Government itself set out in its Application and by reference to which the case has been presented by both Parties to the Court.

" From one point of view it might be said that the second ground of the first Objection, namely the ground based on the reservation in the French Declaration, is merely subsidiary in character. It is true that the first ground of the first Preliminary Objection relies upon the proposition that the Court lacks jurisdiction because the dispute falls to be dealt with under the municipal law of Norway. But Norway has also relied upon the second ground of its first Preliminary Objection. Norway requests the Court ' to decline, on grounds that it lacks jurisdiction, the function which the French Government would have it assume'. It is clear that this request is based on both grounds, the character of the dispute and the French reservation. In the opinion of the Court, the second ground cannot be regarded as subsidiary, in the sense that Norway would invoke the French reservation only in the event of the first ground of its Objection being held to be legally unfounded. The Court's competence is challenged on both grounds and the Court is free to base its decision on the ground which in its judgment is more direct and conclusive.

" Not only did the Norwegian Government invoke the French reservation, but it maintained this second ground of its first Objection throughout and at no time did it abandon it.

" The Submissions in the Counter-Memorial, maintained in the Rejoinder, are formulated as follows:

" ' Having regard to the fact that the Norwegian Government maintains Preliminary Objections Nos. 1, 3 and 4 raised in the document submitted to the Court on April 20th, 1956, May it please [**26**] the Court to adjudge and declare that the claim submitted by the Application of the French Government of July 6th, 1955, is not admissible.'

" Since the Preliminary Objections under the head ' First Objection ' relied upon both grounds—the character of the dispute and the French reservation—it was not necessary, in order to maintain the two grounds, to specify that both were involved. What has just been said also applies to the Final Submissions of the Norwegian Government.

" In the course of his oral presentations Counsel for the Norwegian Government stated:

" ' . . . the Court has jurisdiction only in so far as undertakings prior to the origin of disputes have conferred upon it the power of adjudicating on such disputes as might arise between France and Norway.

' What are these undertakings?

' They are the undertakings resulting from the Declarations made by the two Governments on the basis of Article 36, paragraph 2, of the Statute of the Court.

. . . .

'That is the only basis on which the other Party can rely to show that its Application falls within the limits of the jurisdictional competence of the Court. In so far as the undertakings given by the two Parties are in concordance—to the extent of their reciprocity—it is clear that Norway is bound in relation to France. But she has no other obligation toward France. The Court may therefore adjudicate in this dispute only if it is included within these limits.'

From the reply of the French Agent to this argument it appears that in his view the second ground of the first Objection was fully maintained by Norway. Later, in his oral rejoinder, the Agent for the Norwegian Government declared:

" 'We maintain our positions in their entirety both as regards the merits and as regards the Preliminary Objections.'

The Court cannot infer from the attitude of the Parties that the second ground of the first Objection was regarded by them as unimportant and still less that it was abandoned by the Norwegian Government. Abandonment cannot be presumed or inferred; it must be declared expressly, as was done when Norway declared its abandonment of its second Preliminary Objection.

" The Court does not consider that it should examine whether the French reservation is consistent with the undertaking of a legal obligation and is compatible with Article 36, paragraph 6, of the Statute which provides:

> [**27**] " 'In the event of a dispute as to whether the Court has jurisdiction, the matter shall be settled by the decision of the Court.'

The validity of the reservation has not been questioned by the Parties. It is clear that France fully maintains its Declaration, including the reservation, and that Norway relies upon the reservation.

" In consequence the Court has before it a provision which both Parties to the dispute regard as constituting an expression of their common will relating to the competence of the Court. The Court does not therefore consider that it is called upon to enter into an examination of the reservation in the light of considerations which are not presented by the issues in the proceedings. The Court, without prejudging the question, gives effect to the reservation as it stands and as the Parties recognize it.

" The Court considers that the Norwegian Government is entitled, by virtue of the condition of reciprocity, to invoke the reservation contained in the French Declaration of March 1st, 1949; that this reservation excludes from the jurisdiction of the Court the dispute which has been referred to it by the Application of the French Government; that consequently the Court is without jurisdiction to entertain the Application.

" In view of the foregoing it is not necessary for the Court to examine the first ground of the first Objection, or to deal with

Objections 3 and 4 presented by the Norwegian Government, or with the Submissions of the Parties other than those upon which it is adjudicating in accordance with the reasons stated above."

[Report: *I.C.J. Reports*, 1957, p. 9.]

Judge Moreno Quintana, who voted for the Judgment, made the following declaration (at p. 28):

" The reason why I consider that the Court is without jurisdiction in this case is different from that given in the Judgment. I base myself, not on the second ground of the first Objection put forward by the Government of the Kingdom of Norway but on the first ground of that Objection. State loans, as being acts of sovereignty, are governed by municipal law.

Vice-President Badawi delivered the following Separate Opinion:

[**29**] " The Court has found that it is without jurisdiction on the ground of the reservation attached by the French Government to its Declaration of March 1st, 1949, on which the Norwegian Government relied by virtue of the reciprocity provided for in its own Declaration of November 16th, 1946.

" By its nature, the first Objection, in the form of the reservation concerning national jurisdiction, is conclusive when invoked by the Respondent against an Applicant which has made its declaration subject thereto. It has a formal and direct character which precludes any argument.

" The reservation constitutes, however, a subsidiary formulation of the first Objection which, as conceived and presented by the Norwegian Government throughout the proceedings, was that the dispute falls within the domain of municipal law. The reservation is relied on by the Norwegian Government only in the event of any doubt remaining as to the character of the dispute being that of a dispute within the domain of municipal law. In that event, it would be considered that this character had not been established and the Objection would consequently be rejected. It was in order to obviate this consequence that the reservation was invoked by the Norwegian Government which considered it more conclusive than the Objection relating to municipal law.

" Now, the characteristic feature of a subsidiary request is indeed that it denotes a degree of certainty that the main request does not evoke.

" Further, notwithstanding certain elements that are common to the Objection relating to municipal law and the reservation, the latter is subjective in character, whereas the Objection is, by its very nature, objective. They are therefore different in nature.

" In point of fact, the reservation was not taken up again by the Norwegian Government either in the pleadings or in the oral proceedings.

" I am therefore of opinion that the Court should not base its judgment on the reservation unless it considers that the objection relating to municipal law is not an adequate ground for finding that the Court has no jurisdiction—unless, that is, doubts remain as to the validity of that objection.

" In its Judgment, however, the Court did not think it necessary to undertake an examination of the municipal law character of the dispute. As I consider that the dispute does possess that character, I feel it necessary to give my reasons for this conclusion.

[**30**] " The subject of the proceedings, as defined by the Application of the French Government and maintained by that Government in the pleadings and in the subsequent hearings—apart from the additional Submissions which are concerned with the rejection of the Objections put forward by the Norwegian Government—relates to the construction to be placed on the loan contracts and the determination of the substance of the debt. Now, according

to the generally recognized rules of private international law, these questions are governed by the law of the debtor (in this case, Norwegian law).

" The Permanent Court of International Justice has already so stated in the *Serbian and Brazilian Loans* cases.[1] It found beyond any possible doubt that these questions fall within the domain of municipal law.

" Quite apart from the considerations upon which the Permanant Court relied in finding that it had jurisdiction and in applying French law as interpreted by French jurisprudence, it is thus obvious that, for the Court to have jurisdiction, it must be seised of a claim relating to international law. The French Government itself has recognized this requirement. Not only does it not dispute it, but it seeks to prove that the claim falls within the provisions of Article 36 of the Statute on two grounds, namely, that it comes within categories (*b*) and (*c*) of that Article, i.e. (*b*) any question of international law and (*c*) the existence of any fact which, if established, would constitute a breach of an international obligation.

" In order to show that the case brought before the Court constitutes a dispute under international law, the French Government claims that it possesses that character by virtue of the Second Hague Convention, of October 18th, 1907, relating to arbitration. But it is difficult to follow its reasoning in this connection. At times, the argument based on the Convention is directed towards showing that the action of Norway constitutes a breach of the obligation that country accepted in respect of compulsory arbitration. At other times, it is the very matter of the recovery of contractual debts by a State taking up the case of its nationals which is claimed to be, by its nature, a matter falling within the domain of international law.

" ' The refusal of arbitration is an act contrary to law. It relates to the payment of the international loans of Norway, that is to say, to the question which the Second Convention brought within the sphere of international questions and within those matters which, *by their nature*, fall under *international jurisdiction*.'

" ' The French Government holds that the policy adopted by the Norwegian Government in regard to the payment of these international loans raises a problem of international law, namely, the recovery of contractual debts, which is governed by the Second Convention of 1907.' (Oral argument of May 14th, 1957.)

" It may at once be noted that the contention that the question of the recovery of the debts constitutes, by its nature, an [**31**] international dispute is a gratuitous assertion. There remains to be considered whether the 1907 Convention established compulsory arbitration in the matter of debts, and whether the refusal to arbitrate in the dispute between France and Norway constitutes a violation of an international undertaking such as would authorize the French Government to bring the question of the debts before the Court by means of an Application.

" In the first place, is there compulsory arbitration in respect of the recovery of debts?

" The second paragraph of Article 1 of the 1907 Convention does indeed refer to arbitration, but not for the purpose of imposing upon the State charged as a debtor an obligation to arbitrate; its purpose is merely to limit the undertaking not to resort to force.

" Even if it be conceded that the 1907 Convention gives rise to compulsory arbitration for the recovery of debts, the obligation thereby established cannot have by way of sanction, in the event of a refusal to arbitrate, the effect of changing the nature of the original dispute itself by transforming it from a dispute subject to settlement by arbitration to a dispute subject to judicial settlement. Were such a transformation possible, all disputes in respect of which arbitration is compulsory would, merely by reason of a refusal to arbitrate, fall *ipso facto* within the compulsory jurisdiction of the Court.

" In fact, if the international dispute is constituted by Norway's refusal to comply with an obligation to accept arbitration on the question of the

[[1] See *Annual Digest*, 1929–1930, Case No. 278.]

construction to be placed on the loan contracts, the breach of that international obligation, not the question to be arbitrated, would be the only subject-matter of the international dispute. The proceedings to be instituted before the Court by means of an Application could be designed only to obtain from the Court a decision to the effect that Norway was under an obligation to accept arbitration and to proceed to the drafting of the special agreement and to the appointment of arbitrators. Reference is made in this connection to the *Ambatielos* case.[1]

" But the French Government, in order to establish the jurisdiction of the Court, does not rely only on sub-paragraph (*b*) of Article 36. It relies also on sub-paragraph (*c*) which relates to the existence of any fact which, if established, would constitute a breach of an international obligation. It does not, however, explain its meaning on this point. It has raised it in its Reply and repeated it in its final Submissions without, at any time, making it clear what was the fact involved.

" But since the present case has been presented by the French Government as a reproduction of the two cases on the *Serbian and Brazilian Loans*, it is necessary to note that the Permanent Court upheld its jurisdiction in those cases by assimilating to disputes of pure fact, disputes which had to be decided by the application of national law.

[**32**] " The Permanent Court had already held in its Judgment No. 7[2] that from the standpoint of international law and of the Court which is its organ, municipal laws are merely facts which express the will and constitute the activities of States. It regarded them as such in the cases under reference, itself applying those laws.

" Sub-paragraph (*c*) of Article 36 of the Statute relates to the special case where the Parties are in agreement as to the rule of international law or, more precisely, as to the international obligation, but are in disagreement as to the facts constituting a breach thereof. For, if they are in disagreement as to the international obligation itself, the case would fall within sub-paragraph (*b*), and sub-paragraph (*c*) would merely be an unnecessary repetition.

" Thus, if the application of a system of law were to be regarded as a fact, as would seem to be envisaged in the present case, the Parties would be deemed to be in agreement that international law contains a rule to the effect that the cancellation of the gold clause is not applicable to international payments, but not to be in agreement as to the interpretation of Norwegian law, France, basing herself on sub-paragraph (*c*), would then have instituted these proceedings to obtain from the Court an interpretation of Norwegian law to this effect.

" However, Norway disputes the alleged rule of international law. This is the very basis of the present case. This is therefore not the case covered by sub-paragraph (*c*).

" Obviously, it is still possible for France to hold that, if the Norwegian law does not adopt this rule of international law, then Norwegian law would itself constitute a case of denial of justice. In that event, however, it would not be sub-paragraph (*c*) that could be the ground for the Court's jurisdiction, but sub-paragraph (*d*) of Article 36.

" Now, whilst postulating the denial of justice, the French Government did not take that as its basis. According to its final Submissions the international character of the dispute would, by virtue of sub-paragraphs (*b*) and (*c*) of paragraph 2 of Article 36 of the Statute, derive from the Second Hague Convention of 1907. But neither of these sub-paragraphs, taken in conjunction with the Convention of 1907, justifies this classification.

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[1] [See *International Law Reports*, 1952, Case No. 96.]

[2] [*Certain German Interests in Polish Upper Silesia*: see *Annual Digest*, 1925–1926, Case No. 4.]

" It was asserted, however, that the case falls within the domain of international law because the French Government has adopted the cause of its nationals and is exercising diplomatic protection on their behalf, thereby conferring an international character on the case. It is hardly necessary to point out that this begs the question, since the contention put forward in this Objection is, in fact, that there were no grounds for the exercise of this protection.

" It has also been asserted that the case comes both within the domain of national law and within the domain of international law, or that the question is doubtful.

[**33**] " Questions concerning *inter alia* equality of treatment as between aliens and nationals, the distinction between resident aliens and non-resident aliens, discrimination as between different categories of foreign creditors[1]—these questions are said to be raised by this case and they are all said to be questions of international law.

" But if these questions, apart from that of discrimination, were raised, this was not done originally by the French Government, whose Application and Memorial go no farther than to ask the Court to interpret the loan contracts in the sense set forth in its Submissions, relying on the doctrine of international payments and on the gold clause.

" In point of fact, they were raised as a means of defence by the Norwegian Government. After seeking to establish the national character of the law governing the loan contracts, it led the way in showing that its own interpretation does not constitute a denial of justice—and, in this particular case, that would be the only ground for claiming that there was a breach of an international obligation justifying proceedings before the Court. In the subsequent proceedings, the French Government felt it had to follow the Norwegian Government in this line of argument in order to controvert its contentions. But it would be very strange, and even paradoxical, to consider that the denial of the international character of a question of municipal law and the discussion entered into in that connection confer on that very question an international character.

" The question of which the Court is seised is thus one which, by its very nature, comes within the domain of municipal law. For my part, I consider that, quite apart from the reservation, the Court could and should have upheld the first Objection."

Judge Sir Hersch Lauterpacht delivered the following Separate Opinion:

[**34**] " While I concur in the operative part of the Judgment inasmuch as the Court has declared itself incompetent to decide on the merits of the case submitted to it, I much regret that I do not find myself in agreement with the grounds of the Judgment. As the issues involved are intimately connected with the nature of the decisions of the Court in the matter of its competence,

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[1] The question of discrimination between Swedish and Danish creditors, on the one hand, and other foreign creditors, on the other hand, was introduced by the French Government in the concluding phases of the proceedings and was invoked at one time as giving the dispute an international character on the ground that it constitutes a breach of international obligations, and at another time, in the final Submissions, as a substantive claim.

It is clear, however, that, so far as the merits are concerned, this discrimination in no way effects the construction to be placed on the gold clause and that, further, the French Government does not deduce the proper consequences from it since it does not claim that the French creditors should be paid in Swedish crowns or Danish crowns.

If this discrimination, which is alleged to be a breach of international obligations, were to be regarded as giving the dispute an international character, this would conflict with the claim that there has been a breach of the obligation imposed by the Second Convention of 1907. As the determination of the obligation the breach of which gives rise to an international dispute is the very basis for international proceedings, it would be impossible to admit for the same proceedings two bases that are essentially incompatible.

as well as with some basic questions of its obligatory jurisdiction, I consider it my duty to indicate in some detail my own position on the subject.

" The Judgment of the Court is based exclusively on the finding that the Court is bound to decline jurisdiction for the reason that Norway has invoked the reservation, operating by virtue of reciprocity, of the French Declaration of Acceptance in which the French Government excluded from the jurisdiction of the Court ' matters which are essentially within the national jurisdiction, as understood by the Government of the French Republic '.

" There are two reasons for which I find myself compelled to dissent from the grounds of the Judgment thus expressed. In the first instance, assuming —an assumption which I must reject—that the French Declaration of Acceptance is a text which is valid in law, the question of jurisdiction must, in my view, be decided by reference to substantive Preliminary Objections advanced by the defendant Government rather than by reference to the subsidiary Objection referred to above. Secondly, and principally, I consider that as, in consequence of the latter reservation, the French Declaration of Acceptance is invalid, there is before the Court no text the reservations of which it can apply. This fact, and not the Norwegian reliance upon the French reservation of matters of national jurisdiction, is in my view the true reason why the Court has no jurisdiction in the present case.

" In this Separate Opinion I propose, for the sake of abbreviation, to use the term ' automatic reservation ' to indicate the French reservation of ' matters which are essentially within the national jurisdiction, as understood by the Government of the French Republic '. That description expresses the automatic operation of that reservation in the sense that, by virtue of it, the function of the Court is confined to registering the decision made by the defendant Government and not subject to review by the Court.

" I

"The Preliminary Objections of Norway

[**35**] " In the present case the Government of Norway has challenged the jurisdiction of the Court in reliance upon the following Preliminary Objections:

" (1) It has maintained that, as the French application refers to a dispute which is concerned exclusively with Norwegian national law, it is not a dispute falling within the terms of Article 36 (2) of the Statute which, it is alleged, covers only disputes relating to questions of international law.

" (2) Secondly, the Government of Norway has maintained that the holders of the loan certificates on whose behalf the French Government considered itself entitled to seise the Court did not previously exhaust the local remedies as required by international law. That Objection is closely related to that referred to above, in the sense that, as repeatedly emphasized by the Norwegian Government in the written and oral proceedings, it is the failure to exhaust local remedies which has prevented the dispute from acquiring the complexion of a dispute concerning international law.

" (3) Thirdly, in case ' there is still doubt ' as to the contention that the dispute is concerned solely with a question of Norwegian law, the Norwegian Government invoked, in reliance upon the provision of reciprocity, the ' automatic reservation ' incorporated in the French Declaration of Acceptance. As already stated, the Judgment of the Court is based exclusively on that latter Preliminary Objection.

" It seems a sound principle of judicial procedure that, unless the provisions of its Statute or other cogent legal considerations make that impossible, the Judgment of the Court should attach to the submissions of the Parties a purpose, though not necessarily an effect, which the Parties attached to them. Applied to objections to the jurisdiction of the Court, that principle means that, when a Party has advanced objections to the jurisdiction of the Court, the decision on the question of jurisdiction must be reached by reference to objections which, in the intention of the Party advancing them, are principal rather than subsidiary and which are substantive rather than formal. This is so in particular in the international sphere where a Government may rightly consider that it should not be treated as having successfully challenged the jurisdiction of the Court on the basis of objections which are ancillary and automatic—at a time when its main effort was directed to jurisdictional objections of substance. It is clear from the written and oral proceedings that Norway, far from putting forward the ' automatic reservation ' as the main objection, intended to rely upon it only in a subsidiary manner and in the last resort—only if ' there is still [**36**] doubt ' as to the principal preliminary objection. This explains why, after having invoked the ' automatic reservation ' in a subsidiary manner in the original document entitled '*Preliminary Objections of Norway* ', the Norwegian Government did not subsequently on a single occasion refer to it, except generally and indirectly. That Objection, though not formally withdrawn, was kept in the background throughout the proceedings—a reticence explained by the disinclination of a Government to rely primarily upon an objection the success of which depends on the bare assertion of the will of that Government. In my opinion, a Party to proceedings before the Court is entitled to expect that its Judgment shall give as accurate a picture as possible of the basic aspects of the legal position adopted by that Party. Moreover, I believe that it is in accordance with the true function of the Court to give an answer to the two principal jurisdictional questions which have divided the Parties over a long period of years and which are of considerable interest for international law. There may be force and attraction in the view that among a number of possible solutions a court of law ought to select that which is most simple, most concise and most expeditious. However, in my opinion such considerations are not, for this Court, the only legitimate factor in the situation.

"Accordingly, although I am of the opinion that there is before the Court no valid Declaration of Acceptance by reference to which it can assume jurisdiction, I consider it my duty to state my opinion as to the principal Preliminary Objections of Norway. Apart from a partial objection referred to below, these were the only two jurisdictional objections which were argued before the Court.

" There are two other Preliminary Objections which figure in the written and oral proceedings and to which only passing reference need be made. In one, subsequently withdrawn, Norway asserted that the subject-matter of the dispute did not fall within the terms of the French Declaration of Acceptance which limited the Acceptance to ' disputes which may arise in respect of facts or situations subsequent to the ratification ' of the Declaration of Acceptance. Another Objection had reference to one portion of the claim only. In it Norway contended that, as some of the loans in question were contracted not by the Norwegian State but by certain Banks not identical with it, Norway could not properly be made a respondent in respect of that part of the claim. It is not necessary to examine here that particular Objection—which I do not consider to be well founded.

" With regard to the first Preliminary Objection referred to above I am unable to accept the view that the subject-matter of the [**37**] present dispute is not related to international law but exclusively to the national law of Norway. Undoubtedly, the question of the interpretation of the contracts between the Norwegian State and the bondholders is primarily a question of Norwegian law. It is not disputed that the Norwegian law is the proper law of the contract and that it is for the Norwegian courts to decide what Norway had actually promised to pay. However, the complaint of the French Government is that, having regard to the currency legislation suspending the operation of the gold clause, the Norwegian law which the Norwegian courts are bound to apply in this case is contrary to international law. The Norwegian courts may hold that the gold clause in the bonds is a gold coin clause (as distinguished from a gold value clause), that that gold coin clause has been rendered inoperative as the result of the legislation in question, and that the existing currency is, therefore, a lawful means of payment. In the view of the Norwegian Government this is the proper interpretation of what it has in law promised to pay. However, it is that very legislation, in so far as it affects French bondholders, which may be the cause of violation of international law of which France complains.

" It may be admitted, in order to simplify a problem which is not at all simple, that an ' international ' contract must be subject to some national law; this was the view of the Permanent Court of International Justice in the case of the *Serbian and Brazilian Loans*. However, this does not mean that that national law is a matter which is wholly outside the orbit of international law. National legislation—including currency legislation—may be contrary, in its intention or effects, to the international obligations of the State. The question of conformity of national legislation with international law is a matter of international law. The notion that if a matter is governed by national law it is for that reason at the same time outside the sphere of international law is both novel and, if accepted, subversive of international law. It is not enough for a State to bring a matter under the protective umbrella of its legislation, possibly of a predatory character, in order to shelter it effectively from any control by international law. There may be little difference between a Government breaking unlawfully a contract with an alien and a Government causing legislation to be enacted which makes it impossible for it to comply with the contract. For these reasons it is difficult to accept the argument of Norway to the effect that as this Court can decide only on the basis of international law and that as the main substantive question in the dispute is the interpretation of Norwegian law, this is not a dispute which is covered by Article 36 (2) of the Statute. The dispute now before the Court, although it is connected with the application of Norwegian law, is also a dispute involving international law. It is possible that if the Court had jurisdiction on the merits it would find that Norway has not violated any rule of international [**38**] law by declining to repay the bonds in gold. However, in finding that, the Court would apply international law.

" The greater part of the written and oral argument of Norway—as well as that of the applicant State—has been devoted to a consideration of the relevant questions of international law. The question of the treatment by a State of property rights of aliens—including property rights arising out of international loans—is a question of international law. So is the question whether, in this respect, equality of treatment of nationals and aliens relieves a State of its international responsibility. So is, further, the question whether there is in this respect a difference between resident aliens and aliens resident abroad. It may be also difficult to deny that the allegation of discriminatory treatment as between French and non-Norwegian bondholders raises an issue of international law. The very question whether local remedies have been exhausted—a question on which Norway has made dependent the international character of the dispute—is a question of international law. Finally, although there seems to be little substance in the contentions advanced by the French Government on the subject of The Hague Convention of 1907 relating to Contract Debts in so far as it is alleged to impose an obligation to arbitrate, it is relevant to state that that Convention indirectly recognizes that controversies of that character are suitable for settlement by reference to public international law. It is of interest, in this connection, to note the wording of Article 53 of The Hague Convention of 1907 for the Pacific Settlement of International Disputes which refers expressly, as suitable for arbitration before the Permanent Court of Arbitration, to disputes ' arising from contract debts claimed from one Power by another Power as due to its nationals '.

" The relevance of these questions of international law cannot properly be denied by reference to the fact that unless and until Norwegian courts have spoken it is not certain that there has been a violation of international law by Norway. The crucial point is that, assuming that Norwegian law operates in a manner injurious to French bondholders, there are various questions of international law involved. To introduce in this context the question of exhaustion of local remedies is to make the issue revolve in a circle. The exhaustion of local remedies cannot in itself bring within the province of international law a dispute which is otherwise outside its sphere. The failure to exhaust legal remedies may constitute a bar to the jurisdiction of the Court; it does not affect the intrinsically international character of a dispute.

" This being so, my view is that, in principle, the present dispute is also one of international law and that it comes within the orbit of controversies enumerated in Article 36 (2) of the Statute of the Court.

[**39**] " In my opinion, the Preliminary Objection of Norway relating to exhaustion of local remedies is well founded. This does not mean that the position of the French Government on the subject is altogether without merit. For the requirement of exhaustion of local remedies is not a purely technical or rigid rule. It is a rule which international tribunals have applied with a considerable degree of elasticity. In particular, they have refused to act upon it in cases in which there are, in fact, no effective remedies available owing to the law of the State concerned or the conditions prevailing in it. In the present case, while, as will be suggested presently, the Court cannot regard it as conclusively proven that the Norwegian courts would refuse a remedy, it is clear that in general their decision must be based on Norwegian law, including the legislation of 1923 which is alleged to result in an injury to the legitimate rights of French bondholders. From that point of view I can appreciate the contention of the French Government that there are no effective remedies to be exhausted—even if I must hold that, however contingent and theoretical these remedies may be, an attempt ought to have been made to exhaust them.

"Also, inasmuch as the case of the French Government is based on the allegation of discriminatory treatment as between French bondholders on the one side and Swedish and Danish bondholders on the other, it is not easy to see what remedy the Norwegian courts could provide against governmental acts which, as such, cause no injury to French bondholders.

" However, these doubts do not seem strong enough to render inoperative the requirement of previous exhaustion of local remedies. The legal position on the subject cannot be regarded as so abundantly clear as to rule out, as a matter of reasonable possibility, any effective remedy before Norwegian courts.

" The Norwegian Government has contended that the burden of proving the inefficacy of local remedies rests upon France. There is, in general, a degree of unhelpfulness in the argument concerning the burden of proof. However, some *prima facie* distribution of the burden of proof there must be. This being so, the following seems to be the accurate principle on the subject: (1) As a rule, it is for the plaintiff State to prove that there are no effective remedies to which recourse can be had; (2) no such proof is required if there exists legislation which on the face of it deprives the private claimants of a remedy; (3) in that case it is for the defendant State to show that, notwithstanding the apparent absence of a remedy, its existence can nevertheless reasonably be assumed; (4) the degree of burden of proof thus to be adduced ought not to be so stringent as to render the proof unduly exacting. Both in the written and the oral proceedings the Government of Norway has attempted to adduce such proof. Whatever may be its cogency, it must be [**40**] regarded as sufficient for the purpose.

" In the first instance, in matters of currency and international loans the decisions of courts of various countries—including those of Norway—have not been characterized by such a pronounced degree of uniformity and certainty as to permit a forecast, with full assurance, of the result of an action in Norwegian courts. The decision of the Permanent Court of International Justice in the *Brazilian and Serbian Gold Clause* cases[1] has been followed by courts of some countries but not by those of others. While the courts of most States have interpreted the gold coin clause as importing necessarily a gold value clause, this has not been the practice in all countries. Moreover, the courts of the same State have often shown considerable divergencies and hesitation on the subject. Thus, in England, in the two important cases relating to the gold clause—*The King* [*Rex*] v. *International Trustee for the Protection of Bondholders* [1937] A.C. 500,[2] and *Feist* v. *Société Intercommunale Belge d'Électricité* [1934] A.C. 161—it was left to the House of Lords to reverse the decisions of the Court of First Instance and of the Court of Appeal. While French courts have, with some uniformity, refused to recognize the *cours forcé* in international contracts, it appears that they have done so on different and diverging grounds. In some cases they have acted on the principle according to which a foreign public law can only operate within the territory of the State in question; in other cases they have applied the principle of the autonomy of the will, which makes it possible for the parties to exclude the operation of any national legal system whatsoever; in other cases still they have acted on the view that while the operation of the gold clause is subject to the law of the State concerned, it is so only within the limits of public policy. This being so, there may be no sufficient reason for drawing final conclusions from the alleged previous practice of Norwegian courts and for asserting that it has been conclusively proven that there is in this case no remedy available under Norwegian law. It is possible—however unlikely, in the view of the French Government, that possibility may be—that the Norwegian courts may hold that the bonds embodied a true gold clause and that, having regard to international law or the constitutional law of Norway, the law of 1923 cannot be applied or that it must be applied so as not to injure the French bondholders.

"I cannot consider it as a certainty that, assuming that the Norwegian legislation on the subject is contrary to international law in so far as it affects aliens, no remedy at all is possible under Norwegian law. There has been a tendency in the practice of courts of many States to regard international law, in some way, as part of national law or as entering legitimately into the national conception of *ordre public*. Although the Norwegian Government [**41**] has admitted that in no case can a Norwegian court overrule Norwegian legislation on the ground that it is contrary to international law, it has asserted that it is possible that a Norwegian court may consider international law to form part of the law of the Kingdom to the extent that it ought, if possible, to interpret the Norwegian legislation in question so as not to impute to it the intention or the effect of violating international law. Also, it seems a fact that in certain matters Norwegian courts have the power to review the acts of the legislature, in particular from the point of view of their conformity with the constitution. This, it has been asserted, may mean that Norwegian courts might refuse to give retro-active effect to the legislation in question. These possibilities may be remote. They are not so absolutely remote as to deserve to be ruled out altogether.

"Secondly, it is difficult to admit, having regard to the long history of the present dispute and the negotiations relating thereto, that the French Government has given a sufficient explanation of the failure of the French creditors to seek a remedy before Norwegian courts. No persuasive reason has been adduced why the French Government, by encouraging an attempt to exhaust local remedies, has not assisted in eliminating the possibility of that Preliminary Objection. The delay resulting from any such attempt would have been relatively small in comparison with the long period of years consumed by the protracted negotiations on the subject. There seems to run through the submissions of the French Government the apprehension that after Norwegian courts have finally dismissed the claim of the French creditors the only claim internationally available to the French Government would be that on account of denial of justice. This is probably not so. A final adverse decision of Norwegian courts would still leave it possible to the French Government to contend that Norwegian legislation, as finally upheld by Norwegian courts, is contrary to international law. No decisive importance can be attached to the view that, seeing that the Norwegian Government repeatedly reiterated that it was prevented by the Norwegian Law to effect payment in gold, the French bondholders were entitled to assume that they have no remedy under Norwegian law. The Norwegian Government, being an interested party, was not for this purpose an authorised interpreter of Norwegian law. It was for the bondholders, by bringing an action before Norwegian courts, to attempt to show that the Norwegian Government was mistaken in its interpretation of Norwegian law. If the courts held that that interpretation was correct, then the road to international proceedings would no longer be blocked by the objection based on the failure to exhaust local remedies. I must, therefore, although with some hesitation, consider that objection as well founded.

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[1] See *Annual Digest*, 1929–1930, Case No. 278].

[2] *Ibid.*, 1935–1937, Case No. 6.]

[**42**] " In invoking the ' automatic reservation ' the Govermnent of Norway apparently was of the opinion that what it did was no more than to invoke it in aid—in decisive aid, if need be—of the contention, previously advanced, that the dispute is not concerned with international law and that it does not therefore fall within the orbit of Article 36 (2) of the Statute by reference to which Norway accepted the obligatory jurisdiction of the Court. Actually these two questions are not identical. A dispute may be essentially within the national jurisdiction of a State (i.e. covered by the terms of the ' automatic reservation ') while being at the same time a dispute concerning a question of international law.

" If the Court were called upon to determine itself whether the subject-matter of the present dispute is essentially within the domestic jurisdiction of Norway it would be confronted with a difficult task. It is possible to hold that, although—contrary to the view expressed by the Norwegian Government—the dispute is also one of international law, it nevertheless arises out of a matter essentially within the jurisdiction of the State seeing that questions of currency are essentially within the national jurisdiction. In that case the Preliminary Objection based on the French reservation would be valid in its own right—quite apart from the right of unilateral determination. There is the alternative view that if a dispute is also concerned with international law then it is no longer exclusively within the national jurisdiction; that the terms ' exclusively ' and ' essentially ' are substantially identical; and that, therefore, the subject-matter of the present dispute is not essentially within the national jurisdiction of Norway. However, the Norwegian Government has attached no importance to elaborating that distinction. It not only stated, in the minimum of words, that the matter is essentially within the national jurisdiction of Norway; it stated that it said so and that it said so with finality.

" The determination thus made was advanced in a subsidiary manner at the initial stage of the proceedings. It was subsequently kept in the background and invoked only by studious indirection. It was never formally withdrawn. It provided the exclusive basis for the Judgment of the Court which, on this question, says in effect as follows: According to the Norwegian Government the issue is one essentially within the domestic jurisdiction of Norway. That view may be ill-founded. However, it is the view of the

Norwegian Government. As such it is decisive for the purpose of jurisdiction of the Court—just as if the French Government were the defendant State its view to that effect would be decisive by virtue of the reservation as formulated by it. The Court must accept that view not because it agrees with it, but because it is [43] the view of the Norwegian Government. Its accuracy is irrelevant. This is the inescapable result of the condition under which France —and consequently Norway—accepted the jurisdiction of the Court. That preliminary Objection of Norway is quite peremptory, fully effective to the point of being automatic, and is not subject to review by the Court.

" I have given reasons why, in my view, the ' automatic reservation ', being of a subsidiary character, was not in any case calculated to provide an exclusive basis of the Judgment of the Court. However, apart from that aspect of the question and whatever may be the position with regard to the validity of the French Acceptance as a whole, it is my view that it was not open to the Court to act on that particular reservation. This is so for the reason that I consider it legally impossible for the Court to act in disregard of its Statute which imposes upon it the duty and confers upon it the right to determine its jurisdiction. That right cannot be exercised by a party to the dispute. The Court cannot, in any circumstances, treat as admissible the claim that the parties have accepted its jurisdiction subject to the condition that they, and not the Court, will decide on its jurisdiction. To do so is in my view contrary to Article 36 (6) of the Statute which, without any qualification, confers upon the Court the right and imposes upon it the duty to determine its jurisdiction. Moreover, it is also contrary to Article 1 of the Statute of the Court and Article 92 of the Charter of the United Nations which lay down that the Court shall function in accordance with the provisions of its Statute. It is that question which I now propose to consider in connection with the examination of the validity of the French Acceptance.

" II

"*The Validity of the French Declaration of Acceptance*

" 1. *Is the 'automatic reservation' consistent with the Statute?*

" I have stated the reasons for which, if I felt free to do so, I would reject all Preliminary Objections of Norway with the exception of that relating to the exhaustion of local remedies. However, I do not feel free to decide the question of jurisdiction on these grounds. To do so would be to admit that the Court is confronted with a valid instrument of acceptance of its jurisdiction on the part of France. In my view it is impossible to admit that. I consider that as the French Declaration of Acceptance excludes from the jurisdiction of the Court ' matters which are essentially within the national jursidiction as understood by the Government of the French Republic '— the emphasis being here on the words ' understood by the Government of the French Republic '—it is for the reason [44] of that latter qualification an instrument incapable of producing legal effects before this Court and of establishing its jurisdiction. This is so for the double reason that: (*a*) it is contrary to the Statute of the Court; (*b*) the existence of the obligation being dependent upon the determination by the Government accepting the Optional Clause, the Acceptance does not constitute a legal obligation. That Declaration of Acceptance cannot, accordingly, provide a basis for the jurisdiction of the Court. Norway has not accepted the jurisdiction of the Court on any other basis. The Court therefore has no jurisdiction.

"As stated, the first reason for that view is that that particular part of the acceptance of the Optional Clause on the part of the French Republic is contrary to the Statute of the Court. In the reservation in question the Government of France says in effect: If a Government brings an application before the Court in reliance on the French acceptance of the jurisdiction of the Court and if the Government of France maintains that the Court has no jurisdiction on the ground that the subject-matter of the dispute is essentially within the domestic jurisdiction of France, then the Court has no power to decide upon that particular allegation; it must accept as binding the French understanding of the legal position on the subject.

" If that type of reservation is valid, then the Court is not in the position to exercise the power conferred upon it—in fact, the duty imposed upon it—under paragraph 6 of Article 36 of its Statute. That paragraph provides that ' in the event of a dispute as to whether the Court has jurisdiction, the matter shall be settled by a decision of the Court '. The French reservation lays down that if, with regard to that particular question, there is a dispute between the Parties as to whether the Court has jurisdiction, the matter shall be settled by a decision of the French Government. The French reservation is thus not only contrary to one of the most fundamental principles of international—and national—jurisprudence according to which it is within the inherent power of a tribunal to interpret the text establishing its jurisdiction. It is also contrary to a clear specific provision of the Statute of the Court as well as to the general Articles 1 and 92 of the Statute and of the Charter, respectively, which require the Court to function in accordance with its Statute.

" Now what is the result of the fact that a reservation or part of it are contrary to the provisions of the Statute of the Court? The result is that that reservation or that part of it is invalid. Some examples may usefully illustrate that aspect of the question: What would be the position if in accepting—or purporting to accept—the obligations of Article 36 of the Statute, a State were to exclude the operation of paragraph 6 of that Article not only with regard to one reservation but with regard to all reservations or, generally, with regard to any disputed question of the jurisdiction of the Court? [**45**] What would be the position if the Declaration were to make it a condition that the oral proceedings of the Court shall be secret; or that its Judgment shall not be binding unless given by unanimity; or that it should contain no reasons; or that no Dissenting Opinion shall be attached; or that Judges of certain nationality or nationalities shall be excluded; or that, contrary to what is said in Article 38 of its Statute, the Court shall apply only treaties and custom in the sense that it shall not be authorized to apply general principles of law as recognized by civilized States and that if it is unable to base its decision on treaty or custom it shall pronounce a *non liquet?* What would be the position in the case of any such reservation?

" It might be said that some of these examples are hypothetical and farfetched. In fact they are less farfetched than the particular instance here discussed—the instance of a reservation according to which a Government claims, after it has submitted to the compulsory jurisdiction of the Court, the right to determine for itself, after the dispute has arisen and been brought before the Court, whether the Court has jurisdiction. Neither is it accurate to say that these examples are irrelevant seeing that while the Statute as interpreted in practice permits reservations to its jurisdiction it does not permit reservations as to the functioning and the organization of the Court. For, assuming that distinction to be valid, the reservation here discussed pertains to the functioning of the Court in the matter of its jurisdiction.

" Clearly the Court cannot act otherwise than in accordance with its Statute. By way of illustration reference may be made here to the case of the *Free Zones*[1] in which the Court stated that it ' cannot, on the proposal of the Parties, depart from the terms of the Statute '—a statement made in response to a request of the parties that the Court should communicate to them unofficially the result of its deliberations ([*P.C.I.J.*] Series A, No. 22, p. 12). The Court acted in that way although at that time it was not bound by the express provisions of the Charter and the Statute requiring it to act in accordance with its Statute. In a different sphere, in its Advisory Opinion of

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[[1] See *Annual Digest*, 1929–1930, Case No. 277, at p. 463.]

7 June 1955 concerning the *Voting Procedure of the General Assembly in the Matter of Petitions from South West Africa*, the Court was of the view that it was legally impossible for the General Assembly to reach decisions on these questions in accordance with a voting system 'entirely alien to that prescribed by the Charter' (*I.C.J. Reports* 1955, p. 76[1]). There was in that case room for the argument that voting being to some extent a matter of procedure the General Assembly enjoyed some latitude in the matter. This was not the view of the Court. It based its Opinion on the principle that an organ cannot act except in accordance with its constituent instrument. In the present case the acceptance of the jurisdiction of the Court is made dependent on a condition which radically departs from the Statute—which is in clear contradiction with the Statute— [**46**] with regard to a fundamental aspect of the functioning of the Court. It would seem that, for that reason, the French Declaration of Acceptance would be invalid even if the particular issue which is connected with its invalidity did not arise in the case now before the Court. But that particular issue does arise. The Norwegian Government invoked that particular reservation and, although it has kept it in the background, it has not withdrawn it.

"In accepting the jurisdiction of the Court Governments are free to limit its jurisdiction in a drastic manner. As a result there may be little left in the Acceptance which is subject to the jurisdiction of the Court. This the Governments, as trustees of the interests entrusted to them, are fully entitled to do. Their right to append reservations which are not inconsistent with the Statute is no longer in question. But the question whether that little that is left is or is not subject to the jurisdiction of the Court must be determined by the Court itself. Any conditions or reservations which purport to deprive the Court of that power are contrary to an express provision of the Statute and to the very notion, embodied in Article 36 (6), of conferment of obligatory jurisdiction upon the Court. As such they are invalid. It has been said that as Governments are free to accept or not to accept the Optional Clause, they are free to accept the very minimum of it. Obviously. But that very minimum must not be in violation of the Statute.

"If the Court cannot function except in conformity with its Statute then, when confronted with an Acceptance containing a reservation which is contrary to a provision of the Statute, it must consider that reservation as invalid. This is not a conclusion of juridical refinement. It is the result of the fact that the Statute of the Court is the basis and the very source of the Declaration of Acceptance. The Declaration does not exist except by virtue of the Statute. It does not legally exist unless it is in accordance with it. In this connection mention may be made of the legal principle generally recognized in municipal law according to which a condition, in a contract or in any other legal instrument, that is contrary to a fundamental principle of judicial organization is invalid. That principle is recognized with some precision in French law.

How does it come to pass that, in formulating their acceptance of the jurisdiction of the Court, Governments—for this form of Acceptance has not been confined to the Government of France—deem themselves free to disregard the Statute of the Court to which they are parties? It would be inaccurate to explain that attitude by reference to any absence of familiarity with the terms of the Statute. The relevant provisions of the Statute were clearly before the authors of the Declaration and they were considered by them with reference to the very question here discussed. This is not a question whether the Court ought to give encouragement, direct or indirect, to any such attitude of indifference to its Statute. The Court is not [**47**] concerned with safeguarding the dignity of its Statute—though it is concerned with safeguarding its authority. However that may be, the deliberate character of the disregard of the Statute of the Court by the authors of the Declaration

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[[1] See *International Law Reports*, 1955, p. 651, at p. 658.]

has a bearing upon the effects, in the sphere of nullity, of the Declaration thus made. For it rules out the admissibility of any attempt to bring it somehow, by way of interpretation, within the four corners of conformity with the Statute and thus to salvage it as a valid legal declaration.

" Moreover, the particular reservation now at issue is not one that is contrary to some merely procedural aspect of the Statute. It is contrary to one of its basic features. It is at variance with the principal safeguard of the system of the compulsory jurisdiction of the Court. Without it, the compulsory jurisdiction of the Court being dependent upon the will of the defendant party, expressed subsequent to the dispute having been brought before the Court, has no meaning. Article 36 (6) is thus an essential condition of the system of obligatory judicial settlement as established in the Statute. That provision was inserted in the Statute with the deliberate intention of providing an indispensable safeguard of the operation of the system. Article 36 (2) speaks of the recognition by the parties to the Statute of the ' compulsory ' jurisdiction of the Court. But there is no question of compulsory jurisdiction if, after the dispute has arisen and after it has been brought before the Court, the defendant State is entitled to decide whether the Court has jurisdiction.

" Reference may be made to two arguments adduced with the object of bringing the ' automatic reservation ' within the orbit of conformity with Article 36 (6) of the Statute: In the first instance, it has been said that if the Court declines jurisdiction by reference to the ' automatic reservation ' it is actually, in full conformity with Article 36 (6), making a decision on the question of its jurisdiction. This argument is of a verbal character. For in that case it is not the Court which makes the actual decision on the question of its jursidiction. The decision is made by the defendant Government of Norway. The Court merely registers it. Moreover, the Court says so in its Judgment. It states in effect that its task is confined to registering the decision of the defendant State—a decision which it is entitled to make by virtue of the operation of reciprocity.

" The second argument intended to show that the French reservation is not contrary to Article 36 (6) of the Statute is as follows: If a Government, in conformity with its reservation, has made the determination that a matter is essentially within its national jurisdiction, then there is no dispute as to the question of jurisdiction. For the fact that the Government concerned has made that determination is not in dispute and, therefore, it would seem that [**48**] the question of Article 36 (6) has no relevance in this connection; at most, the application of Article 36 (6) is confined to registering the fact that the determination has been made by the defendant State. This argument is, once more, of a dialectical character. For what is actually the position? A Government brings a case before the Court and maintains in its Memorial that the subject of the dispute is one of international law. The defendent State asserts in its Preliminary Objections that in its opinion that matter is essentially within its domestic jurisdiction. There is thus a dispute between the Parties on the question of the jurisdiction of the Court. However, having regard to the ' automatic reservation ', that dispute cannot be determined by the Court. It is determined by the Government concerned. This is exactly the position in the present case. If we look at the substance of the matter, there is little doubt that the reservation is based on the intention—and has the effect of—divesting the Court of the power conferred upon it by Article 36 (6).

" 2. *Is the 'automatic reservation' consistent with the requirements of a legal obligation to submit to the jurisdiction of the Court?*

" I have given reasons why I consider that the ' automatic reservation ', inasmuch as it embodies the claim of one party to make a decision, binding upon the Court, with regard to the contested question of its jurisdiction is invalid as being contrary to the Statute of the Court.

" I arrive at the same conclusion on the second—and different—ground, namely, that having regard to the formulation of the reservation of national jurisdiction on the part of the French Government the Acceptance embodying the ' automatic reservation ' is invalid as lacking in an essential condition of validity of a legal instrument. This is so for the reason that it leaves to the party making the Declaration the right to determine the extent and the very existence of its obligation. The effect of the French reservation relating to domestic jurisdiction is that the French Government has, in this respect, undertaken an obligation to the extent to which it, and it alone, considers that it has done so. This means that it has undertaken no obligation. An instrument in which a party is entitled to determine the existence of its obligation is not a valid and enforceable legal instrument of which a court of law can take cognizance. It is not a legal instrument. It is a declaration of a political principle and purpose.

" It is irrelevant for the purpose of the view here outlined whether the instrument of acceptance of the obligation of the Optional Clause is a treaty or some other mode of creating obligations. In the *Anglo-Iranian Oil Company* case[1] the Court observed that ' the text of the Iranian Declaration is not a treaty text resulting from negotiations between two or more States ' but that ' it is the result of unilateral drafting by the Government of Iran ' (*I.C.J. Reports* [**49**] 1952, p. 105). The statement means no more than that the declaration is the result not of negotiations but of unilateral drafting. Whether it is a treaty or a unilateral declaration, it is—if it is to be treated as a legal text providing a basis for the jurisdiction of the Court—a manifestation of intention to create reciprocal rights and obligations. It will be noted that Article 36 (2) refers to the acceptance of the jurisdiction of the Court in relation ' to any other State accepting the same *obligation* '. In fact there is no difficulty in visualizing the Declaration of Acceptance as an accession to a multilateral treaty in the same way as, in the case of various conventions concluded under the auspices of the United Nations, Governments accede to a text established by the General Assembly. However that may be, the acceptance of the Optional Clause is an instrument purporting to bring about, as between the accepting State and any other State which has accepted or may accept that text, reciprocal rights and obligations. If the acceptance does not, in law, amount to an assumption of an obligation effectively binding upon the Government concerned, it is not a valid instrument upon which the accepting State can rely and of which the Court can take cognizance. If a Government declares that it accepts the compulsory jurisdiction of the Court unless, in cases which cover potentially the entire field of possible disputes, it determines, after the dispute has come before the Court, that the Court has no jurisdiction, then the declaration thus made constitutes no legal undertaking and cannot be treated as a legal instrument constituting an undertaking.

" The proposition here advanced—namely, that an undertaking in which the applicant party reserves for itself the exclusive right to determine the extent or the very existence of its obligation is not a legal undertaking—is so self-evident as a matter of juridical principle that it is not necessary to elaborate this point by showing it to be a generally recognized principle of law which the Court is authorized to apply by virtue of Article 38 of its Statutes. It is a general principle of law as it results from the legislation and practice of courts in various countries in the matter of contracts and other legal instruments. These are treated as invalid whenever the object of the obligation is reserved for the exclusive determination of the party said to be bound by the obligation in question. (Reference may be made here to the position in French law as summarized in the leading treatise by Planiol and Ripert. They state, when dealing with the general conditions of the validity

[[1] See *International Law Reports*, 1952, Case No. 114, at p. 511.]

of the contract, that the freedom of the party to determine the object of its obligation negatives the legal nature of the agreement (*Traité pratique de droit civil français*, Vol. vi, 2nd ed., 1952, Section 220: 'Détermination de l'objet'). In dealing with so-called potestative conditions, they refer to purely potestative conditions dependent upon the will of the debtor and covered by Article 1174 of the Civil [**50**] Code which provides that 'an obligation is null if contracted under a potestative condition on the part of the obligor' (*ibid.*, Vol. vii, Section 1028). It is not desirable to prolong this Opinion by an examination of English law and of the law of the United States of America on the question. With regard to the latter, reference may be made to the leading treatise on the subject, namely, Williston's 'On Contracts' (revised edition, Vol. i, (1936), § 43) where, in the light of numerous judicial decisions, the freedom of a party to determine the object of its obligation is represented as negativing the legal nature of the agreement. The importance attached to the necessity of a clear determination of the subject-matter of the obligation may be seen from the fact that French courts have held that a contract providing that a party shall be entitled to purchase goods in accordance with a price to be agreed separately is ineffective and unenforceable. In some other countries the courts have held that in such cases reasonable terms are to be fixed by the courts—a solution which, in a different sphere, is in the present case excluded by the terms of the automatic French reservation.)

"That general principle of law is, in turn, no more than a principle of common sense. Applied to the present case, that principle signifies that if the element of legal obligation is non-existent or negligible it must follow that the instrument is not a legal instrument upon which a State can rely as a matter of right for the purpose of invoking the jurisdiction of the Court. Instruments—whether by way of treaties, unilateral declarations, and other texts— cognisable before a court of law and relied upon for obtaining redress must be instruments creating legal obligations. It is irrelevant for this purpose that, having regard to public opinion, an enlightened State is not likely to invoke any such reservation capriciously, unjustifiably, and in bad faith. These are expectations which may or may not materialize. The decisive factor is that the State concerned is not willing to leave a decision on the question to the impartial judgment of the Court but that it insists on its own determination of the issue. Neither is it feasible to try to inject a legal element into the Declaration thus formulated by using phraseology such as that the undertaking in question is binding subject to a resolutive condition dependent upon the promising party. Upon analysis that phrase means no more than that the undertaking is binding so long as the dispute has not been brought before the Court but that its binding force becomes a matter of discretion of the defendant State once the Court has been seised of the dispute.

"It may be argued that, after all, the interpretation of disputed provisions of treaties is not, in the absence of agreement, subject to the compulsory jurisdiction of international courts and that nevertheless that fact does not deprive the treaties in question of their character as binding legal instruments. The answer is that in these [**51**] treaties the object of the obligation is determined and that neither party is accorded the right of unilateral determination which the other party is bound to accept. Moreover, in the present case the absence—the deliberate exclusion—of the jurisdiction of the Court refers to the very ascertainment of the jurisdiction ostensibly conferred upon it in what purports to be a legal text.

"I have given reasons why, inasmuch as the French Declaration of Acceptance leaves it to the declaring Government to determine both the existence and the extent of the obligation undertaken by France, it does not constitute a legal obligation essential to the validity of a legal text. I will now consider whether there are any factors which may legitimately mitigate the apparent rigour of these consequences.

" It might be said that matters which are essentially within national jurisdiction constitute only one part of the potential number of controversies which may come before the Court; that with regard to others the element of legal obligation fully subsists; and that therefore the Acceptance as a whole may still be capable of being regarded as a valid legal instrument. There is little persuasive force in any such argument. The reservation of matters essentially within the domestic jurisdiction of a State as understood by that State is so wide as to cover, at the option of the State concerned, practically all disputes in which it may be involved.

" For, in the first instance, it will be noted that the French reservation in issue refers not to matters which are *according to international law exclusively* within the domestic jurisdiction of the State, but to matters which are *essentially* within the domestic jurisdiction. There are matters which have often been considered as being essentially within the domestic jurisdiction of States but which, having become regulated by treaty or custom, have ceased to be so—an aspect of the question for which the Advisory Opinion of the Permanent Court of International Justice in the case of *Tunis and Morocco Nationality Decrees*[1] provides an instructive and authoritative illustration. Tariffs, immigration, treatment of aliens and citizens in national territory, internal legislation generally—all those matters have been claimed to be essentially within the domestic jurisdiction of States. It is not necessary for me to express an opinion on the subject. However, even if that claim is admitted, those are not necessarily matters which according to international law are exclusively within the domestic jurisdiction of the State—though, as stated, they have often been described as being matters of domestic jurisdiction or essentially of domestic jurisdiction. Practically every aspect of the conduct of the State may be, *prima* [**52**] *facie*, within that category for the reason that normally the State exercises its activity within its national territory, or, on the high seas, in relation to its ships which for some purposes are considered by States to form part of its territory. In the *Lotus* case[2] the Court was prepared to base its decision, to some extent, on the view that the ship affected was Turkish territory and that the offence was therefore committed in Turkey. For these reasons it is possible for a State to maintain, without necessarily laying itself open to an irresistible charge of bad faith, that practically every dispute concerns a matter essentially within its domestic jurisdiction. Most Judgments given by this Court and its predecessor—with the exception of those concerned with territorial disputes—have been given in relation to matters bearing on the activity of the State within its jurisdiction and related to its national legislation and administration. These are the typical occasions giving rise to State responsibility. This aspect of the question is elaborated in more detail in the examination, which follows, of the power of the Court to review the determination made by a Government in pursuance of the ' automatic reservation '.

" If thus practically every matter can be plausibly, though not necessarily accurately, described as a matter essentially within the domestic jurisdiction of the State concerned and if that State is the sole judge of the question, it is clear that, as the result, the element of legal obligation is reduced to a vanishing point.

" I will now examine the view that, although a State reserves for itself the right to determine whether a matter is essentially within its domestic jurisdiction, such determination must be effected in accordance with the legal obligation to act in good faith and that to that extent there is in existence a valid legal obligation and a valid legal instrument. I myself expressed a view

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[[1] See *Annual Digest*, 1923–1924, Case No. 203.]

[[2] *P.C.I.J.*, Series A, No. 10; *Annual Digest*, 1927–1928, Case No. 98.]

to that effect in my *Report on the Law of Treaties* which I submitted in 1953 as a member of the International Law Commission. In the light of further study of this question in connection with the present case, I do not feel it possible to adhere to that view. The legal obligation of a Government to avail itself of its freedom of action in a manner consistent with good faith has a meaning, in terms of legal obligation, only when room is left for an impartial finding whether the duty to act in accordance with good faith has been complied with. But in the case now before the Court any such possibility has been expressly excluded. The Court has no power to give a decision on the question whether a State has acted in good faith in claiming that a dispute covers a matter which is essentially within its domestic jurisdiction. If the Court were to do so, it would [**53**] be arrogating to itself a power which has been expressly denied to it. Unquestionably, the obligation to act in accordance with good faith, being a general principle of law, is also part of international law. The Governments which have appended the 'automatic reservation' have not questioned their legal obligation to invoke it in good faith, that is to say not capriciously and arbitrarily. But it is abundantly clear from the evidence which is generally available that the authors of the 'automatic reservation' have reserved for the Governments concerned the right to judge whether in invoking it in a particular case they have complied with the obligation to act in good faith. They have repeatedly declared that their own sense of international duty and propriety, public opinion within and outside their countries, and their reputation and prestige in the world would constitute a restraining factor of great potency in shaping their decision. But they have denied to the Court the power to determine the legality of that decision from the point of view of the obligation to act in good faith or otherwise. They have reserved that power to themselves.

" For this reason I cannot accept as accurate the view expressed in the following terms in paragraph 26 of the Norwegian 'Preliminary Objections': 'Of course, such a reservation must be interpreted in good faith and should a government seek to rely upon it with a view to denying the jurisdiction of the Court in a case which manifestly did not involve a " matter which is essentially within the national jurisdiction " it would be committing an *abus de droit* which would not prevent the Court from acting.' The Court has no such power. It cannot arrogate to itself the competence—which has been expressly denied to it—to find that the assertion of the defendant State that a matter is expressly within its domestic jurisdiction is so extravagant and so arbitrary as to amount to an action in bad faith and to an abuse of right, with the result that the Court is entitled to ignore or to override the determination thus made. As already stated, in view of the comprehensiveness of the term 'matters essentially within domestic jurisdiction', it is not easy to conceive [of] situations of any such obviousness. It is not certain that a State would be acting flagrantly and irrefutably in disregard of the canons of good faith if it were to determine most disputes as coming within its domestic jurisdiction.

" The question of the obligation to act in good faith arises only in relation to legitimate expectations of the other party. But there is only a nominal degree of legitimate expectation in relation to an obligation, in regard to a potentially most comprehensive category of disputes, as to which the party undertaking it expressly declares in advance that it is free to determine both the existence and the degree of its obligation. As already stated, the attitude of a Government in most disputes is as a rule adopted in pursuance of its internal legislation or other form of authorization determined by its national law. To that extent it is arguable—perhaps inaccurately but not [**54**] necessarily extravagantly so—that any dispute arising in this connection is essentially a matter of domestic jurisdiction. Also, practically all disputes involving an allegation of a breach of an international duty, whether under a treaty or under customary international law, arise out of events occurring within the territory of that State. In that sense it may be claimed, with or without good reason, that they are matters essentially within the national jurisdiction of the State. A dispute relating to the jurisdictional immunities of foreign States or their diplomatic agents may be asserted to fall within that category—especially if its subject-matter is covered by national legislation or the jurisprudence of national courts. A defendant State may allege that, for the latter reason, a dispute concerning its domestic legislation affecting the continental shelf or parts of the high seas relates to a matter within its national jurisdiction. The only disputes which, it might appear, are outside that category are territorial disputes. But even that is not certain. In fact it has been suggested that territorial disputes pertain to matters of domestic jurisdiction. In the communication addressed on May 4th, 1955, by the Government of Argentina to the United Kingdom in the matter of disputed sovereignty over certain Antarctic territories one of the reasons adduced in support of the refusal of the former Government to submit the issue to this Court was that the Government of the United Kingdom had, in its acceptance of the Optional Clause, itself excluded from the competence of the Court questions within its exclusive jurisdiction. The contention that a territorial dispute involves a matter within the domestic jurisdiction of a State may be farfetched, but has the Court been given the power to say that any such assertion is obviously in bad faith, that it constitutes an abuse of a right, that it must be ignored or overridden, and that the Court has jurisdiction notwithstanding the determination to the contrary by the State in question?

"Any attempt to embark upon the examination of the question whether a Government has acted in bad faith in determining that a matter is essentially within its domestic jurisdiction may involve an exacting enquiry into the merits of the dispute—an enquiry so exacting that it could claim to determine, with full assurance, that the juridical view advanced by a Government is so demonstrably and palpably wrong and so arbitrary as to amount to an assertion made in bad faith. Only an enquiry into the merits can determine that although an assertion made by the defendant Government is not legally well-founded it is nevertheless reasonable; or that although it is not reasonable, it is not wholly arbitrary. The Court has no power to make such determination.

" The ' automatic reservation ' is couched in terms so comprehensive as to preclude the Court from reviewing it or interpreting it [55] away not only by reference to any assertion of abuse of a right by the defendant State but also in any other way. Thus, for instance, it is not open to the Court to disregard that reservation by reference to some such argument that the right of exclusive determination pertains only to matters which are ' essentially within domestic jurisdiction '; that a matter which is clearly governed by international law, because of international custom or treaty, is not essentially within the domestic jurisdiction of a State; and that, therefore, such matters are neither within the scope of the reservation nor within the power of the accepting State to determine unilaterally whether the dispute is within the domestic jurisdiction. It is not easy to find a legal limit to the right of the accepting State which has appended a reservation of this kind to decline the jurisdiction of the Court. That right seems to be unqualified. So is the inability of the Court to review the attitude of the Government in question. That very absence of qualification is expressive of the absence of any element of legal obligation implicit in a reservation thus formulated.

" Having regard to the preceding observations I am of the view that the right of the accepting State to determine whether a matter is essentially within its domestic jurisdiction makes the extent and the very existence of its obligation dependent upon its will; that the subject-matter of such determination may cover practically all disputes; that the Court has no power to disregard a determination thus made on the ground that it has not been made in good faith or on any other ground; and that the reservation of domestic jurisdiction thus formulated is therefore invalid inasmuch as it deprives the Acceptance of the essential element of legal obligation.

" 3. *Can the ' automatic reservation ' be separated from the Acceptance as such?*

" I have come to the conclusion that the ' automatic reservation ' relating to matters deemed by the Government of France to be essentially within her national jurisdiction is invalid for the double reason that it is contrary to the Statute of the Court and that it deprives the Acceptance of the indispensable element of legal obligation.

" If the clause of the Acceptance reserving to the declaring Government the right of unilateral determination is invalid, then there are only two alternatives open to the Court: it may either treat as invalid that particular part of the reservation or it may consider the entire Acceptance to be tainted with invalidity. (There is a third possibility—which has only to be mentioned in order to be dismissed—namely, that the clause in question invalidates not the Acceptance as a whole but the particular reservation. This would mean that the entire reservation of matters of national jurisdiction [**56**] would be treated as invalid while the Declaration of Acceptance as such would be treated as fully in force.)

"As stated, the first possibility is that the particular condition attached to the reservation—namely, the words ' as understood by the French Government '—should be treated as non-existent and ignored while the remainder of the reservation and of the Acceptance as a whole be treated as fully valid and subsistent. Legal practice and doctrine within the State are familiar with situations in which a contract or any other legal instrument contains a clause which the law treats as invalid or unenforceable without necessarily bringing about the nullity of the contract or instrument as a whole. In those cases the provision in question is severed—is treated separately—from the rest of the text. This is not always possible. Much depends on whether that provision is an essential part of the instrument in question. In the international sphere the problem of severance of provisions of treaties and other international instruments has been frequently discussed by writers and occasionally in judicial decisions—in particular in connection with the question of termination of treaties on the ground of non-performance by one of the parties or as the result of war or some other change of circumstances. Early writers considered that every single provision of a treaty is indissolubly linked with the fate of the entire instrument which, in their view, lapses as the result of the frustration or non-fulfilment of any particular provision, however unimportant and non-essential. This is not the modern view. Neither is it the view which has secured the adherence of modern governmental and judicial practice, including that of the Permanent Court of International Justice. The latter on a number of occasions declined to treat individual provisions of a treaty as being indissolubly connected and interdependent. (See, for instance, *Free Zones* case, [*P.C.I.J.*] Series A/B, No. 46, p. 140,[1] in which the Court treated Article 435 of the Treaty of Versailles as a ' complete whole ' independent of the rest of the Treaty; and the Advisory Opinions relating to the *Competence of the International Labour Organisation*, Series B, No. 2, pp. 23, 24,[2] and Series B, No. 13, p. 18,[3] with regard to the independent position of Part XIII of the Treaty.) In a different sphere, the Opinion of this Court in the case of the *Reservations to the Genocide Convention*[4] shows that there may be reasonable limits to the notion of the indivisibility of a treaty and that some of its provisions may not be of a nature essential to the treaty as a whole.

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[1] See *Annual Digest*, 1931–1932, Case No. 202, at p. 363.]

[2] *Ibid.*, 1919–1922, Case No. 245.]

[3] *Ibid.*, p. 338, n. 1.]

[4] *I.C.J. Reports*, 1951, p. 15; *International Law Reports*, 1951, Case No. 118.]

" International practice on the subject is not sufficiently abundant to permit a confident attempt at generalization and some help may justifiably be sought in applicable general principles of law as developed in municipal law. That general principle of law is that it is legitimate—and perhaps obligatory—to sever an invalid condition from the rest of the instrument and to treat the latter as valid provided that having regard to the intention of the parties [57] and the nature of the instrument the condition in question does not constitute an essential part of the instrument. *Utile non debet per inutile vitiari.* The same applies also to provisions and reservations relating to the jurisdiction of the Court. It would be consistent with the previous practice of the Court that it should, if only possible, uphold its jurisdiction when such a course is compatible with the intention of the parties and that it should not allow its jurisdiction to be defeated as the result of remediable defects of expression which are not of an essential character. If that principle were applied to the case now before the Court this would mean that, while the French acceptance as a whole would remain valid, the limitation expressed in the words ' as understood by the Government of the French Republic ' would be treated as invalid and non-existent with the further result that Norway could not rely on it. The outcome of the interpretation thus adopted would be somewhat startling inasmuch as it would, in the present case, favour the very State which originally made that reservation and defeat the objection of the defendant State—an aspect of the question commented upon in another part of this Opinion. That fact need not necessarily be a decisive reason against the adoption of any such interpretation.

" However, I consider that it is not open to the Court in the present case to sever the invalid condition from the Acceptance as a whole. For the principle of severance applies only to provisions and conditions which are not of the essence of the undertaking. Now an examination of the history of this particular form of the reservation of national jurisdiction shows that the unilateral right of determining whether the dispute is essentially within domestic jurisdiction has been regarded by the declaring State as one of the crucial limitations—perhaps the crucial limitation—of the obligation undertaken by the acceptance of the Optional Clause of Article 36 of the Statute. As is well known that particular limitation is, substantially, a repetition of the formula adopted, after considerable discussion, by the Senate of the United States of America in giving its consent and advice to the acceptance, in 1946, of the Optional Clause by that country. That instrument is not before the Court and it would not be proper for me to comment upon it except to the extent of noting that the reservation in question was included therein having regard to the decisive importance attached to it and notwithstanding the doubts, expressed in various quarters, as to its consistency with the Statute. It will also be noted that some governments, such as those of India and the Union of South Africa, have attributed so much importance to that particular formulation of the reservation that they cancelled their previous acceptance of the Optional Clause in order to insert, in a substituted Declaration of Acceptance, a clause reserving for themselves the right of unilateral determination. To ignore that clause and to maintain the [58] binding force of the Declaration as a whole would be to ignore an essential and deliberate condition of the Acceptance.

" From the point of view of the Government concerned there were weighty reasons why, anxious to frame its acceptance of the Optional Clause and its reservations thereto in such a manner as to preserve full freedom of national decision in the matter of submission of future disputes to the Court, it attached importance to formulating this particular reservation. In a significant passage, cited in paragraph 25 of the Preliminary Objections of Norway, the Rapporteur of the Committee for Foreign Affairs of the French Chamber said in relation to the reservation in question: ' The French sovereignty is not put in issue and its rights are safeguarded in all spheres and in all circumstances.' In fact, as is suggested in another part of this Opinion, there are only few disputes which cannot, without giving rise to an irrefutable imputation of bad faith, be brought within the orbit of the assertion that they pertain to a matter essentially within the domestic jurisdiction of the State concerned. Similarly, as already stated, there is but little substance in the view that the freedom of determination by the State interested is effectively limited for the reason that it must be exercised in good faith and that the Court is the judge whether it has been so exercised. The Court is therefore confronted with the decisive fact that the Government in question was not prepared to subscribe or to renew its commitment of compulsory judicial settlement unless it safeguarded in that particular way its freedom of action. That particular formulation of the reservation is an essential condition of the Acceptance as a whole. It is not severable from it. The phrase ' as understood by the Government of the French Republic ' must be regarded as being of the very essence of the undertaking in question. It is not a collateral condition which can be separated, ignored and left on one side while all others are given effect. The Acceptance stands [or] falls with that particular reservation and that particular formulation of the reservation. Without these words the Government which made that reservation would not have been willing to accept the commitments of the compulsory jurisdiction of this Court.

" The Court cannot properly uphold the validity of the Acceptance as a whole and at the same time treat as non-existent any such far-reaching, articulate and deliberate limitation of its jurisdiction. To do so would run counter to the established practice of the Court—which, in turn, is in accordance with a fundamental principle of international judicial settlement—that the Court will not uphold its jurisdiction unless the intention to confer it has been proved beyond reasonable doubt. The Court certainly cannot assume jurisdiction if there is a clearly expressed intention to deny it in specified circumstances. This means that it would not be possible for the Court to disregard that part of the reservation in question which claims for the State concerned the right to determine its **[59]** application. It is not possible for the Court to do otherwise than to regard this particular part of the reservation, so specifically formulated, as constituting an essential and not severable part of the instrument of acceptance. It might perhaps be possible—I express no view on the subject—to disregard and to treat as invalid some other reservation which is contrary to the Statute and thus to maintain the Acceptance as a whole. This is not possible with regard to a reservation directly referring to and excluding the jurisdiction of the Court. On the other hand, as I pointed out, it is not possible for the Court to act affirmatively upon that part of the reservation seeing that it is contrary to the Statute. It is thus not possible for the Court, while upholding the validity of the Acceptance, either to act upon that part of the reservation or to ignore it. The inescapable solution of the dilemma is to treat the entire Acceptance as invalid.

" This being so, my conclusion on this aspect of the question is that the reservation of national jurisdiction as qualified by the French Government is an essential part of its acceptance of the obligations of the Optional Clause; that it cannot be severed from the Acceptance as a whole; that as it is contrary to the Statute of the Court and as it deprives the Acceptance of the requisite element of legal obligation it must be held to be invalid and to invalidate the Acceptance as a whole; and that, there being no valid Acceptance, there is no instrument upon which France can rely and which, in the absence of agreement of Norway to submit to the jurisdiction of the Court apart from the Optional Clause, can provide a basis for the jurisdiction of the Court.

" It is necessary in this connection to refer to the Judgment of the Court in the case concerning *Rights of Nationals of the United States of America in Morocco.*[1] In that case, brought before it by an application based on Article 36 (2) of the Statute, the Court exercised jurisdiction although the Acceptances both of the applicant and the defendant State contained the 'automatic reservation'. To what extent is the Court now bound by the fact that it assumed jurisdiction in that case? Upon investigation that case proves irrelevant for the present issue.

" In the first instance, in the case of the *Rights of Nationals of the United States in Morocco* the jurisdiction of the Court was not challenged by the defendant State; the latter did not invoke the 'automatic reservation'. There was, therefore, no direct occasion for the Court to embark upon an examination of the validity of that reservation and of the Acceptance as a whole.

[**60**] " Secondly, although in that case France relied in her Application upon the Optional Clause of Article 36 (2) of the Statute, the jurisdiction of the Court was in fact exercised not on the basis of the Optional Clause but on the principle of *forum prorogatum, i.e.* on what was in fact a voluntary submission independent of the source of jurisdiction originally invoked by the applicant party. The Government of the United States agreed to the jurisdiction of the Court without admitting that the Court was competent on the basis of the Optional Clause. The relevant passage of the Counter-Memorial of the United States was as follows: 'The United States Government does not raise any jurisdictional issue in the proceeding, even though it does not concur in the allegations with respect to the compulsory jurisdiction of the Court which have been presented by the French Government, it being its understanding that its abstaining from raising the issue does not affect its legal right to rely in any future case on its reservations contained in its acceptance of the compulsory jurisdiction of the Court.' (*Case concerning Rights of Nationals of the United States of America in Morocco:* Pleadings, Oral Arguments, Documents, Vol. I, p. 262.) This statement is of significance seeing that in the course of the written proceedings the Government of the United States of America withdrew its Preliminary Objection which it had raised on account of the insufficient clarification of the identity of the Parties. That Objection was withdrawn as soon as it became clear that both France and Morocco would be bound by the Judgment of the Court (*ibid.*, Vol. II. pp. 424–434). It is thus clear that in that case the Court exercised jurisdiction not only because—unlike in the present case—the defendant Party agreed to it but also because it agreed to it on the basis other than the Declaration of Acceptance. The dispute now before the Court is the first case—an entirely novel case—in which a Party has claimed the right, denied to it by Article 36 (6) of the Statute, to substitute itself for the Court in the matter of a decision as to its jurisdiction. This being so, I need not discuss the question as to the extent to which the Court would be bound by the precedent of the case of the *United States Nationals in Morocco*, if that case were relevant to the issue now before the Court.

" It is essential to examine the view that it is not open to the Court to treat the French Acceptance as invalid seeing that Norway has not put forward any such assertion and that by relying, in view of the principle of reciprocity, on the French reservation she implicitly recognized the validity of the French Acceptance. I am unable to agree with that view. It would be open to Norway, by consenting to the jurisdiction of the Court irrespective of the French Acceptance, to confer competence upon the Court by way [**61**] of *forum prorogatum*. However, Norway has not submitted to the jurisdiction of the Court in any way. She has challenged it on various grounds. This being

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[[1] *I.J.C. Reports*, 1952, p. 176; ***International Law Reports***, 1952, Case No. 51.]

so, the fact that she has not raised the particular issue of the validity of the French Acceptance as a whole cannot endow with validity an instrument otherwise invalid. Even if Norway had agreed to the jurisdiction of the Court, it would not have followed that the Court could have exercised it on the basis of the French Declaration of Acceptance. The defendant State cannot, by refraining from raising objections, grant dispensation from invalidity. No one can do it—including, perhaps, the Court itself. The Court must have before it as a basis of its jurisdiction a valid text. It must ascertain the existence of that text. In the past it has, when occasion arose, raised the question of its jurisdiction *proprio motu* (see e.g. the case of the *Administration of the Prince von Pless*, Series A/B, No. 52, p. 15). It is open to the Court, for that purpose, to ascertain the views of the parties on the subject by availing itself of the useful provision of its Rules which enables it to address questions to the parties at any stage of the oral proceedings.

"As stated, the invalidity is inherent in the Declaration of Acceptance formulated in that way. It is not the case that the Declaration is valid until an occasion arises in which that particular reservation is relied upon by one party and challenged by the other with the result that its inconsistency with the Statute is thus brought to light. The Declaration is invalid *ab initio*. Brief reflection shows the irrelevance of the fact that neither party has challenged the validity of the Declaration and that the Court must therefore act upon it. For, clearly, the State which has formulated the ' automatic reservation ' is not likely, or entitled, to question it. The respondent State which relies upon it—by virtue of reciprocity (as Norway has done in the present case)—is not interested in challenging its validity. It finds it an effective, though possibly somewhat embarrassing, weapon of defence—in some cases the only effective means of defence unless it decides to steer the uncertain course of invoking simultaneously and by way of alternative submissions both the invalidity of the reservation and the reservation itself. For these reasons no importance can reasonably be attached to the fact that the validity of the ' automatic reservation ' has not been challenged by either party. Seeing that one party is responsible for its inclusion in its Declaration of Acceptance and that the other Party finds it necessary or imperative to rely on it, I can see but little force in the argument pointing to the fact that the validity of that reservation has not been put in issue by either party.

" Reference must be made in this connection to the argument pointing to the existence of certain treaties of obligatory arbitration [**62**] concluded in the past which, expressly or by implication, conferred upon the signatories the right to determine the arbitrability of a particular dispute. The arbitration treaties which were concluded before the First World War and which contained the then customary reservations of national honour and independence were generally regarded as recognizing by implication such right of unilateral determination. In some cases that right was expressly reserved. That argument is, in any case, irrelevant seeing that those treaties were not subject to the limitation of Article 36 (6) of the Statute of the Court. Were they valid from the point of view of the question whether they contained effective legal obligations? The question is, once more, of an academic character seeing that these treaties were not concluded within the framework of any organic statute of a tribunal possessing jurisdiction to determine their validity. They were devoid of an element of effective legal obligation. They provided a basis for a *compromis* if the parties so wished. They were never applied against the will of the defendant State. While it may thus be pedantic to enquire into the legal validity of the treaties in question in circumstances wholly different from the problem now before the Court, their practical insignificance does not seem to be open to doubt. With isolated exceptions, they were concluded at a time when a system of obligatory arbitration existed in name only.

"Above all, treaties of obligatory judicial settlement providing for the right of unilateral determination of the jurisdiction of the tribunal virtually disappeared after the First World War following upon the establishment of the Permanent Court of International Justice. In practically all—and certainly the principal—treaties of arbitration and judicial settlement concluded after the First World War the right to determine the disputed jurisdiction of the tribunal was conferred upon the tribunal itself (as, e.g., in the Swiss-German Treaty of 3 December, 1921, Article 4; or in the various Locarno Arbitration Treaties of 16 October, 1925—e.g., Article 16 of the Treaty between Germany and Poland). The important multilateral treaties of obligatory judicial settlement concluded after the First and Second World Wars include specific provisions to that effect—as does, for instance, Article 41 of the General Act for the Pacific Settlement of International Disputes of 26 September 1928 and the Pact of Bogotá of 30 April 1948. Article V of the latter treaty provides as follows: ' The aforesaid procedures may not be applied to matters which, by their nature, are within the domestic jurisdiction of the State. If the parties are not in agreement as to whether the controversy concerns a matter of domestic jurisdiction, this preliminary question shall be submitted to decision by the International Court of Justice, at the request of any of the parties.' Article 38 of the most recent multilateral treaty of obligatory judicial settlement—the European Convention of 29 April 1957 for the Peaceful Settlement of Disputes—is to the same effect. An examination of over two hundred treaties in the volume published [**63**] in 1949 by the United Nations and entitled ' Systematic Survey of Treaties for the Pacific Settlement of International Disputes, 1928–1948 ', reveals that only a very small number of treaties—perhaps not more than six—contain a reservation of the right of unilateral determination. The express acknowlegement of the power of the Court to determine its jurisdiction in cases in which that jurisdiction is disputed has thus become, even apart from the Statute of the Court, a uniform feature of the practice of States. The ' automatic reservation ', should it continue to be applied by the Court directly or indirectly, will arrest or reverse that trend which is an essential condition of any true system of obligatory judicial settlement.

" I must now consider some of the implications of a decision of the Court holding that a Declaration of Acceptance which includes the ' automatic reservation ' is invalid. Any such decision has a bearing upon Declarations, similarly formulated, of a number of other States. These now include the United States of America, Mexico, Pakistan, India, South Africa, Liberia, and, perhaps, to some limited extent the United Kingdom of Great Britain and Northern Ireland. The latter, in a Declaration made on 18 April, 1957, excluded from the Acceptance any question ' which, in the opinion of the Government of the United Kingdom, affects the national security of the United Kingdom or of any of its dependent territories '. I am conscious of some apprehended consequences of a decision of the Court holding that the manner in which the Optional Clause has been accepted by an increasing number of States, traditionally wedded to the cause of international judicial settlement, has the effect of rendering their Acceptance invalid. Moreover, that form of accepting the jurisdiction of the Court has not been confined to the Optional Clause. It has been followed, under its influence, in some other texts purporting to provide for the obligatory jurisdiction of the Court. (See, e.g., the reservation of the United States of America to the Pact of Bogotá: *Year Book of the Court*, 1947–1948, p. 144, n. 2. In a series of agreements relating to economic aid and concluded between the United States of America and some other States—as, for instance, with China on 3 July 1948—the following provision occurs: ' It is understood that the undertaking of each Government [providing for the jurisdiction of the Court] . . . is limited by the terms and conditions of such effective recognition as it has heretofore given to the compulsory jurisdiction of the International Court of Justice under Article 36 of the Statute of the Court ': *ibid.*, 1948–1949, pp. 152–155.)

" The circumstance that a decision of the Court may affect Governments which have had no opportunity to express their view on the [**64**] subject is a cause of concern. It would have been preferable if, in accordance with Article 63 of the Statute, the Governments which have made a Declaration in these terms had been given an opportunity to intervene. Failing that, it is possible for those Governments to adopt the attitude that, in accordance with Article 59 of the Statute, the authority of the decision of the Court is limited to the present case and that they are at liberty to assert their attitude on the matter on another occasion.

" In so far as it is within the province of the Court to consider the purpose of the system of the Optional Clause as provided in Article 36 (2) of its Statute, it is bound to attach importance to the fact that the ' automatic reservation ' has tended to impair the legal—and moral—authority and reality of the Optional Clause. Through the operation of reciprocity the practice of illusory acceptances must in the end encompass most declaring Governments including, as in the present case, those which accepted the Optional Clause without reservations.

" It might be said that to look in that way upon a Declaration of Acceptance thus formulated is to underestimate its moral value and to disregard the fact that enlightened Governments are not likely to invoke the reservation in question lightly and abusively. Yet, to stress the moral value of the Declaration is to go some way in admitting that it is devoid of legal force. Moreover, there is little substance in the assumption that Governments exhibit reluctance to invoke reservations to their acceptance of jurisdiction of international tribunals or that any moral impropriety attaches to reservations being invoked. It is a good legal right of Governments to do so. It is seldom that a Government cited before the Court in pursuance of a unilateral application has admitted the jurisdiction of the Court as following from the instrument invoked by the applicant State. In the present case, Norway, which has accepted the Optional Clause without any reservations, save that of reciprocity, has not abandoned the right of unilateral determination which accrues to her by virtue of the French form of acceptance.

" It is difficult to attach importance to the suggestion that an Acceptance containing the ' automatic reservation ' is not wholly devoid of legal value seeing that it may at least provide a basis for the acceptance of the jurisdiction of the Court by way of voluntary submission through the operation of the principle of *forum prorogatum*. No such basis is required for that purpose. A unilateral application altogether unrelated to any previous acceptance of the jurisdiction of the Court is sufficient for that purpose provided that the defendant State is willing to submit to the jurisdiction of the Court.

" If in law an Acceptance of that nature does not constitute a text embodying legal obligations then the decision of the Court in that sense does no more than register a fact; it provides an [**65**] opportunity for any Government so minded to put right a faulty Declaration of Acceptance; and it assists in arresting a tendency which threatens to disintegrate that minimum of compromise which is embodied in the Optional Clause. It is not suggested that the Court should be guided by a desire to achieve these objects— however important they may be for the integrity of international undertakings and the cause of international justice. Neither is it within the province of the Court to assess the propriety of a practice according to which a State, while in fact retaining freedom of action on the matter of submission of disputes to the Court, gains the moral and political advantages associated with professed adherence to the principle of obligatory judicial settlement. What the Court must do is to apply the legal principles governing the matter. It has been said that as States are not at all bound to accept the jurisdiction of the Court and as their Acceptance is in the nature of a voluntary sacrifice, it is not fitting to examine it too closely. The Court cannot be concerned with considerations of this nature. It cannot weigh the niceties of political advantage. For it may be argued that, if as the result of such Acceptance States gain in prestige and reputation while in fact not surrendering their freedom of decision, the nature of the sacrifice is not obvious. Also, while the Government making the ' automatic reservation ' retains freedom of action, it throws upon the defendant State, which has not appended any such reservation, the difficult and often embarrassing responsibility of invoking what, in the eyes of some, may be an odious and peremptory reservation. The present case has shown the implications of the resulting situation.

" If the Court could legitimately be concerned with issues transcending that immediately before it, it might be considered its duty to discourage, in so far as it lies with it, the progressive disintegration of the institution of the Optional Clause as evidenced, *inter alia*, by the tendency to adopt reservations such as that here examined. Governments are under no compulsion, legal or moral, to accept the duties of obligatory judicial settlement. When accepting them, they can limit them to the barest minimum. But the existence of that minimum, if it is to be a legal obligation, must be subject to determination by the Court itself and not by the Government accepting it. A purported obligation, however apparently comprehensive, which leaves it to the will of the State to determine the very existence of the obligation, cannot be the basis of an instrument claimed to found the jurisdiction of the Court. That view seems to be drastic and startling only if it is assumed that principles of law which generally apply in respect of the validity of texts purporting to create a legal obligation do not apply in the case of Governments. Any such assumption is inconsistent with the function of a Court of Justice.

[**66**] " For the latter reason, the problem involved is of even wider import than the question of the jurisdiction of the Court. It raises an issue which is of vital significance for the preservation of its judicial character. That issue is whether it can be part of the duty of the Court to administer and to give the status of a legal text to instruments which in fact do not create legal rights and duties. The judicial character of the Court may become endangered if it were to assume the task of interpreting and applying texts which, being devoid of the element of effective legal obligation, are essentially no more than a declaration of political purpose. Such danger may be inherent in any readiness to elevate to the merit of a legal commitment what is no more than a non-committal declaration of intention to be implemented at the option of the Government concerned.

" My conclusion is therefore that, having regard to the reservation relating to matters which are essentially within domestic jurisdiction as understood by the French Republic, the French Declaration of Acceptance is invalid for the reason:

" (1) That it is contrary to the Statute of the Court;

" (2) That it is incapable of giving rise to a legal obligation inasmuch as it claims, and effectively secures, the right of unilateral determination of the extent and of the existence of the obligation of judicial settlement with regard to a comprehensive and indefinite category of disputes covering potentially most disputes which may come before the Court;

" (3) That the particular qualification of the reservation in question forms an essential part of the Acceptance and that it is not possible to treat it as invalid and at the same time to maintain the validity of the reservation to which it is attached or of the Acceptance as a whole.

"Accordingly, in my view the entire French Declaration of Acceptance must be treated as devoid of legal effect and as incapable of providing a basis for the jurisdiction of the Court. It is for that reason that, in my view, the

Court has no jurisdiction over the dispute. The majority of the Court has reached the same result by acting upon the ' automatic reservation ' and the French Declaration of Acceptance—both of which I consider to be invalid. However, as the Court has expressly stated that, having regard to the circumstances before it, its Judgment does not pre-judge the major issue involved, I feel that a Separate Opinion—as distinguished from a Dissenting Opinion—meets the requirement of the case."

Judge Guerrero delivered the following Dissenting Opinion:

[**67**] " I regret to find myself in disagreement with the operative part of the Judgment and with a few of the considerations on which it is founded.

" On the other hand, I share the view of the Court when it recognizes that, in the present case, the jurisdiction of the Court depends upon the Declarations made by the Parties in accordance with Article 36, paragraph 2, of the Statute.

" This view does not seem to me to conflict with the principle that the problem of the Court's jurisdiction is reduced to determining the extent of the obligations asssumed by the Parties and to verifying their conformity with the provisions of the Statute which the Court is obliged to observe and respect for which it must ensure.

" The consideration of the Court is therefore directed to the instrument by virtue of which it is seised, that is to say, the special agreement or the jurisdictional clause.

" In the jurisprudence of the Court, there are to be found very definite indications for the signatories of these instruments. I shall mention only the Order of the Permanent Court of International Justice made on August 19th, 1929, in the case of the *Free Zones of Upper Savoy and the District of Gex*.[1]

" The representatives of France and Switzerland, Parties to this dispute, were in agreement on communication by the Court unofficially to the Agents of both Parties of any indications which might appear desirable as to the result of the Court's deliberation.

"After stating in the Order that the spirit and letter of its Statute did not allow the Court to act in accordance with the agreement between the Parties and that the Court could not, on the proposal of the Parties, depart from the terms of the Statute, the Order of August 19th, 1929, stated:

> " ' Nevertheless, it is important to set forth clearly that special agreements whereby international disputes are submitted to the Court should henceforth be formulated with due regard to the forms in which the Court is to express its opinion according to the precise terms of the constitutional provisions governing its activity, in order that the Court may be able to deal with such disputes in the ordinary course and without resorting, as in the present case, to a construction which must be regarded as strictly exceptional.' (Order of August 19th, 1929. *Case of the Free Zones*, p. 13, Series A, No. 22.)

" What is said with regard to special agreements applies equally to the conditions in which States formulate their jurisdictional clauses. In the latter, as in the former, the *consensus* of the Parties [**68**] is not sufficient to establish the jurisdiction of the Court. It is further necessary to ascertain whether that *consensus* is compatible with the provisions of the Statute and whether it can be applied without the Court's being obliged to depart from those provisions.

" It should be pointed out that, in the case of the *Free Zones*, the Court decided *ex officio* on the incompatibility of the Franco-Swiss Agreement with the provisions of the Statute of the Court. It did not wait for the question of incompatibility to be raised by the Parties.

" It is highly probable that it would have been the same in the present case if the Court had not considered that it should not ' examine whether the

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[1 *P.C.I.J.*, Series A, No. 22; *Annual Digest*, 1929–1930, Case No. 277.]

French reservation is consistent with the undertaking of a legal obligation and is compatible with Article 36, paragraph 6, of the Statute '.

" One of the aspects of the problem raised by the second part of the first Objection put forward by the Norwegian Government was the question whether that Government is entitled to rely on the restrictions placed by France on the obligation assumed on March 1st, 1949, and whether Norway, equally with France, was entitled to except from compulsory jurisdiction disputes understood by Norway to be essentially within its national jurisdiction.

" This aspect of the problem was examined in to-day's Judgment.

" I shall endeavour to consider briefly the other aspect of the problem which the Court did not think it necessary to examine, namely, that of the compatibility of the French reservation with the provisions of the Statute of the Court.

" The French Government's Declaration accepting the compulsory jurisdiction of the Court contains the following reservation:

> " ' This declaration does not apply to differences relating to matters which are essentially within the national jurisdiction as understood by the Government of the French Republic.'

" The great defect of this reservation is that it does not conform either to the spirit of the Statute of the Court or to the provisions of paragraphs 2 and 6 of Article 36.

" It is obvious that the purpose of paragraph 2 is to establish the compulsory jurisdiction of the Court between States which accede to the optional clause. By the fact that France reserves her right to determine herself the limit between her own national jurisdiction and the jurisdiction of the Court, France renders void her main undertaking, for the latter ceases to be compulsory if it is France and not the Court that holds the power to determine the limit between their respective jurisdictions.

" The reservation conflicts also with paragraph 6 of Article 36, which is in the following terms:

> [**69**] " ' In the event of a dispute as to whether the Court has jurisdiction, the matter shall be settled by the decision of the Court.'

" This principle is common to all arbitral and judicial tribunals of an international character.

" The Court would perhaps be the only tribunal that would be compelled to refuse to deal with a dispute submitted to it whenever a State invoked the reservation in question to claim the right to determine that limit.

" Without going in detail into the questions raised by the French reservation, I wish, nevertheless, to point out that it is an obstacle to the exercise of the judicial function attributed to the Court and that it seriously affects the efficacity of the optional clause.

" These considerations are, in my view, sufficient to prove the urgent necessity for a judicial decision on the validity of reservations which go beyond what is permitted by Article 36 of the Statute.

"Although Article 36 has been construed as meaning that a declaration of accession to the optional clause may contain reservations, it is certain that it was never the intention of the authors of the Statute that such reservations should serve to enable a State to evade the undertakings involved in the declaration provided for by Article 36, paragraph 2, or unilaterally to arrogate to itself rights which the Statute confers solely on the Court.

" Such reservations must be regarded as devoid of all legal validity. It has rightly been said already that it is not possible to establish a system of law if each State reserves to itself the power to decide itself what the law is.

" It is clear, moreover, that the new practices introduced in August 1946 are contrary to the spirit and to the purpose of the Statute of the Court and the Charter of the United Nations.[1]

" The problem to be solved is, however, a simple one. It is, in fact, the problem whether the unilateral will of one State or the common will of the Parties before the Court can have priority over the collective will expressed in an instrument as important as the Statute of the Court.

" It may not be inappropriate to recall that when Article 36 of the Statute was construed as meaning that it gave the right to accede to the optional clause with reservations, this was under the favourable influence of the attitude which the Members of the League of Nations had adopted in regard to the jurisdiction of the Court. Their declarations of acceptance were accompanied only by reservations that came within the framework of Article 36 of the Statute. The anxiety of the Members of the League of Nations was that the [**70**] movement towards the final establishment of international compulsory jurisdiction, which was developing so well before the Second World War, should not be impeded in any way whatsoever.

" It was only in the early days of the United Nations that the situation changed completely, when one of its Members declared, on August 14th, 1946, that it accepted the compulsory jurisdiction of the Court, provided that its Declaration should not apply, *inter alia*, to disputes with regard to matters which are essentially within its own domestic jurisdiction, as determined by itself.

" Six other States have up to the present followed the example set on August 14th, 1946. Should this practice gain other followers, the optional clause will cease to be an instrument capable of bringing about compulsory jurisdiction between States.

" The validity of these new reservations has, of course, not yet been examined by any international organ of the United Nations. There is, in fact, no other procedure to be followed in regard to declarations of accession to paragraph 2 of Article 36 than that which is provided for in paragraph 4 of the same Article. The Declarations are deposited with the Secretary-General of the United Nations, who transmits copies of them to the Parties to the Statute and to the Registrar of the Court.

" What it will be found difficult to understand is what reason the Court could have had for not dealing with the question when it was seised of the Franco-Norwegian dispute, in the course of which the Parties invoked the terms of their respective declarations of accession to the optional clause.

" As regards the operative part of the Judgment, I shall confine myself to saying that I cannot agree that the Court is without jurisdiction when its lack of jurisdiction is founded on the terms of a unilateral instrument which I consider to be contrary to the spirit and to the letter of the Statute and which, in my view, is, for that reason, null and void."

Judge Basdevant delivered the following Dissenting Opinion:

[**71**] " I regret that I am unable to concur in the Judgment of the Court that it is without jurisdiction in the present case and I believe I must indicate briefly the reasons for my dissent.

" In order to appraise the value of the Preliminary Objection raised by the Norwegian Government to the jurisdiction of the Court, the Court has placed itself on the ground on which the Parties chose to argue the matter, namely, Article 36, paragraph 2, of the Statute of the Court and the Declarations of the Governments of the Kingdom of Norway and of the French Republic accepting the compulsory jurisdiction of the Court in accordance with that Article. I do not dispute this point of departure.

" [1] *American Bar Association Journal*, March 1947, No. 3, p. 249, and May 1947, No. 5, p. 432."

" The Court has concentrated its attention on the reservation which is contained in the French Declaration and which provides that ' this declaration does not apply to differences relating to matters which are essentially within the national jurisdiction as understood by the Government of the French Republic '. The Court has pointed out that by virtue of the condition of reciprocity embodied in the two Declarations and provided for in Article 36, paragraph 3, Norway is entitled to rely on that reservation. I interpret the reciprocity clause in the same manner.

" Nor do I consider it necessary, any more than the Court does, to deal with the question of the initial validity of that reservation with regard to the present case.

" It is less the reservation considered by itself and so to speak *in abstracto* than the manner in which Norway's attitude should be interpreted when she invoked the reservation on the basis of reciprocity, which is at the source of my dissent. In other words I confine myself strictly to the present case; a dispute between France and Norway, a jurisdictional objection raised by Norway to the Application presented by France.

" The Judgment of the Court upholds this objection to the jurisdiction on the ground that Norway, invoking the French reservation on the basis of reciprocity, has declared that the present matter was essentially within its national jurisdiction as understood by the Norwegian Government. The position thus adopted by the Norwegian Government was regarded by the Court as sufficient to preclude the compulsory jurisdiction of the Court which was in principle accepted under the Declarations of the two Governments.

" It is with regard to the interpretation thus placed upon the position adopted by the Norwegian Government that I feel the most serious doubts.

" It is possible to imagine that a State invoking the reservation should intend to put it forward as categorical in character so that the opinion expressed by that State with regard to the character of the dispute would be sufficient to preclude the jurisdiction of the Court, without further consideration by the Court: it is not my [**72**] intention to prejudge in any way the question of the validity of the reservation, interpreted as having such a scope. I merely observe that that State would have to manifest that that is the scope which it gives to the opinion it expresses, that its will to assume responsibility for such an attitude would have to be sufficiently apparent. However, I find it difficult to ascribe to Norway such an intention, or such an attitude which would scarcely be consistent with Norway's traditional attitude in the matter of arbitration and international jurisdiction; I find it difficult to consider that Norway intended to assume such a responsibility, political and moral, not only *vis-à-vis* the other Party and before the Court in the present dispute but in a more general manner and by such a precedent, before the United Nations and finally, by reason of the subject-matter of the proceedings, with regard to her own financial credit.

" For the terms in which Norway has referred to the reservation are most moderate. They do not confer upon the reservation a categorical character signifying that the Court ought to confine itself to the reservation and not consider the matter further.

" The reference to the reservation appears in paragraph 23 of the Preliminary Objections but it appears there only in a hypothetical form. On the basis of considerations which are fully developed, the Preliminary Objections first state this conclusion: ' It is clear, therefore, that in bringing before the Court the dispute set out in its Application . . . the French Government is asking the Court to adjudicate upon questions of municipal law and not upon questions of international law, i.e. upon questions which do not fall within the jurisdiction conferred upon the Court by the Declarations made by the Parties under Article 36, paragraph 2, of the Statute '. Immediately following this passage, the Preliminary Objections add: ' There can be no possible doubt on this point. If, however, there should still be some doubt, the Norwegian Government would rely upon the reservations made by the French Government in its Declaration of March 1st, 1949.'

" The Norwegian Government thus begins by stating very strongly the contention that the dispute relates to questions of municipal law and does not, therefore, fall within the jurisdiction of the Court. The soundness of this contention and the value of the arguments put forward in support of it are clearly submitted to the consideration of the Court. The Norwegian Government claims that its contention is irrebuttable and that there can be no possible doubt on this point. It does refer, however, to a hypothetical situation, a situation in which there should still be some doubt, and it is only with regard to that hypothetical situation that the Norwegian Government refers to the French reservation.

" The whole Norwegian argument with regard to the reservation appears in the Preliminary Objections, but quite apart from the fact that the argument is there presented only hypothetically, Norway has not interpreted the reservation as constituting a categorical means whereby a State may preclude the jurisdiction [73] of the Court. Such an interpretation is possible: Norway has not put it forward. Whilst not stating exactly what her view was, Norway puts forward a more moderate interpretation to the effect that ' such a reservation must be interpreted in good faith and should a Government seek to rely upon it with a view to denying the jurisdiction of the Court in a case which manifestly did not involve a " matter which is essentially within the national jurisdiction " it would be committing an *abus de droit* which would not prevent the Court from acting '.

" Norway thereby acknowledges the Court's power to control the exercise by a State of its right to invoke the reservation. What is the extent of this power? The words quoted above do not define the extent of this power, but some indication has been supplied by the statement appearing at the end of the argument on the First Preliminary Objection and at the end of what was said regarding the reservation invoked by Norway. The Norwegian Government begins by asserting its right to rely upon the French reservation but does not stop there. It considers it appropriate to justify the use it makes of that right and in this connection adds the following words: ' Convinced that the dispute . . . is within the domestic jurisdiction, the Norwegian Government considers itself fully entitled to rely on this right.' It would have been unnecessary for the Norwegian Government to state its conviction on this point if it had purported to confer upon its own understanding of the nature of the dispute a decisive character taking it outside the control of the Court. If it says that it is convinced that the dispute is within the domestic jurisdiction, it is because it derives this conviction from the considerations relied upon to prove that the dispute is within the domain of Norwegian law and not of international law. And, ' accordingly ', in other words as a result of the conviction thus acquired, it ' requests the Court to decline, on grounds that it lacks jurisdiction, the function which the French Government would have it assume '.

" If this passage is compared with the importance of the position occupied in the Preliminary Objections by the argument on the character of the dispute as determined by the character of the law which is applicable to it, one is led to the view that, in the mind of the Norwegian Government, the two grounds upon which it relies in support of its first Preliminary Objection converge and that in the present case the determination of the character of the matter will depend upon the law to be applied.

" This interpretation is confirmed by the fact [that] in the subsequent written and oral proceedings, the Norwegian Government carefully concentrated on the character of the applicable law in support of its objection to the jurisdiction. Only one allusion was made on behalf of the Norwegian Government to the French reservation, with indirect and very brief reference to the condition of reciprocity at the hearing of May 20th, 1957. And indeed Counsel for the Norwegian Government merely made the allusion in support of his conclusion that the undertakings binding the two States in the [**74**] matter of jurisdiction ' only relate to disputes of international law '. This confirms the interpretation given above of the intentions of the Norwegian Government and this interpretation is in harmony with the frequently repeated assertion that the Norwegian Government does not reject the jurisdiction of the Court absolutely, because it so chooses, but on grounds which have been carefully set out, thus showing that it was intended that the Court should adjudicate upon them.

"It would have been in the interests of Norway to confer a categorical character upon the defence provided by the French reservation. She has not done so for a highly commendable reason, because she was anxious to respect her international obligations.

" In the matter of compulsory jurisdiction, France and Norway are not bound only by the Declarations to which they subscribed on the basis of Article 36, paragraph 2, of the Statute of the Court. They are bound also by the General Act of September 26th, 1928, to which they have both acceded. This Act is, so far as they are concerned, one of those ' treaties and conventions in force ' which establish the jurisdiction of the Court and which are referred to in Article 36, paragraph 1, of the Statute. For the purposes of the application of this Act, Article 37 of the Statute has substituted the International Court of Justice for the Permanent Court of International Justice. This Act was mentioned in the Observations of the French Government and was subsequently invoked explicitly at the hearing of May 14th by the Agent of that Government. It was mentioned, at the hearing of May 21st, by Counsel for the Norwegian Government. At no time has any doubt been raised as to the fact that this Act is binding as between France and Norway.

" There is no reason to think that this General Act should not receive the attention of the Court. At no time did it appear that the French Government had abandoned its right to rely on it. Even if it had maintained silence with regard to it, the Court ' whose function it is to decide in accordance with international law such disputes as are submitted to it ' could not ignore it. When it is a matter of determining its jurisdiction and, above all, of determining the effect of an objection to its compulsory jurisdiction, the principle of which has been admitted as between the Parties, the Court must, of itself, seek with all the means at its disposal to ascertain what is the law. In a matter in which such research was less imperatively necessary, the Permanent Court did not hesitate to undertake it, stating that ' in the fulfilment of its task of itself ascertaining what the international law is, it . . . has included in its researches all precedents, teachings and facts to which it had access and which might possibly have revealed the existence of one of the principles of international law contemplated in the special agreement '. (P.C.I.J. Judgment No. 9, p. 31.[1])

" On acceding to the General Act, on May 31st, 1931, the French Government, in so far as it was explicitly authorized to do so by Article 39, subparagraph (*b*), and by Article 41 of that Act, declared [**75**] that its accession, involving *inter alia* the acceptance of the compulsory jurisdiction of the Court, applied to disputes ' other than those which the Permanent Court of International Justice may recognize as bearing on a question left by international law to the exclusive competence of the State '. As this reservation was formulated by France, Norway may, as stated in Article 39, paragraph 3, of the General Act, rely upon it as against France.

" Such was the law in force between France and Norway concerning the compulsory jurisdiction of the Court at the time when France accepted afresh

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[[1] *The Lotus* (*Turkey* v. *France*).]

the compulsory jurisdiction of the Court by her Declaration of March 1st, 1949, on the basis of Article 36, paragraph 2, of the Statute. The law thus in force embodied the reservation concerning the exclusive competence of the State, but, on the one hand, there was the qualification of that reservation regarding what is recognized by international law and, on the other hand, the Court was given the power to verify, when the reservation should come to be pleaded, whether it was rightly or wrongly invoked.

" The Declaration by which the French Government accepted compulsory jurisdiction on the basis of Article 36, paragraph 2, of the Statute contains a reservation of wider scope, since it refers not to what is recognized by international law, but to the understanding of the Government which invokes the reservation and, further, since it does not submit that understanding to the verification of the Court. At all events, it does not do so expressly. The Declaration thus limits the sphere of compulsory jurisdiction more than did the General Act in relations between France and Norway. Now, it is clear that this unilateral Declaration by the French Government could not modify, in this limitative sense, the law that was then in force between France and Norway.

" In a case in which it has been contended that not a unilateral declaration but a treaty between two States had limited the scope as between them of their previous declarations accepting compulsory jurisdiction, the Permanent Court rejected this contention and said in this connection:

> " 'The multiplicity of agreements concluded accepting the compulsory jurisdiction is evidence that the contracting Parties intended to open up new ways of access to the Court rather than to close old ways or to allow them to cancel each other out with the ultimate result that no jurisdiction would remain.' (P.C.I.J., Series A/B, No. 77, p. 76.[1])

A way of access to the Court was opened up by the accession of the two Parties to the General Act of 1928. It could not be closed or cancelled out by the restrictive clause which the French Government, and not the Norwegian Government, added to its fresh acceptance of compulsory jurisdiction stated in its Declaration of 1949. This restrictive clause, emanating from only one of them, does not constitute the law as between France and Norway. The clause is not sufficient to set aside the juridical system existing between them on this point. It cannot close the way of [**76**] access to the Court that was formerly open, or cancel it out with the result that no jurisdiction would remain.

" Between France and Norway, on the point now under consideration, the acceptance of compulsory jurisdiction is, therefore, to-day as prior to the French Declaration of March 1st, 1949, set aside only in respect of such disputes as the Court may recognize as bearing on a question left by international law to the exclusive competence of the State.

" This presentation of the state of the law existing between France and Norway explains the sense attached by Norway to her reliance on the French reservation. She relied on it, and could only rely on it, in the sense that this reservation has in relations between France and Norway, that is to say, not as a reservation the application of which depends on the discretionary judgment of the State which relies on it, but as a reservation the scope of which depends on what is recognized by international law as found by the Court. I cannot suppose that Norway intended to give the reservation a more absolute sense which would be in conflict with the law existing in this matter between the two countries.

" This interpretation, involving a reference to what is recognized by international law as found by the Court, is in complete harmony with the moderate interpretation which Norway gave to the reservation and with the small place it occupies in her reasoning which, on the other hand, went to

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[[1] *Electricity Company of Sofia and Bulgaria* (*Belgium* v. *Bulgaria*): see *Annual Digest* 1938–1940, Case No. 199, at pp. 512–513.]

great lengths to show that the dispute relates to questions of Norwegian law and not to questions of international law and, on that ground, does not come within the jurisdiction of the Court.

" In view of all this reasoning—and even from the mere perusal of the Preliminary Objections—I cannot believe that it was the Norwegian Government's intention to prove to the satisfaction of the Court that the dispute relates only to questions of Norwegian law, to ask the Court to find that it agrees with this view and then to add immediately that the Court's opinion on this point is of no importance and that it is only the Norwegian Government's opinion that counts.

" The Norwegian Government's intention seems to me to be quite different. In invoking the French reservation, its intention was that its bearing on the present case should be considered in the light of the elements of the case: the subject of the claim and the law applicable. It is on this footing that the appeal to the reservation must be judged and that the discussion between the Parties in fact developed.

" The Norwegian Government might have followed another course. When it invoked the French reservation, it might have relied, in this connection, on the fact that this case is concerned with public loans, with measures affecting the monetary system of Norway. I do not prejudge the validity of such considerations. That was the course followed in the case of the nationality decrees in Tunis and Morocco[1] and it led the Permanent Court to find that questions of nationality are amongst those which international law [**77**] leaves to the jurisdiction of the State but that it is otherwise when the application of treaties is involved in regard to them. The Norwegian Government did not take this course. The only grounds which it advanced and which, if accepted, would be such as to prove that the present dispute brings before the Court questions which international law leaves to the exclusive jurisdiction of Norway, are those relating to the nature of the law to be applied for the settlement of this dispute, namely, Norwegian law and not international law.

"As the Judgment interprets the Norwegian Government's intention in a different way from that in which I have felt it proper to interpret it—and that is the source of my dissent—it was not necessary for it to consider whether the dispute brought before the Court falls exclusively within the application of Norwegian law and whether, on that ground, it falls outside the jurisdiction of the Court either by the application of Article 36, paragraph 2, of the Statute or through the effect of the French reservation invoked by Norway without further explanation. In view of the silence of the Judgment, I shall confine myself to some very brief observations on this point.

" I understand that the wording adopted for the Submissions in the Application should have led the Norwegian Government to put forward its first Preliminary Objection. The same terms might have been used in the Submissions of a bondholder proceeding against his Norwegian debtor before a Norwegian tribunal. But the discussion before the Court eliminated all assimilation between these two cases and, in the course of these proceedings, it was frequently asserted, particularly on the Norwegian side, that the dispute between the French Government and the Norwegian Government was different from the dispute between bondholders and Norwegian debtors and came within the purview of a different branch of law.

" The French Government is here acting in the exercise of its right under international law to protect its nationals as against a foreign State. The Judgment rightly recalls that, in its Note of January 27th, 1955, the French Government proposed to the Norwegian Government that the dispute should be referred to an international tribunal in order to determine, on the basis of the general principles of international law, whether the gold clause which,

[1] *P.C.I.J.*, Series B, No. 4; *Annual Digest*, 1923–1924, Case No. 203.]

it contended, was contained in the bonds in question, had to be respected. The Judgment recalls also that, at the very outset of the diplomatic dispute, the French Legation in Oslo, in its Note dated June 16th, 1925, stated that it believed a contradiction to exist between the Norwegian law of December 15th, 1923, and the obligations which had been assumed towards the holders of the loans of the Mortgage Bank of Norway, and contended, in this connection, that it would not seem that a unilateral decision can be relied upon as against foreign creditors. In the proceedings before the Court, the French Government continually impugned this law of 1923, from this point of view, and in its final Submissions filed [**78**] on May 25th, 1957, it asked the Court to adjudge and declare that undertakings as to the amount of the debts contracted under the loans referred to in the Application cannot be unilaterally modified. The French Government placed reliance on Judgments Nos. 14 and 15 of the Permanent Court of International Justice, contending that, in the present case as previously in the cases of the Serbian loans and the Brazilian Federal loans, the loans in question are international loans.[1] It complained that Norway was practising discrimination to the advantage of Danish and Swedish holders and to the detriment of French holders, and it claimed that this discrimination constituted a direct violation of international law. On all those grounds it sought to obtain redress through a decision of the Court which, without passing upon the financial adjustment of payments which the French Government declared itself ready to study with the Norwegian Government, would find that the debtor in the case of the loans specified in the Application cannot validly discharge his obligation except by payments as they fall due in gold value.

" It is on this ground that the French Government intended to place the claim it brought against the Norwegian Government. It is not for me to prejudge the reply that should be given to it on any of the points thus raised. I confine myself to noting that adjudication upon this claim is a matter that comes within the purview not of Norwegian law but of international law.

" No doubt, in order that the questions of law thus referred to, and others of the same kind raised in the proceedings, may come up for consideration, it must first be determined that the loans in dispute, or some of them, do in fact contain a gold clause. This is a question of the facts involved in the case, and these have been set out in the Memorial and Counter-Memorial. This statement of the facts may bring up certain questions of Norwegian law concerning, for instance, the initial validity of the gold clause in the loans in dispute. But, if the Court is seised of questions of international law in the dispute at present pending between France and Norway, and if, for that reason, the Court has jurisdiction to adjudicate on this dispute, it obviuosly follows that the Court will also have to examine the questions of fact that arise. It must include among these any questions of the interpretation of such Norwegian laws as may call for consideration. It has never been contended that the Court should refer such questions to the consideration and decision of any particular national tribunal.

" Having regard to the sense I attach to the Norwegian Government's intention in invoking the French reservation, and having regard to the nature of the questions actually submitted to the Court, I do not think that Norway is justified, in this case, in declining the jurisdiction of the Court on the ground of the reservation concerning its national jurisdiction."

Judge Read delivered the following Dissenting Opinion:

[**79**] " I regret that I am unable to concur in the decision of the Court, in this case, and that it has become necessary for me to indicate the reasons which have prevented me from concurring with the majority. As I am of the opinion that the Court should reject all the Preliminary Objections, and deal

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[[1] *P.C.I.J.*, Series A, Nos. 20 and 21; *Annual Digest*, 1929–1930, Case No. 278.]

with the merits, I must examine all aspects of the case, and, in doing this, shall consider the following questions:

" First Question—The nature and scope of the dispute, as it *now* presents itself to the Court.

" Second Question—The Norwegian contention that ' The subject of the dispute as defined in the Application is within the domain of municipal law and not of international law, whereas the compulsory jurisdiction of the Court in relation to the Parties involved is restricted, by their Declarations of November 16th, 1946, and March 1st, 1949, to disputes concerning international law; '.

" Third Question—The Norwegian contention that '*As to that part of the claim which relates to the bond certificates issued by the Mortgage Bank of Norway and the Small Holding and Workers' Housing Bank of Norway*, these two Banks have a legal personality separate from that of the Norwegian State; the action cannot therefore be brought against that State as a borrower; whereas moreover the jurisdiction of the Court is limited to disputes between States; '.

" Fourth Question—The Norwegian contention that ' The holders of bond certificates for whose protection the French Government considers itself entitled to institute international proceedings have not first exhausted the local remedies.'

" Fifth Question—The Norwegian request that the Court should ' adjudge and declare that the claim put forward by the Application of the French Government of July 6th, 1955, is not admissible '.

" First Question—The nature and scope of the dispute as it *now* presents itself to the Court.

" This is the fundamental question, because the conclusions reached with regard to the matters in dispute depend almost entirely on whether the controversy is looked at as it was in the earlier stages of the case, or in the form which it has taken in the course of the Written and Oral Proceedings.

[**80**] " In the Application, the French Agent asked the Court to adjudge

" (1) that there was a real gold clause;

" (2) that the borrower can only discharge the substance of his debt by payment of the gold value both of the coupons and of the principal payments.

" The Norwegian Agent considered that these requests related solely to issues of Norwegian national law which the Court is incompetent to adjudge in a case commenced by Application. But, during the Oral Proceedings, the Final Submissions of the French Government ' On the Merits ' put forward three claims which involved:

" In paragraph 1: request for judgment by the Court that payment to foreign holders of the bonds must be made without any discrimination; and

" In paragraph 3: request for judgment by the Court that Norway cannot by unilateral extraterritorial legislation modify the rights of the French bondholders, without negotiation or arbitration; and

" In paragraphs 2, 4 and 5: request for judgment based on the gold clause.

" (It may be convenient to refer to the first two of these issues as discrimination and extraterritoriality, respectively.)

" It is obviously impossible to suggest that the Final Submissions, raising these issues, relate to matters which are either exclusively or essentially within the national jurisdiction of Norway. To meet this position, the Norwegian Agent has urged the Court to reject the Final French Conclusions. They have been attacked on the ground that they give rise to a new claim.

" The French Agent replied by citing the Chorzow judgment,[1] and by contending that " The intentions of the Statute are therefore perfectly clear: it is possible to amend Submissions any time up to the end of the proceedings.'

" It is true that it has been the established practice of this Court, and of the Permanent Court, to permit the Parties to modify their Submissions up to the end of the Oral Proceedings. Indeed, the President asked the Parties

[[1] *P.C.I.J.*, Series A, No. 17; *Annual Digest*, 1927–1928, Case No. 349.]

to file their Final Submissions before terminating the Oral Proceedings; and, in so doing, he was following a practice of long standing. Thus it was open to France to amend the Submissions at that stage. But the right is subject to two limitations. The first limitation is that, when there is an appreciable [**81**] change, the other Party must have a fair opportunity to comment on the amended Submissions. In this case, the amendment was made at the close of the French opening statement, and Norway has had two opportunities to reply, of which full advantage has been taken.

" The second condition is that the amendment must be an amendment. It must not consist of an attempt by the Applicant Government to bring a new and different dispute before the Court. If so, the amended Submissions are not admissible, unless the new elements have been incorporated in the dispute either by the Respondent Government or by the two Governments in the course of the Written and Oral Proceedings.

"Accordingly, it is necessary to consider whether the allegedly new elements—discrimination and extraterritoriality—raise a new dispute, or whether they define the issues in the dispute which was brought to the Court by the Application.

" The Statute, by Article 40, imposes on the Applicant Government the requirement that ' the subject of the dispute and the Parties shall be indicated '. It does not require that the issues shall be defined; and, indeed, it makes it abundantly clear, by Article 48, that the definition of the issues by Submissions is to be done in the course of the Written and Oral Proceedings. (In this regard, the French text of Article 48 shows that this is so, while the English text is obscure.) Applications have usually contained statements of the issues involved; but these have been treated by this Court and the Permanent Court as indications of the nature of the case.

" It is in this light that the Application must be examined. Did it sufficiently indicate the dispute as it has developed in the course of the Written and Oral Proceedings, and as it had been formulated in the French Final Submissions? In particular, did it sufficiently indicate a dispute involving the two contested elements: discrimination and extraterritoriality?

" The Application gives particulars with regard to the different issues of bonds involved. It sets forth, in a general way, the emergence of the controversy between the French bondholders, represented by the National Association of French Security Holders, and the Borrowers, the Norwegian State and the two Banks. It mentions the formal intervention by the French Government on behalf of its nationals in May, 1953, and subsequent negotiations between the Governments, which did not lead to a settlement. It ends with the indication of the claim, as stated above.

" It thus appears that the Application sufficiently indicated that the case was intended to relate to the dispute which had been at issue between the French Government and bondholders and the Norwegian borrowers and Government for thirty years and twenty days.

" That dispute had certainly been based on the three elements: discrimination, extraterritoriality, and the existence and obligation [**82**] of the gold clause in the bonds. Nevertheless, the part of the Application which purported to indicate the subject of the dispute was obscure.

" Norway takes the position that the words used in the Application to indicate the subject of the dispute confined it to the existence of the gold clause and the obligation of the bonds. France contends that the two contested issues had been in controversy for more than thirty years as essential elements of the dispute, and that the actual claim as stated in the Application is broad enough to include them. The claim reads:

> " ' And that the borrower can only discharge the substance of his debt by the payment of the gold value of the coupons on the date of payment and of the gold value of the redeemed bonds on the date of repayment.'

"The obligation of the bonds depended on three things—the contract, the law and the relevant legislation. The relevant statute which had been under consideration by the two Governments was the law of December 15, 1923. The two issues under consideration—discrimination and extraterritoriality—were inseparably related to that law. That this was so understood by Norway is plainly indicated by the fact that the text of the law was set forth in the third paragraph of the Preliminary Objections, and subsequently treated as the cornerstone of the Norwegian case.

"In these circumstances, I am compelled to accept the French contention, and to reach the conclusion that the French Final Submissions should not be rejected.

"But, even if it is assumed that the claim, as stated in the Application, is confined to the existence of the gold clause and the obligation of the bonds, and that it did not include the contested elements (discrimination and extra-territorial legislation), it does not follow that the French Final Submissions must necessarily be rejected. If the contested elements were incorporated into the dispute by Norway alone, or by the two Governments, in the course of the Written and Oral Proceedings, it would not be open to Norway to complain at this late stage. In order to examine this aspect of the matter, it is necessary to assume that the claim, as stated above, must be construed as confined to the gold clause and the obligation of the bonds, and as excluding the contested elements.

"Accordingly, and with that assumption in mind, I must examine the way in which the allegedly new elements were brought into the case. It will be seen that, from the beginning of the proceedings in the Court, France based its pleadings and oral arguments on the view that they had already been included in the Application. But it will also appear that Norway understood that these contested elements were an integral part of the merits of the dispute before the Court. It will emerge that the request for rejection in the French [**83**] Final Submissions is based on the extremely technical point that the indication of the issues, as set forth in the Application, was so badly drafted that it failed to disclose the real scope and extent of the dispute as understood and developed by both France and Norway. It will appear that Norway took such a dominant part in the enlargement of the dispute in the course of the Written and Oral Proceedings that it is not open to Norway to complain now by raising the extremely technical point referred to above.

"The actual dispute, on the governmental level, commenced with the first French Note, dated 16 June, 1925, and included, together with all the rest of the diplomatic correspondence, in the Memorial. This Note, which was concerned with the claims of French holders of bonds of the Mortgage Bank of Norway, raised the two issues: discrimination and extraterritoriality. The Norwegian reply took the form of the Note, dated 9 December 1925, transmitting a letter from the Mortgage Bank defending its position. This letter questioned the gold clause. It admitted the fact of discrimination in favour of Swedish bondholders and against the French, defending it as being based on good will. It dealt with extraterritoriality as follows:

> "'The question has in all cases been determined by reference to the Law of December 15th, 1923. In accordance with this Law, if the creditor refuses to accept payment in Bank of Norway banknotes at their nominal gold value, the debtor may claim postponement of the payment for as long as the Bank is exempt from redeeming its notes in gold at their nominal value.'
>
> "'The French Note states that a law of this kind can only apply to nationals and not to foreign bondholders. This, however, is a view which cannot be maintained. In any event the question would naturally fall to be decided by a Norwegian Court in accordance with Norwegian legislation and in accordance with Norwegian law and it is quite clear that the decision would be binding on all concerned.'

"Accordingly, for more than thirty years, the controversy was based on the three main elements: discrimination, extraterritoriality and the problem of interpretation and obligation arising out of the gold clause.

"Then came the Application, which is being considered upon the assumption that it must be construed as cutting down the controversy to a single issue. I am reluctant to adopt a narrow and restrictive interpretation of the words used in the Application, in aid of a highly technical argument designed for the sole purpose of preventing justice from being done. Nevertheless, I must proceed on the assumption that the narrow and restrictive interpretation is right, and consider what happened in the course of the treatment of the issues by the Parties.

[**84**] "As might have been expected, France proceeded to deal with the case as if the controversy had continued, uncurtailed by the Application and including the contested elements. The case was dealt with in the Memorial by raising and discussing the issues which are now embodied in paragraphs 2, 3, 4 and 5 of the French Final Submissions. As regards paragraph 3, the extraterritorial point, it was summed up in a sentence:

> "The question which arises may therefore be simply put in the following way: can a debtor State, by means of an internal law providing for the currency of unconvertible banknotes, alter the substance of its external debt?'

"The issue dealt with in paragraph 1 of the Final Submissions, discrimination, was mentioned in the Memorial, and fully argued in the Observations and Submissions. All of the issues, as set forth in the Final Submissions, were fully argued in the Reply and in the course of the Oral Proceedings.

"There was, at first, some difference in the course followed by Norway. I have already pointed out that Norway, in paragraph 3 of the Preliminary Objections, set forth the text of the Law of December 15, 1923, which became the cornerstone of its case. Later, in paragraph 29, in discussing the legal basis of the course followed by Norway, it was stated that 'it was the Law of December 15, 1923, which was applied'. But in taking the 'First Objection', Norway limited that objection to 'the dispute, as defined in the said Application', and put forward arguments which could have no relevancy except on the assumption that the actual controversy had been curtailed by the Application so as to exclude the contested elements, discrimination and extraterritoriality.

"It was the Counter-Memorial, the Rejoinder and the oral arguments by Norway that brought about the fundamental change in the scope of the dispute. For, assuming the curtailment of the controversy by the wording of the Application, its enlargement so as to include the contested elements was indeed a fundamental change.

"The Counter-Memorial devoted nearly three pages to a discussion of the legal aspects of discrimination; and eleven pages to a much more important issue. Norway put forward the argument that the action of the Norwegian legislature in enacting the Law of December 15, 1923, and other relevant laws was justified by the historical background. That background was one of world-wide economic catastrophe: a sort of universal bankruptcy. The argument was that Norway, in the special circumstances, was justified in suspending gold payments, or the payment of gold equivalents. That justification necessarily involved a correlative obligation to give equal treatment to all creditors involved.

[**85**] "The Rejoinder carried the arguments bearing directly on the questions of discrimination and extraterritoriality even further. It developed the argument based on the practice of States in dealing with economic catastrophe by fiscal measures. It brought into the case entirely new considerations: the principles of international law concerning 'national treatment' of aliens, and the system of the 'minimum' or 'international standard'. As in the case of the argument based on State practice, these principles necessarily

involve the problem of discrimination and bear directly on the extent of the Norwegian legislative power. The extent to which the Rejoinder goes in enlarging the scope of the issues is indicated by the fact that one hundred and thirty-four pages of the two volumes are devoted to these aspects of the case.

" In the Oral Proceedings, the same trend was observed. The Norwegian Agent and Counsel devoted a very large proportion of their time to the discussion of the two issues which the Agent now asks the Court to strike out of the case. One of the Counsel went so far as to devote the whole of his time to one of hem.

" In these circumstances, I am of the opinion that the French Final Conclusions do not go beyond the limits of the dispute in the form which it took in the course of the Written and Oral Proceedings; and that the responsibility for any enlargement of the dispute which may have taken place since the Application is mainly due to Norway. At any rate, Norway certainly shared that responsibility with France. It is not open to Norway, at this stage, to complain about this enlargement.

" Second Question—The Norwegian contention that ' The subject of the dispute as defined in the Application is within the domain of municipal law and not of international law, whereas the compulsory jurisdiction of the Court in relation to the Parties involved is restricted, by their Declarations of November 16th, 1946, and March 1st, 1949, to disputes concerning international law;".

" This question was dealt with in two parts by Norway. In the first part it was discussed upon the assumption that it was being put to the Court for its decision. The second part deals with a subsidiary aspect of the question in which the Court is being asked to deal with it not on the basis of its own decision, but by merely registering a decision of the Norwegian Government automatically ousting the jurisdiction of the Court.

[**86**] " *First Part*

" This question is confined to ' the dispute as defined in the Application '. It does not relate to the controversy as it existed between the two Governments in the thirty years preceding the Application or to the issues as discussed and dealt with by France and Norway in the course of the Written and Oral Proceedings. It has nothing to do with the subject-matter of the dispute as set forth in the French Final Submissions. It is not in any sense relevant to the actual case which is now before the Court. It is included in the Norwegian Final Submissions and it represents a position which has been maintained at all stages by Norway, in which the arguments have been qualified and restricted to the dispute as defined in the Application.

" In dealing with the First Question I have taken the position that the French Final Conclusions should not be rejected, and it necessarily follows that I am of the opinion that the Second Question, the point which was raised in the first Preliminary Objection, has no relevancy at the present stage. The actual question as it existed when the point was first taken was of a substantial character, but the objection that the dispute was within the domain of municipal law and not of international law has been maintained in relation to the present position of the case.

" The objection involves the very nature of the case and cannot be considered effectively without touching upon the merits. I do not propose to give my views with regard to the merits, but it is necessary for me to look at the merits in order to determine the sort of issues which they raise—i.e. whether they are issues of national law or of international law or both. I must consider the problem presented by this objection from three different aspects:

"*First Aspect:* That the issue submitted by the Application is purely a matter of national law and does not raise any issue of international law.

" This is the heart of the first Preliminary Objection. If the bond contracts operated under international law, or if, either originally or at a later stage, they gave rise to international obligations due from Norway to France, it would no longer be possible to suggest that the dispute was based solely on municipal law.

"At the early stages of the transaction, the position is reasonably clear. When the French bondholder bought a Norwegian bond, there were only two parties to the executory contract which came [**87**] into being—the bondholder and the Norwegian borrower, either the State or one of the two Banks. The Government of France had no part in the transaction. It was made under national law and there was possible conflict between the different laws involved, French, English and Norwegian. The determination of which law controlled any particular aspect of the matter was a problem to be resolved by the law of the forum in which the suit was brought. The court would apply the rules of private international law which governs the choice of law, and then apply the chosen law to the issues before it. Those rules and the chosen law would both be national, and not international, law.

"At this stage the transaction came solely within the plane of national law. It would therefore be a matter in which the Court was incompetent to adjudicate, and in which it would be necessary if dealing with the Merits to say that there were no rules of international law governing the transaction. It would not be open to this Court to decide upon the issues of choice of law, of interpretation of the contract, or of the extent of its obligation.

" The next stage was when France undertook diplomatic action as a result of the suspension by Norway of payment in gold or in gold equivalents in pursuance of the provisions of the law of 1923. There is a difference between France and Norway as to the date of the adoption of the dispute by the French Government, but that is unimportant.

" France claims that the adoption of the position of the French bondholders by the French Government—the assertion by France to Norway of the French views as to the obligation of the bonds, and the refusal by Norway to concur and act accordingly—transformed this dispute from one between private individuals and the Norwegian borrowers into one between France and Norway, but something more is needed than the mere adoption of a dispute under the national law to give rise to a ' question of international law ' within the meaning of the expression as used in Article 36, paragraph 2, clause (*b*). There must have been a breach by Norway of an obligation under international law due to France.

" Norway contends that the dispute as set forth in the Application remained a dispute under the national law of Norway with which this Court cannot deal. But I have already suggested that the Application, properly construed, was broad enough in its terms to raise those aspects of the problem which consist solely of questions of international law, and I have also indicated that in my opinion the issues are now settled, not by the wording of the Application but by the wording of the Final Submissions of the Government [**88**] of the French Republic.

" In the French Final Submissions, ' On the Merits ', the first paragraph clearly raises the question of discrimination, and the third paragraph raises the question of whether Norway could, in conformity with the principles of international law, by legislative action unilaterally modify the substance of the contracts between Norwegian borrowers and French bondholders.

" In these circumstances, there can be no doubt that questions of international law are involved and that the Court is competent to deal with the claim submitted to it. At any rate, there can be no serious question as to its competence as regards the claim based on discrimination and as regards the claim based on the law of December 15th, 1923.

"*Second Aspect:* That Norway discriminated against the French bondholders and in favour of the Danish and Swedish bondholders.

" I have already referred to this question in dealing with the First Question, and have mentioned it in discussing the First Aspect above. It is, however, necessary to develop it further and to examine the grounds on which Norway has sought to justify the discrimination.

" The fact of discrimination is beyond question, but Norway argues that there were times when the French bondholders were more favourably treated than the Danes and Swedes. But two wrongs do not make a right, and in my opinion the question of balance of advantage is irrelevant.

" Further, I cannot help thinking that the payment in Swedish crowns involved very substantial discrimination. One thing is certain, and that is that on the 23rd December, 1946, a proposal was submitted by France for a settlement of the case, which had then been a sore spot in Franco-Norwegian relations for twenty-one years. This proposal was in the nature of a compromise, asking that the French bondholders should be paid in Swedish crowns on their capital payments, and that the coupons should be paid in Norwegian crowns. The Norwegian Government did not even answer this proposal.

" Norway also questions the existence of a rule of international law requiring equality of treatment, but that is a matter of merits. What must be borne in mind now is that the question as to whether such a rule of international law existed was certainly a ' question of international law ' within the meaning of Article 36.

" Norway relies strongly on the argument that discrimination was justified because it was based on good-will. It is not clear whether it was good-will towards the Danish or Swedish investors or towards Denmark or Sweden. This question of good-will has been [**89**] repeatedly raised and discussed by Norway, commencing on the 9th December, 1925, but its meaning and significance are still obscure. There is no suggestion that the refusal to accord the same sort of treatment to France or to the French investors was based on ill-will, and I cannot believe that the argument intends to suggest that international law considers that discrimination, if based on either good-will or ill-will, ceases in some mysterious manner to be discriminatory. At any rate, the question whether good-will can justify discrimination is a matter of international law and not of the national law of the respondent State.

" Norway also argues that the payments to the Swedish bondholders were *ex gratia*, and therefore not a proper subject for complaint by France. This argument is based upon the assumption that the French bondholders had no legal right to get anything better than Norwegian crowns (or sterling or francs), and that they had no right to receive gold or gold equivalents. But that is begging the question, and the objections to the jurisdiction must be dealt with upon the assumption that the Applicant's contentions with regard to the merits are justified and that the Respondent's contentions with regard to the merits are wrong. The case must be considered on the assumption that the bonds contained a real gold clause binding on Norway.

" It is, of course, true that this question of discrimination has been an important element in the controversy for thirty-two years, but it has been imported into dispute before this Court largely by reason of the justification on which Norway relies for its action in enacting the law of December 15th, 1923, and in establishing the *cours forcé* and impairing the obligation of the bonds. That is a point which I shall deal with more fully in discussing the Third Aspect. But the Norwegian action has been justified on the basis of world-wide economic catastrophe in which Norway and other States were compelled to take legislative measures impairing the obligations of debtors within the country as regards both resident and non-resident creditors. Such a justification obviously raises the question as to whether international law, if it sanctions such a course, permits it where the State in question is discriminating between different classes of creditors.

" I do not need now to express any opinion on this question of justification, but I have no doubt that it involves questions of international rather than of national law.

"*Third Aspect:* The French contention that the enactment by Norway of extraterritorial legislation purporting to impair the obligations [**90**] due to foreign bondholders resident in France was contrary to international law.

" This contention was raised in the French Final Submissions " On the Merits ', paragraph 3. In the course of the controversy, and throughout the written and oral proceedings, France has developed two main arguments along these lines. The first argument is based upon the view that international law treats the obligations arising from the marketing of bonds abroad as being something more than obligations arising under national law. Where, as in this case, the bonds have been:

" (1) marketed abroad;
" (2) expressed in several currencies;
" (3) payable abroad;
" (4) expressed in several languages;

it is argued that they cannot be repudiated without giving rise to a breach of international law.

" France contends that this position is supported by the practice of States as indicated by the arbitrations in such matters, especially in the closing years of the last century and the early years of this century, and reliance is also placed on Article 1 of the Hague Convention of 1907. The terms of this Convention were at first put forward as establishing a legal obligation to submit to arbitration in the matter of the recovery of contract debts. But this position has been abandoned, and in the later stages France was relying on the Convention as establishing the nature and character of the obligation arising out of contract debts claimed from the Government of one country by the Government of another country as being due to its nationals.

" The French position was contested in all its phases by Norway.

" The second French contention arises out of what has been referred to as the special French doctrine with regard to governmental action within a State impairing the obligation of debts due to non-resident aliens. It is contended by France that this doctrine expresses a broad principle of international law which would prevent a State from enacting extraterritorial legislation impairing the contractual rights of non-resident aliens. The French argument is based largely on this being a general principle of law recognized by civilized nations, and it is countered by the argument put forward on behalf of Norway, which is of a two-fold character—Norway relies largely on the practice of States, and also on the rule of the minimum standard.

[**91**] " It will thus be seen that the French claim and the Norwegian justification in this aspect of the question are both based upon considerations of international law and have nothing whatever to do with national law.

" It is, of course, impossible for me at the present stage to indicate my views as to whether France or Norway is right, whether the matter is considered from the point of view of discrimination or of extraterritoriality. On the other hand, I find insuperable difficulty in reaching the conclusion that a case involving these issues can be treated as being solely one of national law; and I am forced to the conclusion that the first Preliminary Objection should be rejected.

" *Second Part*

" In the Preliminary Objections, after arguing that the subject of the dispute as defined in the Application was within the domain of municipal law and not of international law, Norway considered that there could be no possible doubt on this point. If, however, there should still be some doubt, the Norwegian Government intimated that it would rely upon the reservation made by the French Government in its Declaration of March 1st, 1949. After discussing this Declaration, it was stated that ‘ convinced that the dispute which has been brought before the Court by the Application of July 6th, 1955, is within the domestic jurisdiction, the Norwegian Government considers itself fully entitled to rely on this right ’.

“ In invoking the provision contained in the reservation to the French Declaration, which provided for the automatic ouster of the jurisdiction by the unilateral action of the respondent Government, Norway was exercising a right of a highly technical character and the question naturally arises whether there was complete compliance with all of the provisions of the Declaration. The reservation reads as follows:

> “ ‘ This Declaration does not apply to disputes relating to matters which are essentially within the national jurisdiction as understood by the Government of the French Republic.’ (The translation of the French original has been changed by substituting the word ‘ disputes ’ for ‘ differences ’ in order to bring the English text into harmony with the French text.)

“ Norway, in putting forward this highly technical objection, did not make any statement or give any evidence indicating that this dispute related to matters which are *essentially* within the national jurisdiction as understood by the Norwegian Government. It made a bald statement that it was convinced that the dispute was ‘ within the domestic jurisdiction ’, which is quite a different matter. There [**92**] never at any time has been any question about the dispute being within the domestic jurisdiction of Norway. The real question has been whether the dispute was not also and primarily a matter to be determined not by the Norwegian law but by international law. However, Norway made it plain enough that it desired to invoke the French Declaration.

“ I have refused to apply any rigid and purely literal interpretation to the Application and have insisted that it should be interpreted so as to give effect to what obviously was the intention of France and the understanding of Norway. It would be completely inconsistent for me to seek to apply a rigid and purely literal interpretation to the words used by Norway when it sought to invoke the French Declaration. Accordingly, I am compelled to reach the conclusion that Norway did effectively invoke the French Declaration when the point was taken in the Preliminary Objections.

“ On the other hand, I do not think that Norway has maintained its position in this regard.

“ Having purported to invoke in the Preliminary Objections the reservation contained in the French Declaration, Norway did not incorporate this subsidiary point in its actual Submission. Indeed, the actual Submission relating to the first Preliminary Objection was inconsistent with the notion embodied in the Declaration. It asked the Court to find that the subject of the dispute was within the sphere of municipal law and not of international law, while the reservation envisaged a position in which that was not to be decided by the Court, but by the understanding of the Norwegian Government.

“ This point was not mentioned by Norway in the Counter-Memorial, in the Rejoinder or in the Oral Proceedings. Further, in the Norwegian Final Submissions of May 23rd—‘ On the Preliminary Objections ’—the Court is asked to make a finding that ‘ 1. The subject of the dispute, as defined in the Application, is within the domain of municipal law and not of international law ’. This actual Submission by Norway is inconsistent with the maintenance of the position taken in the Preliminary Objections when the French Declaration was invoked. Here again, the formal request that the Court should make this finding is utterly inconsistent with the idea [that] the decision should be made by Norway and not by the Court.

“ It might be thought that, notwithstanding the omission of this point from the Norwegian Final Submissions, it was maintained in the closing statements made on behalf of Norway during the Oral Proceedings.

[**93**] " At the beginning it was said, on behalf of Norway:

" ' In these circumstances, I should not like to take advantage of the Court's patience by repeating what we have already had the honour to set forth in our oral arguments. We maintain our positions in their entirety both as regards the merits and as regards the Preliminary Objections.'

" It is clear that Norway here was maintaining the position which had been taken in the course of the oral arguments and that no reference was intended to any matter touched upon in the Written Pleadings but not dealt with in the course of the Oral Proceedings.

" Later, in dealing with the fourth Objection, which concerned exhaustion of local remedies, it was stated:

" 'All that we have written and all that we have submitted orally to the Court in regard to our fourth Objection therefore still stands.'

In this instance it was clearly intended, as regards the fourth Objection, to maintain all positions which had been taken during the Written Proceedings whether or not they had been maintained in the course of the Oral Proceedings.

" The final position was taken towards the end when it was said:

" ' The Norwegian Government maintains its Submissions in their entirety as I presented them at the sitting on May 23rd . . .'

" I have no doubt in my own mind that the Norwegian Agent and Counsel realized that it was no longer proper to rely upon the French Declaration. In view of the form which the dispute had taken in the course of the Written and Oral Proceedings and especially having in mind that Norway had used 134 pages in the Rejoinder in arguing the international questions involved in the merits of the dispute, it was no longer possible seriously to suggest that Norway understood that the actual dispute before the Court related ' to matters which are essentially within the national jurisdiction as understood by the ' Norwegian Government.

" It is true that Norway has not formally abandoned the course which it adopted when it purported to invoke the reservation contained in the French Declaration. Nevertheless, I am compelled to reach the conclusion that Norway has not maintained that position and that it is necessary to comply with Norway's request to deal with the case on the basis of the Norwegian Final Submissions of May 23rd.

" But even if I thought that Norway had maintained its Objection based on the reservation to the French Declaration, I should still have difficulty in accepting an objection to the jurisdiction of the Court based upon the Second Part of the first Preliminary Objection.

[**94**] " My first difficulty relates to the text of the Declaration. It is necessary, for Norway to succeed, to establish that the Norwegian Government *understands* that the dispute relates to matters which are essentially within the Norwegian national jurisdiction. It is not sufficient to establish that the Norwegian Government *pretends to understand*, or *declares that it understands* that the dispute comes essentially within the scope of Norwegian national law. The text does not use the word ' pretends ' or ' declares ' and it does use language that suggests that it had in mind a genuine understanding.

" When the provisions of the reservation were invoked by Norway, it was not contended that they conferred an arbitrary power to oust the jurisdiction of the Court. Norway took the position that ' should a Government seek to rely upon it with a view to denying the jurisdiction of the Court in a case which manifestly did not involve a " matter which is essentially within the national jurisdiction " it would be committing an *abus de droit* which would not prevent the Court from acting '.

" I am in agreement with the position taken by Norway in this regard, but I do not think that it goes quite far enough. A case might involve a matter essentially within the national jurisdiction and yet not come within the scope of ' disputes relating to matters which are essentially within the national jurisdiction '. Further, I should be disinclined to bring notions of ' good faith ' and *abus de droit* into the question. Practically speaking it, is, I think, impossible for an international tribunal to examine a dispute between two sovereign States on the basis of either good or bad faith or of abuse of law.

" Nevertheless, I think that the basic principle underlying the position taken by Norway in this regard should be accepted. I think that the wording of the reservation to the Declaration properly construed means that the respondent State, in invoking the reservation, must establish that there is a genuine understanding, i.e. that the circumstances are such that it would be reasonably possible to reach the understanding that the dispute was essentially national. Whether the circumstances are such is not a matter for decision by a respondent Government, but by the Court. But, assuming that such circumstances existed, the conclusion reached by a respondent Government could not be reviewed by the Court.

" I am unable to accept the view that the reservation should be interpreted as giving the respondent Government an arbitrary power to settle any question of jurisdiction which arises by the assertion that the Government understands that the matter is essentially within the national jurisdiction regardless of whether that assertion is true or false.

" Such a construction of the clause would lead to something unreasonable and absurd. It would, of course, if that interpretation [**95**] is accepted, be necessary to conclude that the Declaration ran contrary to Article 36, paragraph 6, of the Statute, and was null and void.

" But this interpretation runs directly contrary to the rule which was laid down by the Permanent Court in the *Polish Postal Service in Danzig* (P.C.I.J., Series B, No. 11, p. 39[1]):

> " ' It is a cardinal principle of interpretation that words must be interpreted in the sense which they would normally have in their context, unless such interpretation would lead to something unreasonable or absurd.'

" This rule was approved in the Advisory Opinion of this Court: *Competence of Assembly regarding Admission to the United Nations, I.C.J. Reports 1950* at page 8.[2]

" If we apply the principles of this rule to the present case we find that the relevant words in their natural and ordinary meaning make sense in their context and that, in my opinion, is an end of the matter. It is inadmissible, by a process of interpretation, to rewrite the clause in question as if it had read: ' disputes relating to matters as regards which the Government of the French Republic has declared that it understands that they are essentially within the national jurisdiction '. The words used ' as understood ', if given their natural and ordinary meaning, connote a real understanding, and not a fictitious understanding unrelated to the facts.

" Having these considerations in mind, it is necessary for me to examine the question whether the circumstances are such that it would be reasonably possible to reach an understanding that the dispute was essentially national.

" At the time when Norway invoked the reservation there can be no doubt as to the propriety of the action. At that time, it was certainly reasonably possible, considering the Application alone together with any light that had been thrown upon it by the Memorial, to reach such an understanding. But, as a result of the course taken in the Written and Oral Proceedings, it is now possible to look at the dispute with full knowledge of its essential character. The dispute, in the form which it has now taken, and in which it is expressed in the French Final Submissions, involves a threefold claim based on: discrimination, extraterritoriality and the gold clause. The first two are based solely on international law while the third is based primarily on national law.

[[1] See *Annual Digest*, 1925–1926, Case No. 276, at p. 365.]
[[2] See *International Law Reports*, 1950, Case No. 104, at p. 328.]

I have already pointed out that throughout the Written and Oral Proceedings, the first and second claims have been discussed at great length by France and at much greater length by Norway. In these circumstances, I find it impossible to reach the conclusion that Norway could have reasonably understood that the case was essentially within the Norwegian national jurisdiction.

[**96**] " Accordingly, having considered both the First Part and the Second Part, I have reached the conclusion that the first Norwegian Preliminary Objection, as embodied in the first recital to the Submissions of the Agent of the Norwegian Government on May 23rd, 1957, should be rejected.

" Third Question—The Norwegian contention that ' *As to that part of the claim which relates to the bond certificates issued by the Mortgage Bank of Norway and the Small Holding and Workers' Housing Bank of Norway*, these two Banks have a legal personality separate from that of the Norwegian State; the action cannot therefore be brought against that State as a borrower; whereas moreover the jurisdiction of the Court is limited to disputes between States; '.

" I cannot accept the Norwegian contention as regards these Banks. I agree that they have separate legal personalities distinct from that of the Norwegian State, but that does not wholly dispose of the matter.

" The record shows that in 1954 a bondholder brought an action against the Mortgage Bank of Norway in a French court, the Tribunal de la Seine. The Bank objected to the jurisdiction of that Court on the ground that it was an instrumentality of the Norwegian Government, and for that purpose furnished the court with a certificate, signed by the Minister of Finance of Norway and dated 28th December, 1931, to that effect. It is established that the Bank, both in the matter of the litigation and in the course followed as regards gold payments, payments in Swedish crowns and other matters in dispute, was not acting as a separate personality with a separate power of decision, but was acting on the basis of the advice, instruction and approval of the Minister of Justice of Norway and the Minister of Finance of Norway. This has been the case since the 9th December, 1925, as is proved by Annex V to the Memorial. The proceedings in the French court were concluded in March, 1956, by a default judgment owing to the unwillingness of the Bank to appear and contest the proceedings on the merits.

" It thus appears that the Norwegian State completely identified itself with the Bank for the purpose of preventing the bondholder from obtaining a judicial determination of his rights. It is a sound doctrine that a party cannot blow both hot and cold at the same time, and Norway cannot retreat from the position of complete identification taken in 1931, and persisted in in the proceedings before the French court, for the purpose of preventing this Court from adjudicating upon the matter.

[**97**] " Fourth Question—The Norwegian contention that ' The holders of bond certificates for whose protection the French Government considers itself entitled to institute international proceedings have not first exhausted the local remedies.'

" From the very commencement of the diplomatic negotiations up to the present time, Norway has consistently and persistently insisted that the bondholders should resort to the Norwegian courts for the purpose of having these courts interpret the clauses in the bonds and determine the nature and extent of the obligations to the borrowers thereunder. But, at the same time and just as consistently and persistently, Norway has asserted that the question has been governed by the law of 15th December, 1923, and that that law is applicable to and binding upon foreigners. I have quoted above the actual statement by Norway, made at the commencement of the controversy.

" The rule of international law requiring the exhaustion of the local remedies is of great importance. When a State adopts the cause of its nationals as against a respondent State in a dispute which originally was one of national law, it is important to obtain the ruling of the local courts with regard to the issues of fact and law involved, before the international aspects are dealt with by an international tribunal. It is also important that the respondent State which is being charged with breach of international law should have a fair opportunity to rectify the position through its own tribunals. It is necessary to begin the consideration of the fourth Preliminary Objection with the assumption that France must establish resort to an exhaustion of local remedies before the claims of the French bondholders can be submitted to this Court.

" France has put forward three reasons for not resorting to the domestic tribunals in this case.

" In the first place, France suggests that the rule with regard to the necessity for exhaustion of local remedies is limited to cases in which the aggrieved individuals have taken up residnce within the jurisdiction of the respondent Government and thus consented to the exercise by the tribunals of the country of jurisdiction over them.

" France has not been able to put forward any persuasive authority for accepting this limitation on the application of the rule and, indeed, the weight of authority is the other way.

" In the second place, France also contends that the proper law of the contract is French and that the proceedings could be undertaken in the French courts. But this is a matter of private international law on which I do not propose to express any opinion. It is not directly relevant to the application of the rule of exhaustion of local remedies which, as a rule of public international law, is [**98**] concerned with the exhaustion of remedies available in the respondent State.

" In the third place, France contends that the bondholders should be excused from having undertaken proceedings in the Norwegian courts because such proceedings would offer no reasonable prospect of establishing their rights.

" Here we must again draw a clear-cut line between the original dispute based on national law and the dispute before this Court which is based upon international law. In this Court, the main complaints against Norway on the international plane are:

" 1st—discrimination;
" 2nd—extraterritoriality;
" 3rd—the gold clause issue.

The bondholder could not possibly bring proceedings in the Norwegian courts with regard to the first or second issues. His only course of action was a suit for breach of contract.

" The question, therefore, is whether the bringing of an action in the Norwegian courts by a French bondholder is a course which could be reasonably expected of him, or whether it would have been a procedure of obvious futility.

" I have difficulty in reaching the conclusion that the bondholder could reasonably have been expected to bring proceedings in the Norwegian courts. Since 9th December, 1925, he has had the notion hammered into his head by the Norwegian Government that such a course would be futile because the matter was governed by the law of 15th December, 1923. If he had brought an action and had persuaded the Norwegian court that there was a real gold clause in his bond, he would have met an insuperable barrier in the law of 1923. It would have been in vain for him to have argued that the enactment of the law was contrary to the rules of international law.

" It has been suggested in the Oral Proceedings that he might have asked the court to do one of two things—namely, to interpret the law as being inapplicable to foreigners, or to hold that the law was unconstitutional by reason of its retroactive character. But the French bondholder had never heard of these possibilities, neither of which was suggested at any time in the course of the diplomatic negotiations or in the course of the negotiations which took place between the French National Association and the Mortgage Bank.

" In the fourth place, it has been argued that the rule with regard to exhaustion of local remedies has no application where the rights of the applicant national have been impaired by the direct intervention of the respondent Government or Parliament. If there ever was a case in which the respondent Government and Parliament had intervened to impair the rights of non-resident aliens, it is in the present instance. It is obvious from the terms of the Note of 9th December, 1925, that the Mortgage Bank was not acting under [**99**] its own motion but under pressure from the Minister of Justice and the Minister of Finance. Further, the Storthing, the supreme legislative authority, in enacting this law was directly intervening so as to impair the rights of the French bondholders. Here I am not suggesting that either the Minister of Justice, the Minister of Finance, the Norwegian Government or the Storthing adopted and followed any course that was improper, but when I am dealing with an objection to the jurisdiction I am compelled to assume as against Norway matters which might well be changed on consideration of the merits.

" In view of these circumstances I find difficulty in upholding the fourth Norwegian objection, and am led to the view that it should be rejected.

" Fifth Question—The Norwegian request that the Court should 'adjudge and declare that the claim put forward by the Application of the French Government of July 6th, 1955, is not admissible'.

" I have already given my reasons for thinking that the claim of the French Government, with which the Court is now dealing, is the claim as set forth in the French Final Submissions. In a sense therefore, the Fifth Question is hardly relevant. But, construing the question as relating to the claim before the Court, I am of the opinion that it is not inadmissible. To appreciate the position, it is necessary to bear in mind that there are three complaints before the Court.

" The first is the charge by France that Norway discriminated against the French bondholders, contrary to the rules of international law. This charge, which I have been calling " discrimination ", is formulated in the first paragraph of the French Submissions on the merits.

" The second is the charge by France that Norway, by unilateral action in violation of the rules of international law, enacted legislation impairing the obligation of the bonds, to the detriment of the French investors. This charge, which I have been calling " extraterritoriality ', is formulated in the third paragraph of those Submissions.

" These elements of the dispute are causes of action which, in my opinion, are admissible. This Court alone is competent to dispose of them. They cannot be referred to the Norwegian courts, because those courts are not competent to dispose of a dispute, under international law, between France and Norway. The complaints, as regards discrimination and extraterritoriality, do not touch the breach of any legal obligation owed by Norway to the French bondholders. They relate solely to the obligations imposed on Norway by international law *vis-à-vis* France.

[**100**] " The third complaint is that which concerns the existence and obligation of the gold clause. It is based on the law of contract, and the contract, in this instance, is governed by Norwegian national law and not by international law. This complaint is formulated in the second, fourth and fifth paragraphs of the French Submissions on the merits. This element of the dispute is a cause of action which, in my opinion, is inadmissible. It is a matter that is and was within the scope of the jurisdiction of the Norwegian courts, in suits by the French bondholders against the Norwegian borrowers. France could not, by adopting the claims of French nationals, change the

legal nature of the claims, and transfer them from the national to the international plane.

" I do not think that the jurisdiction of the Norwegian courts to deal with the contractual cause of action, the third complaint under consideration, is in any way impaired by the existence of the first and second complaints which they are not competent to adjudicate. That is so notwithstanding that the three elements are so closely related. But, at the same time, I am of the opinion that the competence of this Court to adjudge the two purely international elements is not ousted, by reason of the coexistence of a closely related, but severable, element which is within the exclusive national competence of Norway.

" Accordingly, I have reached the conclusion that the Court should reject the Norwegian objections in so far as they relate to the first and third paragraphs of the French Submissions on the merits; and allow the Norwegian objections in so far as they relate to the second, fourth, and fifth paragraphs thereof.

" Norway has asked the Court, in the Submissions of May 23rd, 1957, to deal with the merits. This is a conditional request, which would come into operation only if the Court decided that the claim was admissible. As the Court is taking the position that it is not competent to deal with any part of the dispute, it is not desirable that I should proceed to discuss the merits, although my own view is that they should be dealt with in so far as they relate to the first and third paragraphs of the French Submissions. In dealing with the points of jurisdiction and admissibility, it has been necessary for me to look at the merits from time to time, and to make certain observations with regard to them. It was not intended in making these observations to indicate in any way what my opinion would be in the event that it became necessary to consider and dispose of the merits."

International Court of Justice—Competence of—Article 36 of Statute—Optional Clause—Compatibility of Declaration of Acceptance with—Retention of Power to Withdraw Categories of Disputes from Jurisdiction of Court—Definition of Dispute Through Diplomatic Negotiations—Domestic Jurisdiction of State—Question Falling Within—Date When Dispute Arose—Joining of Preliminary Objections to Merits.

Case Concerning Right of Passage over Indian Territory (Portugal *v.* India).

(*Preliminary Objections.*)

International Court of Justice. Judgment of November 26, 1957.

(Hackworth, President; Badawi, Vice-President: Guerrero, Basdevant, Winiarski, Zoričić, Klaestad, Read, Armand-Ugon, Kojevnikov, Sir Muhammad Zafrulla Khan, Sir Hersch Lauterpacht, Moreno Quintana, Córdova, Wellington Koo, Judges; Chagla and Fernandes, Judges *ad hoc.*)

The Facts.—In 1955, the Republic of Portugal filed an application submitting to the Court a dispute between that nation and the Republic of India concerning the right of passage over Indian territory between the territory of Daman (littoral Daman) and the enclaved territories of Dadrá and Nagar-Aveli as well as between each of the two last-mentioned territories. Portugal asserted that the Court had jurisdiction in the dispute for the reason that both Portugal and India had accepted the Optional Clause, constituting Article 36, paragraph 2, of the Statute of the Court. The Declaration of Portugal of December 19, 1955, provided:

> " Under Article 36, paragraph 2, of the Statute of the International Court of Justice, I declare on behalf of the Portuguese Government that Portugal recognizes the jurisdiction of this Court as compulsory *ipso facto* and without special agreement, as provided for in the said paragraph 2 of Article 36 and under the following conditions:
>
> " (1) The present declaration covers disputes arising out of events both prior and subsequent to the declaration of acceptance of the 'optional clause' which Portugal made on December 16, 1920, as a party to the Statute of the Permanent Court of International Justice.
>
> " (2) The present declaration enters into force at the moment it is deposited with the Secretary-General of the United Nations; it shall be valid for a period of one year, and thereafter until notice of its denunciation is given to the said Secretary-General.
>
> " (3) The Portuguese Government reserves the right to exclude from the scope of the present declaration, at any time during its validity, any given category or categories of disputes, by notifying the Secretary-General of the United Nations and with effect from the moment of such notification."

India filed six Preliminary Objections to the exercise of jurisdiction by the Court. The substance of these is set forth in the Judgment of the Court.

Held (by thirteen votes to four): that the Preliminary Objections of India must be rejected.

With regard to the *First Preliminary Objection* (by fourteen votes to three): that a condition in a reservation saving the right prospectively to exclude categories of cases from the jurisdiction of the Court, was compatible with the Optional Clause.

With regard to the *Second Preliminary Objection* (by fourteen votes to three): that the filing of an application three days after the filing of a declaration under the Optional Clause was compatible with the Statute of the Court.

With regard to the *Fourth Preliminary Objection* (by fifteen votes to two): that the filing of an application in the manner described was not an abuse of the right of reciprocity of the respondent State under Article 36 of the Statute.

With regard to the *Third Preliminary Objection* (by sixteen votes to one): that a " legal dispute " within the meaning of Article 36, paragraph 2, of the Statute had, in the circumstances of the case, been defined by diplomatic negotiations.

With regard to the *Fifth and Sixth Preliminary Objections* (by thirteen votes to four and fifteen votes to two, respectively): that objections that the matter was one which by international law fell exclusively within the jurisdiction of India and that the dispute had arisen prior to the operative date in the Declaration of India must be joined to the merits of the case.

The Court said:

[**141**] " *First Preliminary Objection*

" The First Preliminary Objection of the Government of India is to the effect that the Court is without jurisdiction to entertain the Application of Portugal on the ground that the Portuguese Declaration of Acceptance of the jurisdiction of the Court of December 19th, 1955, is invalid for the reason that the Third Condition of the Declaration is incompatible with the object and purpose of the Optional Clause. There are, in the view of the Government of India, three main reasons for such incompatibility.

" The Third Condition of the Declaration of Portugal provides as follows:

> " ' (3) The Portuguese Government reserves the right to exclude from the scope of the present declaration, at any time during its validity, any given category or categories of disputes, by notifying the Secretary-General of the United Nations and with effect from the moment of such notification.'

[**142**] " In the first instance, the Government of India maintains that that Condition gives Portugal the right, by making at any time a notification to that effect, to withdraw from the jurisdiction of the Court a dispute which has been submitted to it prior to such a notification. This is what in the course of the proceedings was described as the retroactive effect attaching to that notification. India asserts that such retroactive effect is incompatible with the principle and notion of the compulsory jurisdiction of the Court as established in Article 36 of the Statute and that the Third Condition is invalid inasmuch as it contemplates an effect which is contrary to the Statute.

" The Government of Portugal has contested that interpretation and has affirmed that the Third Condition does not have such retroactive effect and that, in consequence, it is not incompatible with Article 36 of the Statute.

" In order to decide whether, as maintained by the Government of India, the Third Condition appended by Portugal is invalid, and whether such invalidity entails the invalidity of the Declaration in which it is contained, the Court must determine the meaning and the effect of the Third Condition by reference to its actual wording and applicable principles of law.

" The words ' with effect from the moment of such notification ' cannot be construed as meaning that such a notification would have retroactive effect so as to cover cases already pending before the Court. Construed in their ordinary sense, these words mean simply that a notification under the Third Condition applies only to disputes brought before the Court after the date of the notification.

Such an interpretation leads to the conclusion that no retroactive effect can properly be imputed to notifications made under the Third Condition. It is a rule of law generally accepted, as well as one acted upon in the past by the Court, that, once the Court has been validly seised of a dispute, unilateral action by the respondent State in terminating its Declaration, in whole or in part, cannot divest the Court of jurisdiction. In the *Nottebohm* case the Court gave expression to that principle in the following words:

" ' An extrinsic fact such as the subsequent lapse of the Declaration, by reason of the expiry of the period or by denunciation, cannot deprive the Court of the jurisidiction already established.' (*I.C.J. Reports* 1953, p. 123.[1])

" That statement by the Court must be deemed to apply both to total denunciation, and to partial denunciation as contemplated in the Third Portuguese Condition. It is a rule of interpretation that a text emanating from a Government must, in principle, be interpreted as producing and as intended to produce effects in accordance with existing law and not in violation of it.

[**143**] " The second reason, contended for by the Government of India, for the incompatibility of the Third Portuguese Condition with the object and purpose of the Optional Clause, is that it has introduced into the Declaration a degree of uncertainty as to reciprocal rights and obligations which deprives the acceptance of the compulsory jurisdiction of the Court of all practical value. In particular, it was contended that, in consequence of the Third Condition, the other Signatories are in a continuous state of uncertainty as to their reciprocal rights and obligations which may change from day to day.

" While it must be admitted that clauses such as the Third Condition bring about a degree of uncertainty as to the future action of the accepting government, that uncertainty does not attach to the position actually established by the Declaration of Acceptance or as it might be established in consequence of recourse to the Third Condition.

"As Declarations, and their alterations, made under Article 36 must be deposited with the Secretary-General, it follows that, when a case is submitted to the Court, it is always possible to ascertain what are, at that moment, the reciprocal obligations of the Parties in accordance with their respective Declarations. Under the existing system, Governments can rely upon being informed of any changes in the Declarations in the same manner as they are informed of total denunciations of the Declarations. It is true that during the interval between the date of a notification to the Secretary-General and its receipt by the Parties to the Statute, there may exist some element of uncertainty. However, such uncertainty is inherent in the operation of the system of the Optional Clause and does not affect the validity of the Third Condition contained in the Portuguese Declaration.

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[1] See *International Law Reports*, 1953, p. 567, at p. 576.]

" It must also be noted that, with regard to any degree of uncertainty resulting from the right of Portugal to avail itself at any time of its Third Condition of Acceptance, the position is substantially the same as that created by the right claimed by many Signatories of the Optional Clause, including India, to terminate their Declarations of Acceptance by simple notification without any obligatory period of notice. India did so on January 7th, 1956, when it notified the Secretary-General of the denunciation of its previous Declaration of Acceptance, for which it simultaneously substituted a new Declaration incorporating reservations which were absent from its previous Declaration. By substituting, on January 7th, 1956, a new Declaration for its earlier Declaration, India achieved, in substance, the object of Portugal's Third Condition.

" It has been argued that there is a substantial difference, in the matter of the certainty of the legal situation, between the Third Portuguese Condition and the right of denunciation without notice. [**144**] In the view of the Court there is no essential difference, with regard to the degree of certainty, between a situation resulting from the right of total denunciation and that resulting from the Third Portuguese Condition which leaves open the possibility of a partial denunciation of the otherwise subsisting original Declaration.

" Neither can it be admitted, as a relevant differentiating factor, that while in the case of total denunciation the denouncing State can no longer invoke any rights accruing under its Declaration, in the case of a partial denunciation under the terms of the Third Condition Portugal can otherwise continue to claim the benefits of its Acceptance. For, as the result of the operation of reciprocity, any jurisdictional rights which it may thus continue to claim for itself can be invoked against it by the other Signatories, including India.

" Finally, as the third reason for the invalidity of the Third Condition, it has been contended that that Condition offends against the basic principle of reciprocity underlying the Optional Clause inasmuch as it claims for Portugal a right which in effect is denied to other Signatories who have made a Declaration without appending any such condition. The Court is unable to accept that contention. It is clear that any reservation notified by Portugal in pursuance of its Third Condition becomes automatically operative against it in relation to other Signatories of the Optional Clause. If the position of the Parties as regards the exercise of their rights is in any way affected by the unavoidable interval between the receipt by the Secretary-General of the appropriate notification and its receipt by the other Signatories, that delay operates equally in favour of or against all Signatories and is a conseqence of the system established by the Optional Clause.

" Neither can the Court accept the view that the Third Condition is inconsistent with the principle of reciprocity inasmuch as it renders inoperative that part of paragraph 2 of Article 36, which refers to Declarations of Acceptance of the Optional Clause in relation to States accepting the ' same obligation '. It is not necessary that the ' same obligation ' should be irrevocably defined at the time of the deposit of the Declaration of Acceptance for the entire period of its duration. That expression means no more than that, as between States adhering to the Optional Clause, each and all of them are bound by such identical obligations as may exist at any time during which the Acceptance is mutually binding.

"As the Court finds that the Third Portuguese Condition is not inconsistent with the Statute, it is not necessary for it to consider the question whether, if it were invalid, its invalidity would affect the Declaration as a whole.

" For these reasons, the First Preliminary Objection of the Government of India must be dismissed.

[**145**] " *Second Preliminary Objection*

" The Second Preliminary Objection of the Government of India is based on the allegation that—as the Portuguese Application of December 22nd, 1955, was filed before the lapse of such brief period as in the normal course of events would have enabled the Secretary-General of the United Nations, in compliance with Article 36, paragraph 4, of the Statute of the Court, to transmit copies of the Portuguese Declaration of Acceptance of December 19th, 1955, to the other Parties to the Statute—the filing of the Application violated the equality, mutuality and reciprocity to which India was entitled under the Optional Clause and under the express condition of reciprocity contained in its Declaration of February 28th, 1940; that, in consequence, the conditions necessary to entitle the Government of Portugal to invoke the Optional Clause against India did not exist when that Application was filed; and that, as a result, the Court is without jurisdiction to entertain the Application.

" The principle of reciprocity forms part of the system of the Optional Clause by virtue of the express terms both of Article 36 of the Statute and of most Declarations of Acceptance, including that of India. The Court has repeatedly affirmed and applied that principle in relation to its own jurisdiction. It did so, in particular, in the case of *Certain Norwegian Loans* (*I.C.J. Reports* 1957, pp. 22–24[1]) where it recalled its previous practice on the subject. However, it is clear that the notions of reciprocity and equality are not abstract conceptions. They must be related to some provision of the Statute or of the Declarations.

" The two questions which the Court must now consider are as follows: in filing its Application on the date that it did, namely,

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[1] Reported *supra*, p. 782, in this volume.]

December 22nd, 1955, did Portugal act in a manner contrary to any provision of the Statute? If not, did it thereby violate any right of India under the Statute or under its Declaration?

" In the course of the oral arguments the Government of India disclaimed any intention of contending that Portugal was not entitled to file its Application until the notification of the Secretary-General had reached the Government of India. The latter merely maintained that before its Application Portugal ought to have allowed such period to elapse as would reasonably have permitted the notification of the Secretary-General to take its 'appropriate effects'.

" The material dates, as stated by the Government of India, are as follows: On December 19th, 1955, the Representative of Portugal to the United Nations made the Declaration, on behalf of the Government of Portugal, accepting the compulsory jurisdiction of [**146**] the Court under the Optional Clause. On December 22nd, the Government of Portugal filed in the Court the Application instituting the present proceedings against the Government of India. On the same day, a telegram was sent by the Court notifying the Government of India of the filing of the Portuguese Application. On December 30th, 1955, the Government of India received a copy of the Portuguese Declaration of Acceptance which had been obtained from the Court by its Embassy at The Hague. On January 19th, 1956, a copy of the Portuguese Declaration was officially transmitted to the Government of India by the Secretary-General of the United Nations in compliance with Article 36, paragraph 4, of the Statute.

" The Government of India has contended that, in filing its Application on December 22nd, 1955, the Government of Portugal did not act in conformity with the provisions of the Statute. The Court is unable to accept that contention. The Court considers that, by the deposit of its Declaration of Acceptance with the Secretary-General, the accepting State becomes a Party to the system of the Optional Clause in relation to the other declarant States, with all the rights and obligations deriving from Article 36. The contractual relation between the Parties and the compulsory jurisdiction of the Court resulting therefrom are established, '*ipso facto* and without special agreement', by the fact of the making of the Declaration. Accordingly, every State which makes a Declaration of Acceptance must be deemed to take into account the possibility that, under the Statute, it may at any time find itself subjected to the obligations of the Optional Clause in relation to a new Signatory as the result of the deposit by that Signatory of a Declaration of Acceptance. A State accepting the jurisdiction of the Court must expect that an Application may be filed against it before the Court by a new declarant State on the same day on which that State deposits with the Secretary-General its Declaration of Acceptance. For it is on that very day that the consensual bond, which is the basis of the Optional Clause, comes into being between the States concerned. When India made its Declaration of Acceptance of February 28th, 1940, it stated that it accepted the jurisdiction of the Court for a specified period ' from to-day's date '.

" It has been contended by the Government of India that as Article 36 requires not only the deposit of the Declaration of Acceptance with the Secretary-General but also the transmission by the Secretary-General of a copy of the Declaration to the Parties to the Statute, the Declaration of Acceptance does not become effective until the latter obligation has been discharged, However, it is only the first of these requirements that concerns the State making the Declaration. The latter is not concerned with the duty of the Secretary-General or the manner of its fulfilment. The legal effect of a Declaration does not depend upon subsequent action or inaction of the Secretary-General. Moreover, unlike some other [**147**] instruments, Article 36 provides for no additional requirement, for instance, that the information transmitted by the Secretary-General must reach the Parties to the Statute, or that some period must elapse subsequent to the deposit of the Declaration before it can become effective. Any such requirement would introduce an element of uncertainty into the operation of the Optional Clause system. The Court cannot read into the Optional Clause any requirement of that nature.

" India has further contended that, even though the filing of the Application by Portugal be held to be otherwise in accordance with Article 36, it was effected in a manner which violated rights of India under the Statute and under its Declaration of Acceptance.

"Apart from complaining generally of an impairment of its rights of equality, mutuality and reciprocity under the Statute, India has not specified what actual right has been adversely affected by the manner of the filing of the Portuguese Application. The Court has been unable to discover what right has, in fact, thus been violated.

"As the Court has arrived at the conclusion that the manner of filing the Portuguese Application was neither contrary to Article 36 of the Statute nor in violation of any right of India under the Statute, or under its Declaration of Acceptance, the Court must dismiss the Second Preliminary Objection of the Government of India.

" *Fourth Preliminary Objection*

"As the Second and Fourth Preliminary Objections are concerned with cognate aspects of the filing of the Portuguese Application, it is convenient to consider the Fourth Preliminary Objection before examining the Third.

" In the Fourth Preliminary Objection, India contended that, since it had no knowledge of the Portuguese Declaration before

Portugal filed its Application, it was unable to avail itself, on the basis of reciprocity, of the Third Portuguese Condition and to exclude from the jurisdiction of the Court the dispute which is the subject-matter of the Portuguese Application. This Objection is based on considerations substantially identical with those adduced in support of the Second Preliminary Objection. Accordingly, the Court will confine itself to recalling what it has already said in dealing with the Second Preliminary Objection, in particular that the Statute does not prescribe any interval between the deposit by a State of its Declaration of Acceptance and the filing of an Application by that State, and that the principle of reciprocity is not affected by any delay in the receipt of copies of the Declaration by the Parties to the Statute.

"As the manner of the filing of the Portuguese Application did not in respect of the Third Portuguese Condition deprive India [**148**] of any right of reciprocity under Article 36 of the Statute, so as to constitute an abuse of the Optional Clause, the Court cannot regard the Fourth Preliminary Objection of the Government of India as well founded.

" *Third Preliminary Objection*

" In its Third Preliminary Objection, as defined in the Submissions, the Government of India contended that, as the Portuguese Application of December 22nd, 1955, was filed before the Portuguese claim was effectively made the subject of diplomatic negotiations, the subject-matter of the claim had not yet been determined and that there was therefore, as yet, no legal and justiciable dispute between the Parties which could be referred to the Court under the Optional Clause. It was therefore submitted that, as the conditions necessary to entitle the Government of Portugal to invoke the Optional Clause did not exist at the time of the Application, the Court is without jurisdiction to entertain the Application.

" In particular, the Third Objection is based on the allegation that, although neither Article 36 (2) of the Statute nor the Portuguese or Indian Declarations of Acceptance refer directly to the requirement of previous negotiations, the fact that the Application was filed prior to the exhaustion of diplomatic negotiations was contrary to Article 36 (2) of the Statute, which refers to legal disputes. It was contended by India that, unless negotiations had taken place which had resulted in a definition of the dispute between the Parties as a legal dispute, there was no dispute, in the sense of Article 36 (2) of the Statute, the existence of which had been established in the Application and with respect to which the Court could exercise jurisdiction.

" In examining this Objection, the Court must consider the question of the extent to which, prior to the filing of the Application by Portugal, negotiations had taken place between the Parties in the matter of the right of passage. An examination of these negotiations shows that, although they cover various aspects of the situation arising out of the political claims of India in respect of the enclaves, a substantial part of these exchanges of views was devoted, directly or indirectly, to the question of access to the enclaves. A survey of the correspondence and Notes laid before the Court reveals that the alleged denial of the facilities of transit to the enclaves provided the subject-matter of repeated complaints on the part of Portugal; that these complaints constituted one of the principal objects of such exchanges of views as took place; that, although the exchanges between the Parties had not assumed the character of a controversy as to the nature [**149**] and extent of the legal right of passage, Portugal described the denial of passage requested by it as being inconsistent not only with requirements of good neighbourly relations but also with established custom and international law in general; and that these complaints were unsuccessful.

" While the diplomatic exchanges which took place between the two Governments disclose the existence of a dispute between them on the principal legal issue which is now before the Court, namely, the question of the right of passage, an examination of the correspondence shows that the negotiations had reached a deadlock.

" It would therefore appear that assuming that there is substance in the contention that Article 36 (2) of the Statute, by referring to legal disputes, establishes as a condition of the jurisdiction of the Court a requisite definition of the dispute through negotiations, the condition was complied with to the extent permitted by the circumstances of the case.

" The Court finds that the legal issue was sufficiently disclosed in the diplomatic exchanges, and considers that the Government of Portugal has complied with the conditions of the Court's jurisdiction as laid down in Article 36 (2) of the Statute. Accordingly, the Court must dismiss the Third Preliminary Objection.

" *Fifth Preliminary Objection*

" In its Fifth Preliminary Objection the Government of India has relied on the reservation which forms part of its Declaration of Acceptance of February 28th, 1940, and which excludes from the jurisdiction of the Court disputes with regard to questions which by international law fall exclusively within the jurisdiction of the Government of India, In particular, it was asserted by the Government of India that the facts and the legal considerations adduced before the Court did not permit the conclusion that there was a reasonably arguable case for the contention that the subject-matter of the dispute is outside the exclusive domestic jurisdiction of India. It was therefore submitted that the dispute is outside the jurisdiction of the Court.

" The relevant Submissions of the Government of India filed on September 27th, 1957, are based largely on the following assertions: in paragraph (*a*) of its Submissions on the Fifth Objection it is asserted that ' the Portuguese claim to a right of transit . . . cannot be regarded as a reasonably arguable cause of action under international law unless it is based on the express grant or specific consent of the territorial sovereign ', and that ' the facts presented to the Court in the Pleadings of the Parties show no such express grant or specific consent of the territorial sovereign as could place [**150**] a limitation on the exercise of India's jurisdiction . . . '. In paragraph (*b*) it is asserted that none of the grounds put forward by the Government of Portugal, namely, treaty, custom and general principles of law, can be regarded on the facts and the law which have been presented to the Court as reasonably arguable under international law. Paragraph (*c*) deals exclusively with factual aspects of the matter before the Court. India urges that the Fifth Preliminary Objection must be sustained for the reason that ' regardless of the correctness or otherwise of the conclusions set out in paragraphs 4 (*a*) and 4 (*b*), the uncontradicted facts presented in the Pleadings of the Parties establish that the question of transit between Daman and the enclaves has always been dealt with both by Portugal and the territorial sovereign on the basis that it is a question within the exclusive competence of the territorial sovereign.' Finally, in paragraph (*d*) it is urged that the dispute submitted to the Court by Portugal is not a legal dispute which may be decided by the Court under Article 38, paragraph 1, of the Statute.

" The facts on which those Submissions of the Government of India are based are not admitted by Portugal. The elucidation of those facts, and their legal consequences, involves an examination of the actual practice of the British, Indian and Portuguese authorities in the matter of the right of passage—in particular as to the extent to which that practice can be interpreted, and was interpreted by the Parties, as signifying that the right of passage is a question which according to international law is exclusively within the domestic jurisdiction of the territorial sovereign. There is the further question as to the legal significance of the practice followed by the British and Portuguese authorities, namely, whether that practice was expressive of the common agreement of the Parties as to the exclusiveness of the rights of domestic jurisdiction or whether it provided a basis for a resulting legal right in favour of Portugal. There is, again, the question of the legal effect and of the circumstances surrounding the application of Article 17 of the Treaty of 1779 and of the Mahratha Decrees issued in pursuance thereof.

" Having regard to all these and similar questions, it is not possible to pronounce upon the Fifth Preliminary Objection at this stage without prejudging the merits. Accordingly, the Court decides to join that Objection to the merits.

" In these circumstances, it is not necessary for the Court to examine the other questions relating to the Fifth Objection which have been raised by the Parties in their Submissions.

[**151**] *"Sixth Preliminary Objection*

" In its Sixth Objection the Government of India contended that the Court is without jurisdiction on the ground that India's Declaration of February 28th, 1940, accepting the compulsory jurisdiction of the Court is limited to ' disputes arising after February 5th, 1930, with regard to situations or facts subsequent to the same date '. In particular, the Government of India maintained: (*a*) that the dispute submitted to the Court by Portugal is a dispute which did not arise after February 5th, 1930, and (*b*) that in any case it is a dispute with regard to situations and facts prior to that date.

" The Court must examine the relevant Indian reservation, in the first instance, in so far as it refers to the date on which the dispute may be said to have arisen. The first contention advanced in this connection by the Government of India is that the dispute submitted to the Court did not arise after February 5th, 1930, but —partly or wholly—before that date. However, the Government of Portugal contends that the dispute submitted to the Court arose after 1953, when the Government of India adopted certain measures relating to passage and transit between the littoral territory of Daman and the enclaves of Dadra and Nagar-Aveli.

" That divergence of views cannot be separated from the question whether or not the dispute submitted to the Court is only a continuation of a dispute which divided Portugal and the territorial sovereign prior to 1930 concerning the right of passage. The Court, having heard conflicting arguments regarding the nature of the passage formerly exercised, is not in a position to determine at this stage the date on which the dispute arose or whether or not the dispute constitutes an extension of a prior dispute.

" Similar considerations apply to the second element of the reservation *ratione temporis* which forms part of the Indian Declaration of Acceptance, namely, in so far as it refers to ' situations or facts ' subsequent to 5th February, 1930.

" It was contended that the question of the existence or non-existence of a legal right of passage was not, prior to 1930, in controversy between the Parties concerned and that they managed throughout to settle, without raising or resolving the question of legal right, the practical problems arising in this connection. On the other hand it was also contended that the dispute now before the Court is a continuation of a conflict of views going as far as 1818, and that it is a dispute ' beyond any question with reference to situations or facts stretching far back before 1930 '.

[**152**] " The Court is not at present in possession of sufficient evidence to enable it to pronounce on these questions. To do that

would necessitate an examination and clarification of, often complicated, questions of fact bearing on the practice pursued by the authorities concerned for a period of very considerable duration and stretching back to 1818, or even 1779. There are other factors which give rise to similar considerations. These factors include the disputed interpretation of the Treaty of 1779 between the Mahrathas and the Portuguese. Any evaluation of these factors, although limited to the purposes of the Sixth Preliminary Objection, would entail the risk of prejudging some of the issues closely connected with the merits. Accordingly, the Court must join the Sixth Preliminary Objection to the merits.

" The Government of Portugal added to its Submissions a statement requesting the Court to recall to the Parties the universally admitted principle that they should facilitate the accomplishment of the task of the Court by abstaining from any measure capable of exercising a prejudicial effect in regard to the execution of its decisions or which might bring about either an aggravation or an extension of the dispute. The Government of Portugal has expressly disclaimed any intention of invoking the provisions of Article 41 of the Statute concerning the indication of interim measures. The Court does not consider that, in the circumstances of the present case, it should comply with the request of the Government of Portugal."

[Report: *I.C.J. Reports*, 1957, p. 125.]

Judge Kojevnikov stated (at p. 153) that " he cannot concur either in the operative clause or in the reasoning of the Judgment because, in his opinion, the Court should at the present stage of the proceedings hold that it is without jurisdiction on one or indeed more of the Preliminary Objections raised by the Government of India."

Vice-President Badawi delivered the following Dissenting Opinion:

[**154**] " I am in agreement with the decisions of the Court on Objections 1, 3, 4 and 5, without, however, subscribing to certain aspects of the reasoning for those decisions.

" I regret, however, that I cannot concur in the decisions relating to Objections 2 and 6, which I consider well-founded. Each of these Objections would be sufficient in itself to exclude the jurisdiction of the Court to deal with the dispute relating to right of passage.

" The Second Objection relates to the premature filing of the Portuguese Application of December 22nd, 1955.

" The Portuguese Declaration was deposited with the Secretary-General on December 19th, but the Full Powers of the representative of that State were signed at Lisbon only on the 20th and were transmitted to the Secretary-General only on the 21st.

" Therefore, although the Declaration was submitted on December 19th, it was properly deposited only on the 21st.

" But the Application to the Court was filed on December 22nd. The Government of India, as a result of its own investigations, was able to discover the existence of the Declaration towards the end of December, but the

Secretary-General did not transmit it to the States until January 1956 (the 19th).

" India bases its Objection on the lack of equality, mutuality and reciprocity, but these bases are for India but the consequences of the consensual character of the Declarations. In my opinion, these consequences do not furnish any additional force to the argument based on that consensual character. I shall, therefore, confine myself to this consensual character, the basis of this objection.

" It is generally recognized that a State can be brought before an international tribunal only with its consent. The system of Declarations, however ingenious it may be as a means of overcoming certain hesitations and of finding a practical and variable formula for the acceptance of the jurisdiction of the Court without a rule which is directly and uniformly binding, is none the less based on the idea of consent.

" When Article 36 of the Statute uses the words ' *ipso facto* and without *special* agreement ', it stresses the conventional character of Declarations and it confirms that character by the expression " in relation to any other State acccepting the same obligation ". These words make it quite impossible to attribute to a Declaration by itself a unilateral character and a binding effect on this ground.

[155] " It has been said that the Court has, in certain passages in its decisions, described Declarations as unilateral acts, but an examination of these passages shows that this description in no way signifies that a Declaration by itself and of its own force binds other States. The Court was simply indicating that for the purpose of interpreting such Declarations their unilateral origin should be taken into consideration.

" Portugal, moreover, does not contest the consensual character of the legal relationship which is formed between States which have subscribed to Declarations accepting the compulsory jurisdiction of the Court. But it has argued that what creates the consensual bond between these States is the coinciding of their Declarations, or, more accurately, the provision of Article 36, paragraph 2, which establishes a reciprocity of rights and obligations as between the States accepting the same obligation. But that reciprocity cannot create the agreement. It may define its extent. But what creates the agreement here, as in every other meeting of wills, is always the basic idea of offer and acceptance.

" Indeed, any Declaration can be analysed only into an acceptance by the State depositing it, of the Declarations of those States which have preceded it and into an offer by it to them. This analysis is particularly evident when the new Declaration contains new reservations.

" But whichever, in this analysis, is the State which offers and that which accepts, it is essential in each case that the offer should be accepted by the State to which it is addressed. This acceptance, even though it be regarded as delimited by reciprocity, is none the less indispensable. It must exist, for it is the basis of the resulting obligation upon these States to submit to the jurisdiction of the Court. It matters little whether the acceptance be actual or constructive, on the basis of a legal interpretation that communication is equivalent to acceptance, it must always be recognized as the only foundation for the jurisdiction of the Court.

" It goes without saying that the Secretary-General is not the ultimate recipient of the Declaration, which is deemed to be addressed or notified by the State making it to the other States which have already accepted the compulsory jurisdiction, so that a binding contract may be formed between them.

" The notification of Declarations to the Secretary-General, or their deposit with him and his obligation to communicate them to other States, are merely intended to take the place of direct communications. The Secretary-General is thus a mere depository entrusted with the duty of bringing the Declarations to the knowledge of the other States. By channelling these communications through the office of the Secretary-General, the Statute [**156**] was simply seeking to ensure communication in an efficient and regular way. This communication constitutes a special obligation of the Secretary-General which is provided for by Article 36 of the Statute.

" Translated into legal terminology, the system of Declarations constitutes a contract by correspondence between the declarant State and the other State through the agency of the Secretary-General as an intermediary who, in these cases, constitutes a stage in the transmission. Counsel for Portugal indeed recognized the correctness of this legal construction, but he contended that the contract was formed by the mere deposit with the Secretary-General.

" It is necessary in this connection to recall that every Declaration is itself an acceptance and an offer. The offer by Portugal contained in its Declaration and addresssed to the other States had not been accepted by India or, indeed, communicated to India.

" With regard to the formation of contracts by correspondence, municipal legal systems adopt different positions. Some adopt the declaration theory; others the dispatch theory. Still others take the view that the contract is concluded at the time and place where the author of the offer becomes aware of its acceptance, and there is the further view, which is that of the French *Cour de Cassation,* that it is a question of fact which has to be decided in the light of the circumstances of each case.

" Portugal contends that Article 36 of the Statute is silent on this point but, being obliged to recognize the consensual character of Declarations as a tacit implication of the system, it seeks to explain the expression of consent as between States by the mere coinciding of their Declarations. But, in fact, this coincidence is often lacking and, in any event, it constitutes only the measure and the extent of the respective obligations of the States.

" It is true that the point is a new one and one for which there is no precedent. Generally speaking, the point has not been dealt with either in the writings of publicists or in judicial decisions. The present case reveals the desire that was felt to spring a surprise and thus to avoid the possibility of abrogation of or exclusion from a Declaration. But it fails wholly to satisfy the minimum conditions required for the formation of a contract.

" Since the Declaration was deposited with the Secretary-General on the eve of the Application, it would have been impossible to suppose that it would be transmitted to the other States within 24 hours. The position therefore is the same as if the Declaration had not been made.

" It is unnecessary and would indeed be useless to discuss the question of the moment at which consent may be said to exist, at which a contract may be regarded as having been formed between [**157**] the declarant State and the other States. Whatever that moment may be, the position in the present case is that, in any event, and whatever criterion or moment may be adopted with regard to the formation of a contract by correspondence, it was prior to that moment. The present case is similar to one in which there is an offer which has not yet been dispatched.

" In relying upon Article 36, paragraph 2, of the Statute to say that a Declaration produces its effects immediately and makes it permissible to seise the Court the day after it is deposited, the Court puts the emphasis on the expression '*ipso facto*', '*de plein droit*', but by isolating that expression from the following expression 'and without special agreement', which completes it, the complete idea contained in the Statute has been dismembered and disregarded. What the Statute sought to provide was that there should be no need, for the acceptance of the jurisdiction of the Court, of a *special* agreement (I stress the word 'special') between each State and the other States. However, since submission to an international tribunal is essentially and pre-eminently conventional in character, such submission, in accordance with the Statute, is to result *ipso facto* from the convention which comes into being between the declarant State and the other States by the exchange of Declarations between them—an exchange the operation of which is ensured by the Statute through a dual obligation: that of the declaring State to deposit it with the Secretary-General and that of the latter to communicate it to the other States. The notion of a convention has thus been strictly observed both in substance and in form in the Optional Clause system.

" But would it have been possible to preserve this idea without the operation of the classical notion of offer and acceptance? It is obvious that the authors of the Statute could not have brought about innovations in legal concepts. But apart from this classical mechanism, there remains only the theory of the declaration of the will and that of the contract by accession in which the dual elements of offer and acceptance become merged. Very few legal systems, however, recognize the first theory, whereas the second has no points of analogy with the Optional Clause.

" Indeed, whereas the essential feature of the ' adherence ' or ' accession ' contract is uniformity, that of Declarations is variety and diversity. Each Declaration expresses the conditions, the purposes and the policy of the State which makes it. Furthermore, in ' adherence contracts ' one of the parties in fact is in a position in which it is impossible to discuss the terms of the contract. It is obliged to contract and gives its adherence to the all-powerful will of the other. In this category are included, *inter alia*, contracts of [**158**] service, contracts for transport and for insurance. What analogy can there be between such contracts and Declarations accepting jurisdiction?

" Reference has also been made to the case of collective or multilateral conventions in which a State, by acceding thereto, assumes by its mere act of accession the capacity of a party to the convention, benefiting from the rights conferred by the convention and subject to the obligations which it prescribes independently of acceptance by other States. But the position in this case is no different from that referred to in ' adherence contracts ' under municipal legal systems, since the convention is accepted as a whole—as it stands—and since indeed it remains open to accessions by the will of its signatories.

" Reliance has, however, been placed upon the Opinion of the Court of May 28th, 1951, on Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide.[1] But, in the first place, this Opinion does not deal with the rule relating to adherence to collective conventions; furthermore, the Opinion recognizes that a given reservation is valid only if it is accepted by every one of the contracting parties and that this conception, directly inspired by the idea of contract, constitutes an undeniable principle. Moreover, the Opinion given by the Court was expressly limited to the Genocide Convention itself.

" Furthermore, the Optional Clause system established by Article 36 of the Statute has nothing in common with a collective convention. It is concerned with individual Declarations, varying considerably in character, which, combined together by means of their mutual exchange, constitute conventions which are equally variable and limited by reciprocity.

" Reference has been made to the practice of States which denounce and renew their Declarations in the belief that both their denunciation and their renewal take immediate effect, and, in particular, the contrast has been pointed out between the attitude and the contentions of India with regard to the premature character of the Application and the formula adopted by that State with reference to its denunciation of January 7th, 1957, of its own Declaration, a denunciation which was to take immediate effect; and it has

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[[1] *I.C.J. Reports*, 1951, p. 15; *International Law Reports*, 1951, Case No. 118.]

been argued that what applies to the denunciation of the Indian Declaration should likewise apply to the Portuguese Declaration.

" But it is more than doubtful, in my opinion, whether the word ' immediate ' can have the effect of eliminating the consensual [**159**] notion in respect of the denunciation of the contract by which the jurisdiction of the Court is accepted.

" In the case both of the formation of this contract and of its denunciation, the same rules relating to the necessity for acceptance should be applied.

" I therefore consider that the juridical construction which both takes into account the factual elements of the dispute submitted to the Court and is in conformity with the Statute, does not make it possible to say that any agreement existed between Portugal and India with regard to acceptance of the jurisdiction of the Court. It would follow that the Court is without jurisdiction to deal with the Application of December 22nd, 1955, on the basis of the Second Objection.

" The Sixth Objection is based upon the provision relating to disputes arising after February 5th, 1930, with regard to situations or facts subsequent to that date; it is an objection *ratione temporis*.

" I shall disregard the first phase in which this Objection bore a certain relationship of dependence with the Fifth Objection and in which the scope of the Objection was vague, imprecise and hypothetical, and I shall confine myself to the final form of the Objection, the form in which it was put forward in the oral reply. In this phase, as in the earlier ones, both Parties relied upon the Judgments in the *Phosphates* case[1] and in the *Electricity Company of Sofia* [*and Bulgaria*][2] case, and each relied upon the words used by the Permanent Court in the two decisions regarding the situation which it described as *the source of the dispute*.

" In both the *Phosphates* case and the *Electricity Company of Sofia* case, there was a clear distinction between the dispute and the situation. In the *Phosphates* case, both the dispute and the situation which gave rise to it were, in the view of Italy, unlawful acts. But the Court traced back the situation, which gave rise to the conflict, to 1920, the date of the dahir establishing the phosphate monopoly, and it held itself without jurisdiction because that date was prior to the date of the ratification of the Declaration.

" In the *Electricity Company of Sofia* case, the Bulgarian Government sought to trace back the dispute to an earlier date, namely, that of the arbitral awards made prior to the Declaration, in which case the Court would have been without jurisdiction; but the Court found that the awards had been recognized by both parties as being binding and that the question of their application after the date of the Declaration was the source of the disputes.

[**160**] " In the present case, in spite of the fact that India claims that the dispute was prior to 1930, its real date is 1954. This is the date contended for by Portugal and it was at the end of July of that year that it became crystallized.

" But what is the fact or the situation which can be regarded as the source of the dispute? Portugal, in the last phase of the oral arguments, expressed the view that ' They are those *which were constituted by* the interruption of communications with the enclaves, brought about by the act of the Indian Union in 1954, and by the continuance of that state of affairs. At a given moment India decided to prevent access by Portugal to its enclaves and put that decision into effect ' (p. 236 of the Oral Proceedings volume).

" In an earlier phase, Portugal stated: ' It is well known how this dispute came into existence. In its Notes of February 27th, 1950, and of January 14th and May 1st, 1953, the Indian Union manifested its claim to put an end to the sovereignty of Portugal over its territories in the Hindustan Peninsula by absorbing these territories. These Notes—as stated in paragraph 30 of the Memorial—constitute the "prelude to the events which are the basis of the present action".' (Same volume, p. 117.)

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[1] *Phosphates in Morocco* (*France* v. *Italy*): *P.C.I.J.*, Series A/B, No. 74; *Annual Digest* 1938–1940, Case No. 198.]

[2] *P.C.I.J.*, Series A/B, No. 77; *Annual Digest*, 1938–1940, Case No. 199.]

"According to this argument, the situation began in 1950 and gave rise to the dispute of 1954.

" In the view of India, the situation must be traced back to 1818 and is consequently prior to 1930.

" Before examining the Indian argument, it should be said that one cannot avoid the conclusion that Portugal is confusing the dispute and the situation. The fact that there is a culminating point in the dispute, namely, 1954, does not mean that it does not consist of more than one phase, and it was Portugal, in its first oral argument, which described the 1950 and 1953 Notes as 'the prelude to the events which are the basis of the present action'. To include within the words 'facts and situations' the developments of the dispute would be to distort the meaning of those words. The dispute had already begun in 1950 and since it is both a political and legal dispute, it took various forms and passed through several stages.

" In so far as India is concerned, since what is involved is merely passage on sufferance, the difficulties and obstacles which that country inflicted on Portugal, which began in 1950 and culminated in 1954, are but progressive manifestations of the dispute which constitute the dispute from its beginning until its end, and not the situation which gave rise to the dispute.

" In the view of India, the facts and situations which gave rise to the dispute are those preceding the period 1950–1954, which go back into the past, to 1818, that is to say, the whole period during which passage was exercised.

" It is out of this situation, with its ambiguous and equivocal character, that the dispute provoked by the measures taken in [**161**] 1954 arose. What is here involved is a factual situation: the authorization of passage which was differently understood by each of the Parties: by India, as on sufferance or as an act of grace, and by Portugal, as a right. In reality, the situation is one susceptible of two interpretations. The exercise of passage would not be incompatible with either of those interpretations. In the actual conditions in which it was exercised, that is, by means of separate authorizations, it would appear rather to have been permitted on sufferance. Considered as a right, various elements of a right would appear to be lacking.

" Indeed, the fragmentary and individual character of the requests for authorization in respect of each transport, subject to the discretion of the authority to which the requests were addressed, would *prima facie* exclude the conclusion that any general right did exist, and would likewise exclude the possibility that by the repetition of these authorizations a right of passage came into being. The right to refuse passage on any or every occasion is to be assumed from the necessity for a request.

" However that may be, the situation which existed before 1930 was identical with that which existed afterwards, an equivocal situation which gave rise to the dispute of 1954, when India took the view that certain political circumstances justified it in finally refusing further to extend this sufferance. The lengthy duration of this sufferance has no bearing upon the character of this passage since, in the absence of any express recognition of right during this long period, there was no change in the equivocal position.

" It matters little whether a dispute has or has not arisen expressly with regard to that situation, the priority of date is referable only to the situation and not to the dispute. The Declaration does not say 'concerning prior disputes' but 'prior situations or facts'. It is therefore applicable even if those facts or situations have never given rise to differences between the Parties.

" The fact remains that this situation was prior to 1930, and whatever may be the validity and weight of the arguments adduced by Portugal in support of its conception of this passage as a right, the mere probability of India's conception of passage as on sufferance would be sufficient to justify the objection *ratione temporis*.

" Even if it should appear on examination that the view which Portugal has formed or the legal construction which it puts upon this situation is correct, that would in no way alter the fact that the situation existed prior to 1930 and that fact, by itself, and irrespective of the merits of the question, is sufficient to exclude the dispute from the jurisdiction of the Court.

" In the *Phosphates in Morocco* case, the Court considered it sufficient as a reason for holding itself without jurisdiction that the [**162**] act, which was the subject of the dispute between France and Italy, was merely the application of a dahir of 1920, that is, a date earlier than the ratification of the French Declaration, and held that it was unnecessary to consider whether the dahir was or was not contrary to the international obligations assumed by France.

" It follows that even if Portugal could succeed in showing that it did in reality enjoy a right, that possibility is wholly unconnected with the Sixth Objection. If the Court had rejected that Objection it would have given retroactive effect to the Indian Declaration and would thus have adjudicated upon a situation some two centuries old.

" It is of interest in this connection to recall what the Permanent Court said in the *Phosphates* case as an explanation of the *raison d'être* of this objection '*ratione temporis*':

" ' Not only are the terms expressing the limitation *ratione temporis* clear, but the intention which inspired it seems equally clear: it was inserted with the object of depriving the acceptance of the compulsory jurisdiction of any retroactive effects, in order both to avoid, in general, a revival of old disputes, and to preclude the possibility of the submission to the Court by means of an application of situations or facts dating from a period when the State whose action was impugned was not in a position to foresee the legal proceedings to which these facts and situations might give rise ' (p. 24).

" The facts and situations referred to in the Sixth Objection are not the same as the grounds on which the applicant relies, and the argument that the general principles of law and general custom are above and beyond dates is of no relevance in the present case.

" These principles and custom do not constitute a situation. They might be a justification for a situation. But what is relevant to this Objection is priority of date, not legality. The fact or situation which is the source of a dispute has a causal connection with that dispute. Legal grounds have not, and cannot have, any such connection.

" The Court has decided to join this Objection to the merits. This joinder is said to be justified, on the one hand, by the connection between the facts relevant thereto and those relevant to the Fifth Objection, and, on the other hand, by the need to have further clarification of the origins of the dispute.

[**163**] " But, in the first place, this Objection is distinct from and independent of the Fifth Objection, and the facts which make up its elements have nothing in common with those pertaining to the Fifth Objection.

" In the second place, in order to uphold this Objection, it is necessary only to perceive the relationship between the present dispute and a prior situation said to have given rise to it. But the elements of this relationship are to be found in the documents now before the Court and they have been sufficiently discussed by the Parties. There is no need, in order to reach a conclusion with regard to this relationship, to accumulate facts or to discover any new facts.

" In view of all these considerations, I am of opinion that the source of the dispute is the ambiguous and equivocal situation, resulting from a system of individual authorizations depending upon the discretion of the authority granting them, which was understood in different ways by the two Parties. This situation was determined or influenced by political considerations. The dispute arose when, as a result of changed political circumstances, India decided to refuse to continue these authorizations.

" This situation having existed since the beginning of the last century, I consider the Objection to be justified and the Court to be without jurisdiction to deal with the dispute."

Judge Klaestad delivered the following Dissenting Opinion:

[**164**] " In its Fifth Preliminary Objection the Government of India invokes a reservation contained in its Declaration of 1940 accepting the compulsory jurisdiction of the Court, which excludes from this jurisdiction ' disputes with regard to questions which by international law fall exclusively within the jurisdiction of India '. It contends that the Court lacks jurisdiction because the present dispute concerning Portugal's alleged right of passage over Indian territory between Daman and the enclaves and between the enclaves themselves relates to questions which fall exclusively within the national jurisdiction of India.

" The legal principle applicable to a question of this kind was formulated by the Permanent Court of International Justice in its Advisory Opinion concerning *Nationality Decrees issued in Tunis and Morocco.*[1] Applying that principle to the circumstances of the preliminary phase of the present dispute, I shall have to examine in a summary and provisional manner whether the legal grounds invoked by the Government of Portugal may justify the provisional conclusion that they are of juridical importance for the dispute and, if so, whether these grounds relate to questions of international law.

" The Government of Portugal invokes a Treaty of 1779 concluded between Portugal and the Mahratha ruler and various Mahratha Decrees purporting to carry out the provisions of Article 17 of that Treaty. It contends that sovereignty over the enclaves was thereby ceded to Portugal by the Mahratha ruler, while the Government of India alleges that Portugal acquired only certain revocable fiscal rights with regard to the enclaves, and that the sovereignty over them was retained by the Mahratha State. It is possible that this divergence of opinion may have a bearing on the question of right of passage between Daman and the enclaves. As it involves the interpretation of a treaty, it relates to a question of international law.

" The Government of Portugal further invokes a Convention of 1785 concluded with the Mahratha ruler. By this Convention it was provided that Portugal was obliged to quell any rebellion which might break out in the enclaves. It is argued that this provision presupposed Portugal's access to the enclaves, thereby affirming her right of passage over Mahratha territory. Whether this view is justified or not may depend on an interpretation of this Convention and would consequently relate to a question of international law.

" The Government of Portugal also relies on an alleged local custom which during a period of nearly two centuries is said to [**165**] have developed between Portugal and the Mahratha State and its successors. The question whether a possible usage with regard to passage between Daman and the enclaves was exercised in such a manner as to satisfy the requirements of Article 38, paragraph 1 (*b*), of the Statute of the Court is a question of international law (compare Judgment in the *Asylum* case, *I.C.J. Reports* 1950, pp. 276–277[2]).

" The Government of Portugal finally invokes an alleged international general custom as well as general principles of law recognized by civilized nations (Statute, Article 38, paragraphs 1 (*b*) and (*c*)), while the Government of India, refuting the Portuguese allegations in this respect, places itself upon the same ground of international law.

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[1] *P.C.I.J.*, Series B, No. 4; *Annual Digest*, 1923–1924, Case No. 203.]

[2] See *International Law Reports*, 1950, Case No. 90, at pp. 284–286.]

" It is unnecessary to pursue this summary and provisional examination of the legal grounds invoked by the Government of Portugal in order to form an opinion upon the nature of the dispute. This examination is sufficient to show that in any case some of these grounds may be of juridical importance for the present dispute and that they relate to questions of international law. It is in my view evident that the subject-matter of the dispute can only be decided on the ground of international law, and that it cannot be considered as relating to ' questions which by international law fall exclusively within the jurisdiction of India '. I am therefore unable to accept the Fifth Preliminary Objection.

" With regard to the question whether this Objection should be rejected or joined to the merits, opinions have differed. In my view it should be rejected, since a summary and provisional examination of the legal grounds invoked by Portugal has in a sufficient measure disclosed elements of international law which may be of relevance for the decision of the dispute.

" This provisional finding as to the nature of the dispute does not in any way prejudge the consideration of the merits. With regard to the question whether the Portuguese contentions as to the alleged right of passage over Indian territory are justified or not, I have formed no opinion whatsoever. Such an opinion could be arrived at only when the dispute at the next phase of the proceedings has been argued and considered on the merits. The preliminary question whether the Court has jurisdiction to decide these merits should be distinguished from the actual exercise of that jurisdiction.

" With regard to the other questions in dispute, I am in general agreement with the Court."

Judge Chagla delivered the following Dissenting Opinion:

[**166**] " I regret that I am unable to agree with the conclusion arrived at bythe majority of my colleagues. As the matter is of considerable importance, I think it necessary to give the reasons for my dissent.

" There are two unique features in this case—one is the third condition in the Portuguese Declaration, and the other is that the Portuguese Application which started this case was filed within three days of the making of the Declaration and before the provision contained in the second part of Article 36 (4) of the Statute of the Court could be complied with. Neither of these aspects has ever been considered by this Court, and they both raise very important questions with regard to the jurisdiction of the Court.

" Turning to the First Objection of India, it may be readily granted that the Optional Clause gives the widest freedom to a State which submits to the compulsory jurisdiction of the Court. This freedom is in two respects. A State has the right to define the categories of disputes which it is prepared to submit to the compulsory jurisdiction of the Court. It may make any reservation it likes and it may limit the categories to any extent that it desires. The other respect is that it can limit the time of the pendency of the Declaration. The Declaration may last two years, one year, six months, or even it could be terminable on mere notice. But the third condition of Portugal is an entirely different kind of reservation. It reserves the right to Portugal to alter and modify the scope of its Declaration during the pendency of that Declaration.

" It was urged by India that this reservation was retroactive and it was open to Portugal to withdraw a pending litigation by having resort to this reservation. It is pointed out that the expression ' from the date of the notification ' used in the third condition only indicates the point of time from which the reservation becomes effective; it does not refer to its scope or ambit. There is no limitation placed by Portugal upon the extent of the reservation and, therefore, it is suggested that Portugal, under this third condition, reserves to itself the right of withdrawing a pending litigation before the Court. India is not without support in this interpretation. The reaction of Sweden to this condition was the same as India. (See Sweden's Note to the Secretary-General of the United Nations dated 23rd February, 1956.) Portugal replied to this Note by its Note of 5th July, 1956, in which it stated that this condition did not warrant the conclusion that the Portuguese [**167**] Government would be in a position to withdraw from the jurisdiction of the Court any dispute, or category of disputes, already referred to it. If the reservation is retroactive, then there can be no dispute that the reservation is bad. On the other hand, it must be borne in mind that a court must always lean against giving retroactive or retrospective effect to an instrument, the more so when such an interpretation is likely to invalidate the instrument and to deprive a tribunal of its jurisdiction. Even if the language of the reservation is susceptible of this interpretation, if the other interpretation is possible, the Court would rather give the interpretation to the instrument which would render it valid and which would not deprive this Court of its jurisdiction.

" But whatever interpretation the Court places upon this condition, it must be an interpretation based upon the language used in the instrument itself. No assistance can be sought from the *ex post facto* and *ex parte* statement made by Portugal to which reference has been made by which it attempted to clarify and elucidate its own Declaration. No canon of construction is more firmly established than the one which lays down that the intention of a party to an instrument must be gathered from the instrument itself and not from what the party says its intention was.

" But even if no retroactive effect can be given to Portugal's Declaration, it suffers from a defect, which, in my opinion, is fatal. Once a reservation is made with regard to categories of disputes which are submitted to the compulsory jurisdiction of the Court, categories over which the Court has jurisdiction must be specified and defined. The jurisdiction of the Court with regard to these categories of disputes must be finally accepted when the Declaration is made.

" It is futile to try to draw a distinction between the Portuguese reservation and the right to terminate a Declaration at any time. It was suggested in the course of the arguments that, in the latter case, a State can put an end to its obligation to submit to the compulsory jurisdiction of the Court with regard to all categories of disputes, while, in the former case, a more limited right was reserved by Portugal in that it could only limit the scope of its obligation. This argument is specious. In the latter case, by terminating the Declaration, the juridical bond between a declarant State and the other State comes to an end. The State no longer adheres to the Optional Clause and is not liable to the compulsory jurisdiction of the Court with regard to any matter. In the former case, the juridical bond continues. In the latter case, both the right to bring a dispute before the Court and the obligation to submit to the jurisdiction of the Court come to an end. In the former case, the right remains and the State can put an end to the obligation with regard to any dispute at its own discretion.

" Distinguished authors have regretted the continuous decline of the Optional Clause, and it is the duty of the Court to prevent any [**168**] further decline of this Clause. Judge Lauterpacht in the *Norwegian Loans* case (*I.C.J. Reports of Judgments, Advisory Opinions and Orders*, 1957[1]), when considering the French reservation in that case, said (p. 64) that it ' tended to impair the legal—and moral—authority and reality of the Optional Clause ', and also (p. 65) that it ' threatens to disintegrate that minimum of compromise which is embodied in the Optional Clause '. These observations also apply to the novel reservation embodied by Portugal in her Declaration.

[[1] Reported *supra*, p. 782, at p. 815.]

Acceptance by Portugal of the compulsory jurisdiction of the Court is entirely illusory. The minimum of compromise which is embodied in the Optional Clause is the right given to the State to limit the categories of disputes which it is prepared to submit to the compulsory jurisdiction of the Court; but any further derogation from that minimum of compromise should not be permissible. Once a State, by its Declaration, has expressed its clear will to submit to the compulsory jurisdiction of the Court a particular dispute, the jurisdiction of the Court with regard to that dispute must continue so long as the Declaration lasts. As the intention of the Optional Clause to is make a State accept the compulsory jurisdiction of the Court, any reservation which frustrates that intention must be held to be opposed to the general purpose of the Optional Clause and therefore invalid.

" It was suggested that even if this reservation was invalid, as it did not affect the present case, it could be severed from the rest of the Declaration and the rest of the Declaration could be held valid. The doctrine of severance is well settled in municipal law and it also applies to international law. If a provision in an instrument is an essential condition, and if the Court is satisfied that in the absence of that essential condition the instrument would not have been executed, then if the condition is bad, the court is powerless and the whole instrument must be declared to be invalid. Otherwise, the court would be writing a new instrument without the essential condition. In this case there cannot be the slightest doubt that the reservation we are considering is an essential condition of Portugal's adherence to the Optional Clause. It is on this condition that Portugal has agreed to confer jurisdiction upon the Court. The condition is of the very essence of the submission of Portugal to the compulsory jurisdiction of the Court, and if this condition is invalid, the whole Declaration must be declared to be invalid.

"As I am of the opinion that India's First Objection should prevail, it would be unnecessary to consider her Second and Fourth Objections, but as they have been argued at considerable length [**169**] and as they raise questions of considerable importance, I would like to express my opinion on them.

" Both the Objections are based on the fact that Portugal's Declaration was deposited with the Secretary-General of the United Nations on the 19th December, 1955, and the present Application was filed on the 22nd December, 1955. I do not think there is any instance in the history of this Court where a State has filed an Application with such lightning speed. It is urged on behalf of Portugal that adherence to the Optional Clause is a unilateral act by a State and the Declaration comes into force immediately it is deposited with the Secretary-General of the United Nations. It is further pointed out that there is nothing in the Statute or the Rules of the Court which requires that any time should elapse between the making of the Declaration and the filing of the Application. It is therefore said that although copies of the Declaration were not transmitted by the Secretary-General to the Parties to the Statute nor to the Registrar of this Court, and although India had no knowledge that any such Declaration had been made by Portugal, the Declaration became immediately effective, and to the extent that the same obligations were undertaken by the Declaration of Portugal and the Declaration of India, India became liable to be called before the Court in answer to any claim made by Portugal which fell within the scope of the two Declarations.

" The narrow question that we have to consider is whether the Statute of the Court contemplates that the Declaration should be immediately effective without knowledge, presumptive or actual, on the part of the other States who have already adhered to the Optional Clause—in other words, whether a juridical bond can be created by a new declarant with the other States who are already Parties to the Optional Clause by the mere deposit of the Declaration with the Secretary-General so as to entitle the new declarant immediately to file an Application and bring another State before the Court. India has contended that by this precipitous Application, Portugal has violated the principle of equality of States before the Court, a principle which is the very basis of the Optional Clause. Portugal, on the other hand, has relied on the letter of the law and has urged that apart from the reciprocity of obligations at the date of the Declaration, there is no other reciprocity or equality which is contemplated by Article 36 (2) of the Statute. Whether the Statute permits a State to file an Application before the ink on its Declaration is dry or not, it will be agreed that this is a practice which should not be countenanced by the Court; and if there is any provision in the Statute which can permit the Court to refuse to entertain Portugal's Application, it should do so under the circumstances of the case.

"Article 36 (4) of the Statute consists of two parts: one, making it incumbent upon a State making a Declaration to deposit it with the Secretary-General of the United Nations, and the second [**170**] making it incumbent upon the Secretary-General to transmit copies thereof to the Parties to the Statute and to the Registrar of the Court. It is common ground that unless the Declaration is deposited as required by Article 36 (4), the Declaration cannot become effective. It is difficult to understand why, if the first part of Article 36 (4) is mandatory, the second part is not equally mandatory. It is said that the second part is purely administrative or procedural and it merely gives a direction to the Secretary-General to carry out his duties. It is difficult to accept the argument that a provision so unimportant should have found a place in so solemn a document as the Statute of the Court. In my opinion, the same importance should be attached to both the parts of Article 36 (4). There must have been some reason why the framers of the Statute inserted this provision in Article 36 (4) and the obvious reason is that some time should elapse between the making of the Declaration and the filing of an Application.

"It is unnecessary in this case to speculate as to what is the proper time that should elapse between the making of the Declaration and the filing of the Application. Sufficient unto the day is the law thereof: and it will be sufficient to deal only with the facts of this case. It is clear that in this case an Application has been filed by Portugal before the second part of Article 36 (4) was complied with, and it is open to the Court to say that the Application is premature and that Portugal should have waited until effect had been given to the provision of the second part of Article 36 (4).

"Emphasis has been placed upon the expression '*ipso facto*' used in Article 36 (2) of the Statute. It is suggested that this expression makes it clear that the mere deposit of the Declaration, and nothing more, brings about the consensual bond between the declarant State and the State which has accepted the same obligation. The expression '*ipso facto*' must be read with the words that follow 'and without special agreement'. What the Statute emphasizes is that apart from the Declaration no special agreement is necessary to attract the application of the Optional Clause. Article 36 (2), in my opinion, does not deal with the question as to when the Declaration becomes effective. For this purpose we have to turn to Article 36 (4).

"There is also force in India's contention that by the timing of Portugal's Application, India was deprived of the right to invoke in her favour the third condition in Portugal's Declaration. It is now well-settled law that a State which is a Party to the Optional Clause is entitled to incorporate into its own Declaration any condition contained in the Declaration of any other State which has adhered to the Optional Clause. (See the *Norwegian Loans* case, *I. C. J. Reports of Judgments, Advisory Opinions and Orders*, 1957.[1]) Therefore, it cannot be disputed that India had the right to make use of the third condition as against Portugal as much as Portugal [**171**] had the right as against India. But if this right is to have any meaning or significance, it must be a right which can be exercised. Portugal, by filing the Application when she did, made it impossible for India to exercise that right. Portugal could have invoked this condition any time before filing the Application. India could have only invoked it if she had knowledge of the Declaration before the Application was filed. Once the Application was filed, inasmuch as the condition, as I have pointed out, is not retroactive, India was deprived of that right and was compelled to accept the jurisdiction of the Court whether she liked it or not. In the *Norwegian Loans* case, it was stated that Norway, *equally with France*, was entitled to except from the compulsory jurisdiction of the Court disputes falling within the ambit of France's reservation. In the *Phosphates in Morocco* case,[1] although a particular limitation in the Declaration of one State did not appear in the Declaration of the other, it was held that the limitation must hold good as between the Parties; and in the *Electricity Company of Sofia and Bulgaria* case,[1] the Court said that in consequence of the condition of reciprocity laid down in paragraph 2 of Article 36, the limitation contained in the Declaration of one State must be applicable as between the Parties.

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[1] Reported *supra*, p. 782, in this volume.]

" Now what is the reciprocity that Article 36 (2) contemplates? Is it the narrow reciprocity suggested by Portugal, namely, the reciprocity that should subsist at the date of the Application, or a wider reciprocity which would entitle a State to avail itself of every limitation contained in the other Party's Declaration to the same extent and in the same manner as the other Party?

" It should be remembered that in the *Norwegian Loans* case, at the date of France's Application, Norway had not availed itself of the reservation contained in France's Declaration with regard to domestic jurisdiction. Therefore, if reciprocity had been narrowly construed in that case, Norway could not have availed herself of that limitation. But the Court held that Norway was as much entitled as France to plead that the particular dispute fell within her domestic jurisdiction. Therefore, strictly, the principle of reciprocity had been given effect to after France's Declaration had been filed and the Court did not confine itself to considering the situation as it existed at the date of France's Application. The question that now arises is whether the Court should not look at the situation as it existed before Portugal filed her Application. And if the Court comes to the conclusion that India could only have exercised the third limitation contained in Portugal's Declaration before Portugal filed her Application, and if India has been deprived of that right, then the principle of reciprocity under Article 36 (2) has been violated. In any view of the case, in my opinion, the [**172**] Court should come to the conclusion that the haste with which Portugal filed this Application has resulted in an abuse of the Optional Clause and also an abuse of the processes of the Court, and therefore the Court should refuse to entertain Portugal's Application.

" India's Third Objection is that the present dispute was brought before this Court without preliminary diplomatic negotiations and without the negotiations reaching a deadlock. It is urged by India that the jurisdiction of the Court is confined to deciding legal disputes, and before there can be a dispute, it must be clear that the controversy cannot be settled by negotiations. It is pointed out that before a State is brought before the bar of the International Court, every attempt should first be made to see whether the controversy in question could not be amicably settled. Our attention has been drawn to the various Notes that were exchanged between India and Portugal, and it does appear that Portugal never raised in these Notes the general question of a right of passage as such. What was discussed in these Notes [were] certain concrete questions relating to special situations arising out of disturbances which had occurred within the Portuguese enclaves; and what Portugal insisted on was that India had incurred an international

[[1] See *supra*, p. 856, nn. 1 and 2.]

responsibility by its behaviour at a given time and in a specific situation. Our attention is drawn to the fact that if the general question of a right of passage had been raised in this diplomatic exchange of Notes, this Court would have had a better conception of the right claimed by Portugal. As it is, the Court is not in a position to know or judge what is the actual nature of the right claimed by Portugal. Nor had India been given an opportunity to formulate or express her views with regard to the right claimed by Portugal before the matter was brought before the Court. Reliance is placed on the observations of the Court in the *Electricity Company of Sofia and Bulgaria* case (P.C.I.J., Series A/B, No. 77, p. 132[1]): 'What is essential is that, prior to the filing of an Application by one Party bringing a dispute before the Court, the other Party must have been given the opportunity to formulate and to express its views on the subject of the dispute. Only diplomatic negotiations will have afforded such an opportunity.'

"It is also urged by India that this rule with regard to preliminary diplomatic negotiations does not operate only in those cases where there is a provision to this effect in a treaty between the Parties. The rule is of general application and is based on two considerations: (1) the need of the Court to know what is the subject-matter of the dispute, and (2) efforts made by the Parties to reach an agreement have been fruitless.

[**173**] "There can be no doubt as to the desirability of States negotiating with regard to a dispute and trying to arrive at a fair solution before they avail themselves of the compulsory jurisdiction of the Court. But what we have to consider is whether failure to pursue this desirable course deprives the Court of its jurisdiction. It is clear on the authorities that what the Court has insisted upon is the mere existence of a dispute, and a dispute has been defined as a divergence of opinions or views between two States. It has also been held that this divergence is established after one Government finds that the attitude of the other is contrary to its own. In the *Chórzow Factory* case (Series A, No. 13, p. 10[2]), the Court pointed out that 'it would no doubt be desirable that a State should not proceed to take as serious a step as summoning another State to appear before the Court without having previously, within reasonable limits, endeavoured to make it quite clear that a difference of views is in question which has not been capable of being otherwise overcome. But, in view of the wording of the article, the Court considers that it cannot require that the dispute should have manifested itself in a formal way; according to the Court's view, it should be sufficient if the two Governments have in fact shown themselves as having opposite views.' Therefore, it is clear that the dispute should not be manifested in any formal way and all that is necessary is that two Governments should show themselves as holding opposite views. It has also been observed in the case of *Certain German Interests in Upper Silesia* (Series A, No. 6, p. 14[3]): '. . . a difference of opinion does exist as soon as one of the Governments concerned points out that the attitude adopted by the other conflicts with its own views'. It is difficult to take the view that the attitude of India on the question of Portugal's claim with regard to a right of passage does not conflict with the view held by Portugal. I would therefore overrule this Objection.

"Turning to the Fifth Objection, we heard very learned arguments as to the burden of proof. In my opinion, now that all the arguments are before the Court, the question of burden of proof loses much of its importance. But even so, I should like to say a few words about it. It is always for a party which comes before a court or a tribunal to make out a *prima facie* case that the tribunal or court has jurisdiction. If that *prima facie* burden is discharged, it may be that the burden would shift on to the other party. When India objects to the jurisdiction of the Court on the ground that the subject-matter of the dispute falls exclusively within her domestic jurisdiction, it would not be correct to describe her attitude as it has been described by Counsel for Portugal as attempting to obstruct the normal course of statutory procedure. Undoubtedly the party coming to the Court has the right to have the benefit of the procedure [**174**] provided by the Statute and the Rules for contentious matters. But that is so only on the assumption that the Court has jurisdiction. All that India has done is to draw the attention of the Court to the fact that, looking to her Declaration, the Court has no jurisdiction over this particular dispute. It is ultimately for the Court to decide the question of jurisdiction and it is only if the Court takes the view that the dispute falls within the ambit of India's Declaration that the matter can go on and the rules of statutory procedure can be given effect. It is equally incorrect to say that inasmuch as India is relying on an exception contained in her Declaration which confers jurisdiction upon the Court the burden is upon her to make good that exception. India has accepted the compulsory jurisdiction with regard to certain categories of disputes, and the particular category with regard to matters falling exclusively within her domestic jurisdiction has been excluded. Therefore, it is for Portugal to establish that the dispute which she has brought before the Court falls within the scope of India's Declaration, and she can only establish that provided she satisfies the Court that the dispute is not exclusively within the domestic jurisdiction of India. The reservation made by India with regard to matters falling exclusively within her domestic jurisdiction is not an exception: it is an essential—an integral—part of her acceptance of the jurisdiction of the Court.

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[1] See *Annual Digest*, 1938–1940, Case No. 199.]

[2] *Interpretation of Judgments No.* 7 and 8: see *Annual Digest*, 1927–1928, Case No. 347, at p. 508.]

[3] See *ibid.*, 1925–1926, Case No. 326, at p. 427.]

" Coming to the substance of the matter, there are certain points which are beyond controversy. The first is that India has exclusive territorial sovereignty over the territory through which Portugal claims a right of passage or a right of transit. I think it is equally indisputable that *prima facie* a State enjoying territorial sovereignty has the right to allow or to prohibit a right of passage or transit through her territories to any other State or to permit a right of passage or transit under such terms and conditions as she thinks proper. It is true that even though a subject-matter may fall within the domestic jurisdiction of a State, the State may not have complete discretion with regard to it but its discretion may be controlled by any international obligation undertaken by it. If India has undertaken any international obligation, then the matter is no longer exclusively within her domestic jurisdiction. In other words, the matter would not be within the reserved domain but would be within the international domain into which the Court can enquire and determine what are her obligations according to international law.

" It is true that in a large majority of cases, when an Objection is taken on the ground of domestic jurisdiction, the Court is inclined to join the Objection to the merits because the Court feels that it is impossible to arrive at a decision on this issue without investigating into the merits of the subject. But this is not always [**175**] so. Otherwise it would never be open to a State to take a Preliminary Objection on this ground. The test has been clearly laid down by this Court as to what has to be established in order that the Court will not uphold the Objection at a preliminary stage but would stand it over to the hearing. Portugal must establish that the legal grounds relied upon by her justify a provisional conclusion that they are of juridical importance for a decision of the dispute according to international law. (See the classical statement of the law in the *Nationality Decrees of Tunisia and Morocco*, Series B, No. 4, p. 25.[1]) To use simpler language, Portugal must show that her claim discloses an arguable cause of action under international

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[[1] *Annual Digest*, 1923–1924, Case No. 203, at p. 352.]

law. Again, to use a different language, Portugal must show that the general rule that the subject-matter being within the domestic jurisdiction of India is within her discretion has been displaced by some rule of international law.

" Now what is the subject-matter of the dispute between Portugal and India? I will not consider the various metamorphoses which Portugal's claim has undergone. But as finally indicated to this Court it is a right of transit between Daman and the Portuguese enclaves of Dadra and Nagar-Aveli in order to maintain communications between Daman and these two enclaves. The first striking thing about this alleged right is that it is completely indefinite and vague and, as was described by Counsel for India, ' something undefined and disembodied, hard both to exercise and to enforce '. When a State comes to this Court claiming a right against another State, it must be a right which should be enforceable. It must be a right which, if conceded by the Court, could be given effect to by the defendant State. No Court would give judgment which could not be carried out by the losing party. And the most surprising feature of Portugal's claim in this case is that if she were to succeed in her contentions, the judgment she would obtain from this Court could never be given effect to by India. If the Court were to declare that Portugal has a right of transit over Indian territory from Daman to the enclaves, it would be impossible for India to know what the nature, extent or content of that right would be. Would Portugal be entitled under this right to transport a whole army from Daman to the enclaves in order to suppress the revolt which has taken place there? Would she be able to transport tanks and artillery and all the paraphernalia of modern arms and armaments? Would she be able to fly aeroplanes over Indian territory in order to bomb the enclaves in order to reduce them to subjection? Or would the right be confined to transit facilities to be given to diplomatic envoys or a small unit in order to maintain law and order in the enclaves? These queries conclusively establish that Portugal has failed to formulate any legal right which she can assert against India. It is only by negotiations which may result in a treaty that the modalities of a right of transit can be settled between India and Portugal. But the Court cannot be called upon to draft a treaty between these [**176**] two States. The Court can only pronounce upon an existing right, and if the right claimed is so insubstantial as to be incapable of being translated into something which is enforceable, the Court must come to the conclusion that the right claimed is not a legal right, much less a right recognized by international law or a right with regard to which India's discretion is controlled by any international obligation. It seems to me that on this ground alone India's Preliminary Objection must be sustained. It would be a sheer waste of time of this Court to join this issue to the merits when at the end of it the Court would have to come to the conclusion that no effective declaration can be made in favour of Portugal.

" I have already pointed out that it is an elementary principle of international law that a State has exclusive competence within its own territory. This principle was emphatically pronounced by Chief Justice Marshall in the *Schooner Exchange* case (1812, 7 Cranch 116): ' The jurisdiction of the nation within its own territory is necessarily exclusive and absolute. It is susceptible of no limitation not imposed by itself. Any restriction upon it, deriving validity from an external source, would imply a diminution of its sovereignty to the extent of the restriction, and an investment of that sovereignty to the same extent in that power which could impose such restriction. All exceptions, therefore, to the full and complete power of a nation within its own territories, must be traced up to the consent of the nation itself. They can flow from no other legitimate source.' It is not suggested by Portugal that India has ever given her consent to any limitation upon her territorial sovereignty over the territory in question. Although in her Memorial Portugal relied upon treaties between the Mahratha rulers and herself, this contention was given up or at least not pressed at the hearing. As a matter of fact, the only treaty which deals with this subject at all is the Portuguese-Mahratha Treaty of 1741, which, surprising as it may seem, provides expressly that soldiers of either power are not to enter the territory of the other without permission. If, therefore, India has not given her consent to any limitation upon her sovereignty, is there any other international obligation undertaken by India independently of any treaty or her consent? I may observe in passing that Portugal concedes that the right of transit claimed by her, even though it may be without any immunity, does constitute a limitation upon India's sovereignty.

"An international obligation may arise through local custom. If for a considerable period of time Portugal has been exercising this right, then the right may be upheld by international law. But in order that local custom should be established, it is not sufficient for Portugal merely to state that for a long period she maintained [**177**] communications between Daman and the enclaves. She must go further and establish that the transit facilities that she had were enjoyed by her as a matter of right and not as a matter of grace or concession on the part of the Indian Government. And if one thing is clear beyond anything else from the record that we have before us, it is that throughout the period in question—from 1818 when the British appeared on the scene onwards—the facilities enjoyed by Portugal with regard to communicating with her enclaves were entirely at the discretion of the Indian Government and they were granted to Portugal as a matter of grace and indulgence. The Indian Government always reserved to itself the right to control the passage or transit facilities and even, if occasion arose, to prohibit it altogether. We have instances where a complete embargo was placed by the Indian Government on the carriage of certain goods. We have instances where no less a person than the Consul-General of Portugal reminded the Governor of Diu that authorization by the British authorities was indispensable before any Portuguese troops could cross British territory. Therefore, India is right when she says that a right of passage subject to be revoked in whole or in part by somebody else is not a right at all. I think that Portugal realizes the weakness of her case under this head and therefore what has been really urged before us by Portugal is that this right which she claims is warranted by general principles of international law. General principles of international law would be applicable if Portugal establishes a general custom in contradistinction to a local custom by which a State has the right to have access to enclaves by transit facilities being given to her in order to maintain communications between herself and her enclaves. Now the only general custom which is comparable to the question we have to consider which international law recognizes is the right of innocent passage in territorial seas and in maritime parts of international rivers, and also immunity given to diplomatic representatives when they are in transit between one State and another. No general custom has ever been established permitting a State to have access to her enclaves as of right. Portugal has relied on a learned study made by Professor Bauer of other enclaves, but this study only shows that the right of passage either arises out of treaty or out of local custom which is not applicable to the present case.

"A principle of international law may also be imported from municipal law where the principle in municipal law is universally recognized and when that principle is not in conflict with any rule of international law itself; and the strongest reliance is placed by Portugal on the principle of municipal law which may be described as an easement of necessity. It is said that when you have an owner [**178**] of land and his land is surrounded by the lands of other owners, the former has a right of access to a public road. This right of access arises out of necessity because but for this access the owner would be landlocked and would not be able to get out of his land, and therefore, in these circumstances, municipal law presupposes a right of way in the first owner over the lands of other owners. In my opinion, it would be extremely unsafe to draw an analogy between the rights of an owner and the obligations of other owners under municipal law and the rights and obligations of States under international law. There can be no comparison between private property and territorial sovereignty nor can there be any comparison between a citizen and a sovereign State. A sovereign State can pass any legislation affecting private property. It can compel the owner of land to cede any right to neighbouring owners. But that surely cannot be true of territorial sovereigns. Portugal cannot compel India to cede any right to her nor can India be placed under any obligation because Portugal is under a necessity to have access to her enclaves. Further, such a rule would obviously be in contradiction with the one undisputed well-established principle of international law, namely, territorial sovereignty, and therefore there is no scope for importing this principle of municipal law into the domain of international law.

" Even in municipal law parties may agree as to the nature and extent of an easement, and if parties agree, then municipal law will not presume an easement of necessity. In this case, the relations between Portugal and the territorial sovereign of India clearly demonstrate that the conditions of Portugal's passage or transit over Indian territory were clearly settled and those conditions were that Portugal had no right to a passage or transit but she could only be afforded such facilities as the Indian Government, in its absolute discretion, thought fit to concede. Therefore, Portugal has failed to make out any case, let alone an arguable case, that India's discretion with regard to this particular subject-matter, which clearly falls within her own domestic jurisdiction, is controlled by any international obligation or that there is any rule of international law which takes this matter out of the reserved domain. Under the circumstances, I think that the Court should uphold this Objection raised by India and should decide that there is no necessity for further investigation of the facts and no useful purpose would be served by joining this Objection to the hearing.

" I now come to the last and final Objection of India, which is Objection Six. It is with regard to *ratione temporis*, and India's contention is that the dispute brought before the Court arose [**179**] prior to 5th February, 1930, with regard to situations or facts prior to that date and that therefore the dispute is clearly excluded from the competence of the Court by reason of her reservation in her Declaration of 28th February, 1940. It is clear from the jurisprudence of the Court that the only facts or situations which can be considered for the purpose of this Objection are those facts or situations which are the source or cause of the dispute. It is clear to my mind that the source of the dispute is the divergence of opinion between India and Portugal as to the legal implications of what transpired from 1812 onwards. The divergence is not only as to what happened in 1954. The divergence is as to the whole concatenation of facts and situations relied on by Portugal for asserting her right. Portugal says that India has acted contrary to her obligation to allow right of passage to Portugal and the breach of her obligation only took place in 1954, and therefore it is irrelevant to consider for the purpose of this Objection any facts or situations prior to 1954. This is clearly a fallacy. The obligation of India itself is in dispute and according to Portugal herself the obligation of India arises from facts and situations prior to 1930. The question that the Court has to consider is not whether there was any breach of Portugal's legal right by India in 1954. The question is whether Portugal had any legal right at all and Portugal can only establish the legal right by a body of evidence from 1818 to 1954 which forms a single and continuous whole. This is not a new dispute which Portugal seeks to bring before the Court. The conflict of views between the two Governments stretches back to 1818. It is a dispute as to the true result in law of facts and situations from 1818 onwards. In the *Phosphates in Morocco* case (P.C.I.J., Series A/B, No.

74, p. 24), the Court observed that the expression 'facts and situations' was wide enough to embrace all the different facts capable of giving rise to a dispute, and a situation would include within its connotation not merely facts but also legal consequences resulting from a given set of facts. Again, in the *Phosphates in Morocco* case, dealing with the general object of the limitation *ratione temporis*, it is stated (p. 24): '. . . it was inserted with the object of depriving the acceptance of the compulsory jurisdiction of any retroactive effects, in order both to avoid, in general, a revival of old disputes, and to preclude the possibility of the submission to the Court by means of an application of situations or facts dating from a period when the State whose action was impugned was not in a position to foresee the legal proceedings to which these facts and situations might give rise '. This observation in all its force applies to the present case. The Government of India was not in a position to foresee the legal proceedings to which the facts and situations from 1818 onwards might give rise. And the whole object of India's limitation contained in her Declaration is to prevent adjudication by the Court with regard to such [**180**] facts and situations. In my opinion, there is no answer to India's Sixth Objection.

" I should like to make one general observation with regard to the question of the jurisdiction of the Court. It has been said that a good judge extends his jurisdiction. This dictum may be true of a judge in a municipal court; it is certainly not true of the International Court. The very basis of the jurisdiction of this Court is the will of the State, and that will must clearly demonstrate that it has accepted the jurisdiction of the Court with regard to any dispute or category of disputes. Therefore, whereas a municipal court may liberally construe provisions of the law which confer jurisdiction upon it, the International Court on the other hand must strictly construe the provisions of the Statute and the Rules and the instruments executed by the States in order to determine whether the State objecting to its jurisdiction has in fact accepted it.

" I would, therefore, dismiss Portugal's claim on the ground that the Court has no jurisdiction to entertain it."

ii.—Procedure

International Court of Justice—Interim Measures of Protection—Article 41 of Statute—Interim Measures of Protection and Jurisdiction of Court on the Merits—Necessity for Interim Measures.

INTERHANDEL CASE (SWITZERLAND *v.* UNITED STATES OF AMERICA).

(*Interim Measures of Protection.*)

International Court of Justice. Order of October 24, 1957.

(Badawi, Acting President; Hackworth, President: Guerrero, Basdevant, Winiarski, Zoričić, Klaestad, Read, Armand-Ugon, Kojevnikov, Sir Muhammad Zafrulla Khan, Sir Hersch Lauterpacht, Moreno Quintana, Córdova, Wellington Koo, Judges; Carry, Judge *ad hoc*.)

THE FACTS.—On October 2, 1957, the Swiss Confederation instituted against the United States of America proceedings in the matter of the restoration of the assets of Interhandel. The application requested the Court

> " To adjudge and declare, whether the Government of the United States of America appears or not, after considering the contentions of the Parties,

> " 1. that the Government of the United States of America is under an obligation to restore the assets of the *Société internationale pour participations industrielles et commerciales S.A.* (Interhandel) to that company;
>
> " 2. in the alternative, that the dispute is one which is fit for submission for judicial settlement, arbitration or conciliation under the conditions which it will be for the Court to determine. "

On October 3, 1957, the Swiss Government, in reliance on Article 41 of the Statute of the Court and Article 61 of the Rules of the Court, asked the Court:

> " pending a final decision in the proceedings instituted by the Application of October 1st, to indicate the following measures:
>
> " (a) The Government of the United States of America is requested to take no legislative, judicial, administrative or executive step to part with the property which is claimed to be Swiss property in the submissions of the Swiss Application of October 1st instituting proceedings, so long as the case concerning this dispute is pending before the International Court of Justice.
>
> " (b) In particular, the Government of the United States is requested not to sell the shares of the General Aniline and Film Corporation claimed by the Swiss Federal Government as the property of its nationals, so long as the proceedings in this dispute are pending.
>
> " (c) In general, the Government of the United States should so act that no measure whatever is taken which would prejudice the right of Switzerland to execution of the judgment which the Court will deliver, either on the merits or on the alternative submission."

The United States on October 11, 1957, filed a Preliminary Objection in the following terms:

> " The Government of the United States of America, through its Co-Agents Loftus Becker and Dallas S. Townsend, herewith files a preliminary objection under Article 62 of the Rules of the Court, to the proceedings instituted by the Government of Switzerland in the Interhandel case by its application of October 1, 1957, in so far as that application relates to the sale or other disposition of the shares of General Aniline and Film Corporation now held by the United States Government. The United States Government has determined that such sale or disposition of the shares in the American corporation, title to which is held by the United States Government in the exercise of its sovereign authority, is a matter essentially within its domestic jurisdiction. Accordingly, pursuant to paragraph (b) of the conditions attached to this country's acceptance of the Court's compulsory jurisdiction, dated August 14, 1946, this country respectfully declines,

without prejudice to other and further preliminary objections which it may file, to submit the matter of the sale or disposition of such shares to the jurisdiction of the Court."

On October 19, 1957, the United States transmitted the following statement to the Court:

" 1. At the public sitting of October 12, 1957, Co-Agent Dallas S. Townsend, for the United States of America, stated as follows:

> " ' Chemie[1] unsuccessfully exhausted its appellate remedies to the Supreme Court, and when the six months period of grace had expired, without Chemie making the production, the District Court entered the order and in 1956 held that Chemie's complaint stood dismissed. Again Chemie appealed unsuccessfully to the Court of Appeals and in this way attempted to get back into the case. The Court of Appeals affirmed and now Chemie, in its second trip to the Supreme Court, is making another effort to get back into the case by petitioning the Supreme Court to review the decision of the Court of Appeals. This petition is now pending before the Supreme Court of the United States.' (Verbatim Record, p. 44.)

" 2. In the afternoon (Washington time) October 14, 1957, many hours after the adjournment on that day of the sitting of this Court at 11.39 a.m., the Supreme Court of the United States of America granted the above-mentioned petition of I.G. Chemie (Interhandel) to review the decision of the Court of Appeals, by issuing the following order:

> " ' Number 348. Société internationale pour participations industrielles et commerciales, S.A. [*v.*] Brownell. United States Court of Appeals for the District of Columbia circuit. Certiorari granted. Counsel are invited to discuss, among other things, the power of the District Court to dismiss, and the propriety of its dismissal, of petitioner's complaint, under rule 37 (B) (2) of F.R.C.P. [Federal Rules of Civil Procedure], for failure to obey its order, for production of documents, issued under rule 34 of F.R.C.P. in the absence of evidence and of finding that petitioner " refuses to obey " such order.'

" 3. The Government of the United States of America wishes to state expressly that it adheres to its preliminary objection, filed October 11, 1957, and to the reasons given in the arguments of its agent and co-agent of October 12 and October 14, 1957, why no interim measures of protection should be issued with respect to the sale or disposition of the shares of General Aniline and Film Corporation. For the information of Court, the Government of the United States of America is not taking action at the present time to fix a time schedule for the sale of such shares."

Held (by fourteen votes to one): that, in all the circumstances, there was no need to indicate interim measures of protection.

The Court said: [**110**] " Whereas Switzerland and the United States of America have, by Declarations made on their behalf, accepted the compulsory jurisdiction of the Court on the basis of Article 36, paragraph 2, of the Statute;

" Whereas by its subject-matter the present dispute falls within the purview of that paragraph;

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[1] [I.G. Chemie, otherwise Société Internationale etc., or " Interhandel ".]

" Whereas the Government of the United States of America has invoked, against the request for the indication of interim measures of protection, the reservation by which it excluded from its Declaration matters essentially within its domestic jurisdiction as determined [111] by the United States and whereas the Government accordingly ' respectfully declines . . . to submit the matter of the sale or disposition of such shares to the jurisdiction of the Court ';

" Whereas at the hearing the Co-Agent of the Swiss Government challenged this reservation, on a number of grounds, and stated that, in its examination of a request for the indication of interim measures of protection, the Court would not wish to adjudicate ' upon so complex and delicate a question as the validity of the American reservation ';

" Whereas the procedure applicable to requests for the indication of interim measures of protection is dealt with in the Rules of Court by provisions which are laid down in Article 61 and which appear, along with other procedures, in the section entitled: ' Occasional Rules ';

" Whereas the examination of the contention of the Government of the United States requires the application of a different procedure, the procedure laid down in Article 62 of the Rules of Court, and whereas, if this contention is maintained, it will fall to be dealt with by the Court in due course in accordance with that procedure;

" Whereas the request for the indication of interim measures of protection must accordingly be examined in conformity with the procedure laid down in Article 61;

" Whereas, finally, the decision given under this procedure in no way prejudges the question of the jurisdiction of the Court to deal with the merits of the case and leaves unaffected the right of the Respondent to submit arguments against such jurisdiction;

" Whereas the Swiss Government, by its request of October 3rd for the indication by the Court ' of the interim measures of protection which should be taken in order to safeguard the rights of the Swiss Federal Government ' purported to submit its request ' in conformity with Article 41 of the Statute and Article 61 of the Rules of Court ';

" Whereas the Court, in order to decide what action should be taken in pursuance of the request, must, in accordance with Article 41 of the Statute, ascertain what is required by the circumstances to preserve the respective rights of the Parties pending the decision of the Court;

" Whereas of the three points set forth in the submissions of, Switzerland with regard to its request for the indication of interim measures of protection, the second is the only one which is formulated in terms fulfilling the requirement laid down in Article 61, paragraph 1, of the Rules and which relates to the concern of the Court to preserve the rights which may be subsequently adjudged by the Court to belong either to the Applicant or to the Respondent;

[**112**] "Whereas, accordingly, the Court must direct its attention to this point, namely, the request to the Government of the United States not to sell the shares of the General Aniline and Film Corporation claimed by the Swiss Government as the property of its nationals, so long as the proceedings in this dispute are pending;

"Whereas in the light of the information furnished to the Court, it appears that, according to the law of the United States, the sale of those shares can only be effected after termination of a judicial proceeding which is at present pending in that country in respect of which there is no indication as to its speedy conclusion, and whereas such a sale is therefore conditional upon a judicial decision rejecting the claims of Interhandel;

"Whereas, on the other hand, in the statement of the views of the Government of the United States transmitted to the Court on October 19th, 1957, it is said that that Government 'is not taking action at the present time to fix a time schedule for the sale of such shares';

"Whereas in the premises it does not appear to the Court that the circumstances require the indication of the provisional measures envisaged in the request of the Swiss Federal Government;

"The Court holds that there is no need to indicate interim measures of protection."

[Report: *I.C.J. Reports*, 1957, p. 105.]

Judge Klaestad delivered the following Separate Opinion (in which President Hackworth and Judge Read concurred):

[115] "I share the view that the request for the indication of provisional measures must be declined, but for different reasons, which I shall briefly outline in a general way without mentioning details.

"In the present preliminary phase of the proceedings I have to examine in a summary and provisional manner whether it appears *prima facie* that the Court lacks jurisdiction to take action under Article 41 of its Statute.

"In its Declaration accepting the compulsory jurisdiction of the Court the Government of the United States of America made the reservation that the Declaration should not apply to 'disputes with regard to matters which are essentially within the domestic jurisdiction of the United States of America as determined by the United States of America'. This reservation relates to the whole of the Court's jurisdiction under the Statute, including its jurisdiction to take action under Article 41.

"The United States Government has filed a Preliminary Objection, under Article 62 of the Rules of the Court, to the proceedings instituted by the Application, 'in so far as that Application relates to the sale or other disposition of the shares of General Aniline and Film Corporation now held by the United States of America'. The United States Government has determined that such sale or disposition of the shares is a matter essentially within its domestic jurisdiction. It has invoked the above-mentioned reservation and challenged the Court's jurisdiction to indicate provisional measures with regard to the sale or other disposition of the shares. This invocation of the reservation must be understood as relating to the first Submission of the

Application concerning the alleged obligation to restore the assets of *Interhandel*, and not to the second and alternative Submission concerning reference to judicial settlement, arbitration or conciliation.

"At the hearing the Co-Agent of the Swiss Government referred to the question of the validity of the American reservation, but he did not expressly contend that it is invalid. As to this question there does not at present appear to exist any dispute which calls for the consideration of the Court.

" In the case of *Certain Norwegian Loans*[1] the Court was confronted with a similar situation. Norway invoked, by virtue of the condition of reciprocity, a reservation in the French Declaration accepting the compulsory jurisdiction of the Court similar to the above-mentioned American reservation. Both Parties relied on the French [**116**] Declaration and argued on the basis that the reservation was legally valid. In such circumstances, the Court considered it was not called upon to enter into an examination of the validity of the French reservation and decided to give effect to that reservation.

" I consider that I shall have to adopt the same attitude in the present case, giving effect to the reservation in so far as it is invoked without entering into an examination of its validity. But in this preliminary phase of the present proceedings, the finding that the Court lacks jurisdiction in respect of the matter to which the Preliminary Objection relates, must of necessity be only of a provisional character. Such a *prima facie* finding does not in any way prejudge the question of the jurisdiction of the Court to deal with the merits of the case."

Judge Lauterpacht delivered the following Separate Opinion:

[**117**] " In its Order the Court has assumed jurisdiction with regard to the request of the Swiss Government, made under Article 41 of the Statute of the Court, to indicate interim measures of protection with a view to safeguarding the rights of that Government. Acting under Article 41 of the Statute, the Court has found that, in the circumstances now obtaining, there is no need to indicate the interim measures of protection as requested by the Swiss Government. By necessary implication it has left open the possibility of indicating such measures, at a renewed request of the Swiss Government, at some future date if circumstances should so require—for instance, if the proceedings now pending before the Supreme Court of the United States of America were to terminate in a way enabling the Government of the United States of America to proceed with the measures which form the subject-matter of the Swiss request. In my view—so long as the Government of the United States of America continues to determine that the object of the request of the Swiss Government pertains to a matter which is essentially within the domestic jurisdiction of the United States of America—the Court has no power to assume jurisdiction with regard to interim measures of protection and to proceed under Article 41 of the Statute by either granting or declining the request.

" In its Declaration of Acceptance of the jurisdiction of the Court of 4th April 1946 the Government of the United States excluded from its Acceptance ' disputes with regard to matters which are essentially within the domestic jursidiction of the United States of America as determined by the United States of America '. In its request for an indication of interim measures of protection of 3rd October 1957 the Government of Switzerland, referring to its Application of 1st October 1957, asked the Court to indicate, *inter alia*, that ' the Government of the United States is requested not to sell the shares of the General Aniline and Film Corporation . . . so long as the proceedings in this dispute are pending '. On 11th October 1957 the Government of the United States of America filed, in conformity with Article 62, paragraph 1, of the Rules of the Court, a Preliminary Objection in which it informed the Court that it had determined that the sale or disposition of the shares in the Corporation in question is a matter essentially within its domestic jurisdiction.

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[1] Reported *supra*, p. 782, in this volume.]

" In reliance on the Preliminary Objection thus filed, the Government of the United States has asserted that the Preliminary Objection removed the basis for any assumption of a *prima facie* [**118**] jurisdiction of the Court on the merits of the dispute and that the Court therefore lacked the power to exercise jurisdiction under Article 41 of the Statute. That contention I consider to be well founded. In my view, having regard to the determination made by the Government of the United States under the terms of its Declaration of Acceptance, the Court possesses no such power.

" In deciding whether it is competent to assume jurisdiction with regard to a request made under Article 41 of the Statute the Court need not satisfy itself—either *proprio motu* or in response to a Preliminary Objection—that it is competent with regard to the merits of the dispute. The Court has stated on a number of occasions that an Order indicating, or refusing to indicate, interim measures of protection is independent of the affirmation of its jurisdiction on the merits and that it does not prejudge the question of the Court's jurisdiction on the merits (*Case concerning the Polish Agrarian Reform and the German Minority*, Series A/B, No. 58, p. 178;[1] *Anglo-Iranian Oil Company Case, I.C.J. Reports* 1951, p. 93[2]). Any contrary rule would not be in accordance with the nature of the request for measures of interim protection and the factor of urgency inherent in the procedure under Article 41 of the Statute. However, it is one thing to say that action of the Court under Article 41 of the Statute does not in any way prejudge the question of its competence on the merits and that the Court need not at that stage satisfy itself that it has jurisdiction on the merits or even that its jurisdiction is probable; it is another thing to affirm that the Court can act under Article 41 without any regard to the prospects of its jurisdiction on the merits and that the latter question does not arise at all in connection with a request for interim measures of protection. Governments which are Parties to the Statute or which have undertaken in some form or other commitments relating to the obligatory jurisdiction of the Court have the right to expect that the Court will not act under Article 41 in cases in which absence of jurisdiction on the merits is manifest. Governments ought not to be discouraged from undertaking, or continuing to undertake, the obligations of judicial settlement as the result of any justifiable apprehension that by accepting them they may become exposed to the embarrassment, vexation and loss, possibly following upon interim measures, in cases in which there is no reasonable possibility, *prima facie* ascertained by the Court, of jurisdiction on the merits. Accordingly, the Court cannot, in relation to a request for indication of interim measures, disregard altogether the question of its competence on the merits. The correct principle which emerges from these apparently conflicting considerations and which has been uniformly adopted in international arbitral and judicial practice is as follows: The Court may properly act under the terms of Article 41 provided that there is in existence an instrument such as a Declaration of Acceptance of the Optional Clause, emanating from the Parties to the dispute, which *prima* [**119**] *facie* confers jurisdiction upon the Court and which incorporates no reservations obviously excluding its jurisdiction. These conditions do not exist in the case now before the Court.

" Unless and until the peremptory reservation included in the Declaration of Acceptance made by the Government of the United States of America and now formally invoked by that Government is declared invalid in appropriate proceedings before the Court, it must be deemed to exclude the jurisdiction of the Court on the merits with regard to the claim of the Government of Switzerland for the restitution of the property of the Corporation in question

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[1] [See *Annual Digest*, 1933–1934, Case No. 216.]

[2] [See *International Law Reports*, 1952, Case No. 113.]

—a claim which is directly related to the request for interim measures with regard to the sale and the disposition of the shares of that Corporation. If the Court subsequently holds that reservation to be valid, that will automatically terminate its jurisdiction with regard to the sale of the shares. Should, on the other hand, the Court eventually declare the reservation in question to be invalid, such invalidity may well entail the invalidity of the Declaration of Acceptance as a whole and thus render impossible altogether the jurisdiction of the Court. While I do not wish to prejudge the eventual decision of the Court on these questions it is apparent that, on either alternative, the Court will be without jurisdiction to entertain the Application so far as it relates to the sale and disposition of the shares. I do consider that the third possibility—namely, that the Court may declare the reservation to be invalid and nevertheless uphold the validity of the Declaration of Acceptance as a whole—is sufficiently remote to permit its exclusion as a factor in the *prima facie* appreciation of the possibility of the Court's jurisdiction on the merits. Moreover, quite irrespective of any future decision of the Court on the question of the validity of the reservation in question, the latter must, so long as it remains a valid expression of the will of the Government of the United States, be given full and unqualified effect. Unlike in other similar cases, there is no question here of any uncertainty or controversy as to whether the subject of the dispute is covered by the reservation. That reservation must be deemed to embrace all aspects of the procedure of the Court under its Statute. The Court is legally not in a position, at any stage of the procedure, to exercise jurisdiction—whether by granting the request for an indication of interim measures or by declining it—unless in conformity with the terms of the Declaration of Acceptance. In the matter of its jurisdiction there is no other legal basis for its action under the Statute.

" It might be said that as the Government of the United States of America has invoked what may be described as the ' automatic reservation ' only in respect of the sale or other disposition of the shares, there is nothing to prevent the Court from acting under Article 41 with respect to other aspects of the request of the Swiss Government. This may be so. However, the Swiss request for [**120**] interim measures of protection covers primarily the question of sale and disposition of the shares. The present Order of the Court is concerned exclusively with that aspect of the request as being the only one which fulfils the requirements of Article 61, paragraph 1, of the Rules of the Court. In its Order the Court has assumed jurisdiction with regard to the request thus defined. It has declined to grant it. As already stated, by clear implication it leaves open the possibility of affirmative action should circumstances undergo a change. In both respects the Order is, in my opinion, contrary to a conclusive condition under which the jurisdiction of the Court has been accepted.

" In my view it is not open in the present case to the Court to find either that there is a need or that there is no need for interim measures of protection on the basis of Article 41. The Court ought to declare that it is without jurisdiction to entertain the request.

" For these reasons, while I am in agreement with the operative part of the present Order, I cannot otherwise subscribe to it.

" I have refrained from referring to or elaborating the additional, and no less decisive, reason why, in my view, the Court is without jurisdiction to entertain the request for interim measures filed by the Swiss Government. In my Separate Opinion in the case of *Certain Norwegian Loans* (*I.C.J. Reports* 1957, pp. 43–66 [see *supra*, pp. 793–817]) I came to the conclusion that a reservation of the kind now before the Court is invalid and that its invalidity entails the invalidity of the Declaration of Acceptance as a whole. If that is so, the Government of the United States cannot validly become either a plaintiff or a defendant under its Declaration of Acceptance—although it is open to it, in respect of any claim brought against it in reliance on its Declaration of Acceptance, to submit to the jurisdiction of the Court on some other basis. However, I have abstained from adopting that view as a ground of the present Opinion seeing that the question of the validity of the above reservation of the United States of America is not now before the Court and that it may, with the possible participation of other Signatories of the Optional Clause intervening by virtue of Article 63 of the Statute, form the subject-matter of a decision of the Court at a subsequent stage of the proceedings."

Judge Wellington Koo made the following declaration:

[**113**] "I agree with the decision of the Court not to indicate provisional measures in the case, but regret that I do not share the reasons upon which it is based. In my view, the Court has no jurisdiction to deal with the request for such measures. The Government of the United States raised an objection based upon Proviso (*b*) of its Declaration of August 14th, 1946, accepting the compulsory jurisdiction of the Court under paragraph (2) of Article 36 of the Statute. Proviso (*b*) states that the Declaration shall not apply to '. . . (*b*) disputes with regard to matters which are essentially within the domestic jurisdiction of the United States of America as determined by the United States of America'.

"Although the objection was raised by the United States in the form of a Preliminary Objection, under Article 62 of the Rules of Court, to the proceedings instituted by the Swiss Government's Application of October 1st, 1957, 'in so far as that Application relates to the sale or other disposition of the shares of General Aniline and Film Corporation now held by the United States Government', it was, in fact, an objection directed against the Court's jurisdiction to indicate provisional measures, requested by the Swiss Government on October 3rd, 1957. This was made clear by the Agent of the United States in his observations at the proceedings held on October 12th and 14th, 1957, under paragraph 8 of Article 61 of the Rules of Court, when he urged that Proviso (*b*) to the United States' Declaration of Acceptance excluded the Court's jurisdiction in the matter of the sale or other disposition of the shares of the General Aniline and Film Corporation—a matter which the United States had determined to be essentially within its domestic jurisdiction in exercise of its reserved right under Proviso (*b*).

"I consider that this objection is well founded, that the Court is not competent to deal with the Swiss request for indication of provisional measures and that its decision should be based upon this ground. The reason of lack of urgency is a true circumstance, but the placing of its decision on this ground carries an implication that the Court considers the said Proviso (*b*) to the United States' Declaration is not applicable to the matter of provisional measures, whereas, in my view, it is applicable." [**114**]

Judge Kojevnikov declared that he was unable to agree with the Order.

NOTE.—The previous proceedings in the courts of the United States are reported, *sub nom. Société Internationale pour Participations Industrielles et Commerciales S. A.* v. *Brownell, Attorney General, et Al.*, in *International Law Reports*, 1955, p. 184. The grant of the writ of *certiorari* by the Supreme Court of the United States, referred to in the statement submitted to the Court by the United States on October 19, 1957, is recorded at 355 U.S. 812, 78 Sup. Ct. 61, 2 L.Ed. 2d 30 (1957). Concerning related litigation in the courts of the United States, see *Kaufman et Al.* v. *Brownell*; *Attenhofer et Al.* v. *Brownell*, 247 F. 2d 553 (reported *infra*, p. 907), and *Brownell* v. *Kaufman et Al.*, 251 F. 2d 374 (reported *infra*, p. 911).

C—CONCILIATION

Conciliation—Procedure—Evidence—Expert Evidence—View by Conciliation Commission of Damaged Property—Amendment to Finding of Commission for Typographical Error—Amendment for Omission to Deal with an Item of Claim.

MANNELLA CLAIM.

Italian-United States Conciliation Commission. April 5, 1957.

(Matturri, Sorrentino.)

THE FACTS.—This was a claim under Article 78 of the Peace Treaty with Italy of 1947,[1] for compensation for war damage to the real and personal property at Ateleta, in Italy, of the claimant, a United States national. The Italian Government made an offer in settlement of the claim, which was refused as being insufficient.

By an Order dated September 28, 1955, the Commission fixed a hearing in which the testimony of two partial experts was to be heard. After the hearing the Commission, by Order dated March 6, 1956, ordered both partial experts to meet and submit further findings on the question of damages. On April 6, 1956, both experts submitted reports of their findings. Subsequently, the Representatives of both Governments each appointed an impartial expert to accompany them and the other interested members of the Commission to make a personal inspection of the property. The Commission met at Roccaraso on July 9, 1956, and on the Mannella property the next day; they held hearings and made a personal inspection of the real property. Thereafter, both impartial experts submitted their reports to the Representatives of the two Governments.

Held: that the claimant was entitled to receive the sum of 11,666,000 lire, being two-thirds of the sum of 17,000,000 lire, the amount of the loss found to have been suffered by the claimant, as a result of the war, by reason of damage done to her property in Italy.

The Commission said: " The only questions to be decided by the Commission are those involving the evaluation of the various damages. The Commission, having heard the partial and impartial experts; having studied the appraisals submitted by both parties to this controversy; and acting in the spirit of conciliation finds that the damages suffered as a result of the war by the claimant's property can be equitably valued at 17,000,000 lire."

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[1] Article 78, para. 4, provides (in part): " 4.—(*a*) . . . In cases where property cannot be returned or where, as a result of the war, a United Nations national has suffered a loss by reason of injury or damage to property in Italy, he shall receive from the Italian Government compensation in lire to the extent of two-thirds of the sum necessary, at the date of payment, to purchase similar property or to make good the loss suffered. . . ."

Subsequently, it came to light that (i) there had been an error in the decision of the Commission in that the amount of the war damage had been stated as 17,500,000 lire instead of 17,000,00, and (ii) the Commission had omitted to deal with a claim by E.G.E.L.I.[1] for the administration of the claimant's property. The Commission promulgated a fresh decision in which the typographical error was rectified and, having heard argument on the liability of the claimant for the administration charges of E.G.E.L.I., held that from the total amount awarded to the claimant " the Italian Government is entitled to deduct (without prejudice to any principle or question as to the liability of claimants generally for E.G.E.L.I. charges) any charge which may be found to be owing by the claimant, Domenica Mannella, for the administration of her property by E.G.E.L.I."

[Report: Unpublished (Decision No. 168 and Amendment thereto).]

Conciliation—Conciliation Commissions—Rules of Evidence—Evidence in Support of Claims—Sufficiency of—Affidavits by Claimants as to Ownership—Insufficiency When Unsupported by Independent Evidence.

D'ANNOLFO CLAIM.

Italian-United States Conciliation Commission. June 25, 1957.

(Matturri, Sorrentino.)

THE FACTS.—This was a claim under Article 78 of the Peace Treaty with Italy of 1947 by Federico and Beniamino d'Annolfo as owners of certain property in Italy for compensation in respect of loss of that property. The claim had originally been made to the Italian Ministry of the Treasury, who rejected it on the grounds that according to the official records the property belonged to persons other than the claimants and that there was no record of any transfer of the property to the claimants. The claim was referred to the Commission, and the claimants filed affidavits tending to establish their title to the property. No supporting evidence was adduced.

Held: that the claim must fail. Unsupported affidavits by the claimants as to ownership were not sufficient to establish title.

The Commission said: " It is well established that a person who makes a claim of property has the burden of establishing ownership thereof. The Petition states that the claimants were each half owners of a building and two parcels of land. Annex 1 of the original Petition is a copy of the statement of claim filed with the Italian Ministry of the Treasury. It is the only evidence filed in support of the claim.

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[1] See *supra*, p. 648.

" There are two affidavits, one by each of the claimants, which are a part of Annex 1 and which contain, in substance, identical statements. The only portion thereof which has any reference to ownership is contained in paragraph 2 which states: ' In support of such claim and *as proof of ownership* and the extent and nature of the damage suffered, I submit Exhibit " A "—a detailed description of the property, before and after the war, and appraisal of the damage drawn up by a duly recognized surveyor together with his sworn statement . . . ' (emphasis supplied). The Exhibit ' A ' referred to contains only the following pertinent statement in the opening paragraph: (in translation) ' It is premised that the above-named person is the rightful owner of, etc.' The petitioners' case is based on this evidence alone.

" In the first place, the question of probative value of an affidavit was given due consideration by this Commission in its Decision Number 11 (*The United States of America ex rel. Norma Sullo Amabile* v. *The Italian Republic*, Case No. 5 [1]) and it is not necessary to set forth the entire reasoning of that decision here. Suffice it to say that the said decision accepts as proof the introduction of affidavits into evidence but leaves to the individual case the weight to be given said affidavits, especially in the light of their contents and the availability of other or better evidence. In the instant case it can be said that the affidavits presented are of no value on the question of ownership. Federico and Beniamino d'Annolfo claim to be the owners of the damaged parcels, but, at best, they have made only self serving declarations to establish that fact. They rely on the sworn statement of the surveyor ' as proof of ownership ' yet that statement contains no more than a presumption that the claimants are the owners of the property.

" Furthermore, the best evidence of ownership is an extract of the official real property records of the municipality where the property is located. It is true that said records may have been destroyed, although no such evidence appears in this case, but in that event it would have been incumbent on the claimants to establish that fact and then come forth with the best evidence in lieu thereof. The claimants have not produced any official real property records nor have they given any explanation for their absence.

" The Italian Ministry of the Treasury rejected the claim because the official records show that the property belonged to persons other than the claimants. Thereafter the claimants were given 90 days within which to submit additional evidence of title but after the expiration of that time they did not come forth with any new

[[1] See *International Law Reports*, 1955, p. 843, *sub nom. Amabile Claim.*]

evidence nor did they make any statement to refute the findings of the Italian Ministry of the Treasury. Their inaction, when combined with the complete inadequacy of the evidence already submitted, leaves the Commission no alternative but to reject their claim for failure of proof. . . ."

[Report: Unpublished (Decision No. 174).]

Conciliation—Conciliation Commissions—Procedure—Necessity for Existence of a Dispute—Claim for Interest—Claim for Costs.

See p. 654 (*Wollemborg Claim*), at pp. 658, 663.

Conciliation—Award by Arbitrators as "*amiables compositeurs*".

See p. 761 (*Société Européenne d'Études et d'Entreprises* v. *People's Federal Republic of Yugoslavia*).

F—MISCELLANEOUS

Arbitration—International Tribunals—Miscellaneous—Administrative Tribunal of the International Labour Organization—The Law to be Applied—General Principles of Law.

See p. 748 (*In re Waghorn*).

International Tribunals—Miscellaneous—The Law Applicable—Court of Justice of the European Coal and Steel Community—The Law of Member States—Apparent Gap in Treaty—Comparative Study of Relevant Systems of Law.

See p. 699 (*Algera et Al.* v. *Common Assembly of the European Coal and Steel Community*).

International Tribunals—Miscellaneous—Court of Justice of European Coal and Steel Community—Evidence and Procedure—Interpretation of Pleadings—Proof of Receipt of Letter—Plaintiff's Name and Address Misspelt on Envelope—Law Applicable—Jurisdiction of Court Over Appeals Heard *de pleine juridiction*.

See p. 711 (*Acciarierie Laminatoi Magliano Alpi* (*A.L.M.A.*) v *The High Authority of the European Coal and Steel Community*)

International Tribunals—Miscellaneous—The Law Applicable—National Law as Current Among Parties to Treaty.

See p. 711 (*Acciarierie Laminatoi Magliano Alpi* (*A.L.M.A.*) v. *The High Authority of the European Coal and Steel Community*).

PART XI

WAR AND NEUTRALITY

A—WAR IN GENERAL

IV.—Belligerent Forces

War—Belligerent Forces—Irregular Forces—Status of—Non-Observance of Article 1 of Hague Regulations—Hostile Acts Against Occupant—Reprisals by Occupant—Whether Victims of Reprisals Entitled to Damages from Irregular Forces Responsible for Hostile Acts against Occupant.

See p. 986 (*Sansolini and Others* v. *Bentivegna and Others*).

V.—Effects of Outbreak of War

ii.—On Treaties

War—Effects of Outbreak of—On Treaties—Abrogation or Suspension of Treaty—Treaty of Extradition—Conduct of Parties to Treaty After End of War—Conclusiveness of—Revival of Treaty—By Unilateral Notification Pursuant to Peace Treaty.

ARGENTO *v.* HORN *ET AL.*

United States, District Court, Northern District, Ohio. May 26, 1955.

Court of Appeals, Sixth Circuit. February 12, 1957.

THE FACTS.—Upon application of the Republic of Italy, certified by the Secretary of State of the United States, and upon complaint of the Italian Consul for Ohio and Kentucky, extradition proceedings were initiated against Argento in the United States District Court. After a hearing, the United States Commissioner concluded that the evidence was sufficient to sustain the charge that Argento was the same Tommaso Argento who had been convicted *in absentia* and sentenced to life imprisonment in Italy in 1931 for a murder committed there in 1922. Since the Italian conviction was *in absentia*, the Commissioner treated the case as though the appellant had been charged with but not convicted of a crime in Italy.[1] The Commissioner committed Argento to custody pending surrender to the Republic of Italy. By writ of habeas corpus and action for declaratory judgment, Argento attacked the legality of his arrest, commitment, and detention. Argento contended that the Convention between the United States and Italy for the Surrender of

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[1] See Hackworth, *Digest of International Law*, vol. 4 (1942), pp. 52, 132.

Criminals, signed at Washington on March 23, 1868 (15 Stat. 629, T.S. No. 174), had been abrogated by the outbreak of war between the two parties in 1942; that the Treaty was not validly revived by the notification to the Italian Government of February 6, 1948, in accordance with Article 44 of the Treaty of Peace with Italy, signed at Paris on February 10, 1947 (61 Stat. 1245, T.I.A.S. No. 1648); and that in the absence of any valid and subsisting extradition treaty, his extradition to Italy would be in violation of the law of the United States.

Held (by the District Court *sub nom. Argento* v. *North*): that the writ of habeas corpus must be denied. The notification given by the United States to Italy that it desired to keep in force and to revive the Convention for the Surrender of Criminals of 1868 was determinative of the continuing force of the Treaty. [Report: 131 F. Supp. 538.]

On appeal,

Held (by the Court of Appeals): that the judgment of the District Court must be affirmed. Since the Treaty of Extradition was not terminated but merely suspended during the war and therefore remained in effect, the extradition of Argento would not be in violation of the law of the United States. Although the Court was of the view that it was extremely doubtful that war *ipso facto* abrogated a treaty of extradition, it preferred to rest its decision on the fact that the two Governments had, both in concluding the Treaty of Peace of 1947 and in their subsequent conduct, evidenced their understanding that the Treaty was still in effect. This construction of the Treaty, while not conclusive on the Court, must be accorded great weight.

The Court said: " Without question the appellant is on sound ground in asserting that he cannot be extradited to Italy in the absence of a valid treaty so providing. That the Executive is without inherent power to seize a fugitive criminal and surrender him to a foreign nation has long been settled. *Valentine* v. *United States, ex rel. Neidecker*, 1936, 299 U.S. 5, 57 S.Ct. 100, 81 L.Ed. 5;[1] see *Factor* v. *Laubenheimer*, 1933, 299 U.S. 276, 54 S.Ct. 191, 78 L.Ed. 315.[2]

" While Congress might conceivably have authorized extradition in the absence of a treaty, it has not done so. The law is clear. Title 18 U.S.C.A. § 3181, states,

> " ' The provisions of this chapter relating to the surrender of persons who have committed crimes in foreign countries shall continue in force only during the existence of any treaty of extradition with such foreign government.'

[[1] See *Annual Digest*, 1935–1937, Case No. 167.]
[[2] *Ibid.*, 1931–1932, Case No. 160, *sub nom. Laubenheimer* v. *Factor*.]

This condition is repeated in 18 U.S.C.A. § 3184, making the provisions of that section operable only 'whenever there is a treaty or convention for extradition between the United States and any foreign government.'

"As to the existence of a valid extradition treaty between the United States and Italy, the parties are in agreement upon the underlying facts. They differ completely in the conclusions to be drawn from them.

"A treaty of extradition was concluded between the two nations in 1868, 15 Stat. 629. Valid amendments were made to the treaty in 1869 and 1885, 16 Stat. 767 and 24 Stat. 1001. Murder was one of the crimes made extraditable by the treaty.

"On December 11, 1941, 55 Stat. 797, the Congress of the United States declared that a state of war existed between the United States and Italy. At the conclusion of the war a treaty of peace was concluded, effective September 15, 1947. 61 Stat. 1245. This peace treaty, which was duly ratified by the United States Senate, provided in Article 44 as follows:

> "'1. Each Allied or Associated Power will notify Italy, within a period of six months from the coming into force of the present Treaty, which of its pre-war bilateral treaties with Italy it desires to keep in force or revive. Any provisions not in conformity with the present Treaty shall, however, be deleted from the above-mentioned treaties.
>
> '2. All such treaties so notified shall be registered with the Secretariat of the United Nations in accordance with Article 102 of the Charter of the United Nations.
>
> '3. All such treaties not so notified shall be regarded as abrogated.' 61 Stat. 1386.

On February 6, 1948, the Secretary of State of the United States notified the Republic of Italy that the United States desired to keep in force or revive, among others, the Extradition Treaty of 1868, as amended.

"It is the appellant's position that under established principles of international law the outbreak of war between Italy and the United States in 1941 operated to abrogate completely the extradition treaty previously existing between the two nations. That being so, the appellant argues that in order to revive the extradition treaty it was necessary to make a new treaty, and that a new treaty under the Constitution of the United States could have been made only by the President, with the explicit concurrence of the Senate by a two-thirds vote. U.S.Const. Article II, Section 2. The appellees concede in their brief, as they obviously must, 'that it would . . . require the concurring action of the President and the Senate to re-enact a treaty once dead as distinguished from one which is dormant or held in abeyance. . . .'

"Whether the war between Italy and the United States completely annulled the previous extradition treaty is thus the central question before us. If the war did have that effect, the appellant is correct in his position that there is now no treaty of extradition between the two nations, since it is conceded that the ' notification ' of February 6, 1948, was not submitted to the United States Senate for its advice and consent.

" Early publicists adopted the view that war *ipso facto* abrogates all treaties between the belligerent nations.[1] In more recent times, however, this theory has been rejected by the textwriters in international law,[2] and it seems never to have been espoused by courts in the United States.

" The question was first considered by the Supreme Court in *Society for Propagation of the Gospel in Foreign Parts* v. *New Haven*, 1823, 8 Wheat. 464, 5 L.Ed. 662. Although *dicta*, the views the Court there expressed have never since been questioned:

" ' But we are not inclined to admit the doctrine urged at the bar, that treaties become extinguished, *ipso facto*, by war between the two governments, unless they should be revived by an express or implied renewal on the return of peace. Whatever may be the latitude of doctrine laid down by elementary writers on the law of nations, dealing in general terms, in relation to this subject, we are satisfied, that the doctrine contended for is not universally true. There may be treaties of such a nature, as to their object and import, as that war will put an end to them; but where treaties contemplate a permanent arrangement of territorial, and other national rights, or which, in their terms, are meant to provide for the event of an intervening war, it would be against every principle of just interpretation, to hold them extinguished by the event of war. . . . We think, therefore, that treaties stipulating for permanent rights, and general arrangements, and professing to aim at perpetuity, and to deal with the case of war as well as of peace, do not cease on the occurrence of war, but are, at most, only suspended while it lasts; and unless they are waived by the parties, or new and repugnant stipulations are made, they revive in their operation at the return of peace.' *Society for Propagation of the Gospel in Foreign Parts* v. *New Haven*, 1823, 8 Wheaton 464, at page 494, 5 L.Ed. 662.

This statement was cited as basic law in the United States as recently as 1947 in *Clark* v. *Allen*, 1947, 331 U.S. 503, 67 S.Ct. 1431, 91 L.Ed. 1633,[3] where it was said, ' We start from the premise that the outbreak of war does not necessarily suspend or abrogate treaty provisions.' 331 U.S. at page 508, 67 S.Ct. at page 1435.

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[1] See Lenoir, " The Effect of War on Bilateral Treaties, with Special Reference to Reciprocal Inheritance Treaty Provisions," 34 Georgetown L.R. 129 (1946), where citations to the views of the earlier writers upon this question are collected in footnote 9. The reasoning in support of this view is expressed in 3 Vattel, *The Law of Nations*, Section 175 (trans. of ed. 1758, Fenwick, 1916), which is there quoted: " Conventions and treaties are broken and annulled when war breaks out between the transacting parties, either because such agreements imply a state of peace, or because each party, having the right to deprive the enemy of his property, may take from him such rights as have been given him by treaties."

[2] " [T]he farther back we go, the more sweeping and undiscriminating are the assertions that all treaties are abrogated by the outbreak of war between the contracting parties, and the passage of time brings with it the realization that there are many exceptions to this statement." McNair, *The Law of Treaties*, page 532 (1938).

[[3] See *Annual Digest*, 1947, Case No. 82.]

" While it is therefore settled, at least in this country, that all treaties are not automatically abrogated by the outbreak of war between the parties, it is not easy to postulate an applicable standard to determine whether a particular treaty has survived a war. The difficulty was stated more definitively than was the solution in *Karnuth* v. *United States*, 1929, 279 U.S. 231,[1] at page 236, 49 S.Ct. 274, at page 276, 73 L.Ed. 677:

" ' The effect of war upon treaties is a subject in respect of which there are widely divergent opinions. The doctrine sometimes asserted, especially by the older writers, that war *ipso facto* annuls treaties of every kind between the warring nations, is repudiated by the great weight of modern authority; and the view now commonly accepted is that " whether the stipulations of a treaty are annulled by war depends upon their intrinsic character." 5 Moore's *Digest of International Law*, § 779, p. 383. But as to precisely what treaties fall and what survive, under this designation, there is lack of accord. The authorities, as well as the practice of nations, present a great contrariety of views. The law of the subject is still in the making, and, in attempting to formulate principles at all approaching generality, courts must proceed with a good deal of caution. But there seems to be fairly common agreement that at least the following treaty obligations remain in force: Stipulations in respect of what shall be done in a state of war; treaties of cession, boundary, and the like; provisions giving the right to citizens or subjects of one of the high contracting powers to continue to hold and transmit land in the territory of the other; and, generally, provisions which represent completed acts. On the other hand, treaties of amity, of alliance, and the like, having a political character, the object of which " is to promote relations of harmony between nation and nation," are generally regarded as belonging to the class of treaty stipulations that are absolutely annulled by war. Id., p. 385, quoting Calvo, *Droit Int.* (4th Ed.) IV. 65, § 1931.'

" Counsel have cited us to no decision, and we have found none, specifically relating to the effect of war upon a treaty of extradition. Such a treaty does not conveniently fit into either of the alternative classifications set out in the *Karnuth* opinion quoted above. If the question were to be decided in a vacuum, the conclusion could only be that it is extremely doubtful that war *ipso facto* abrogates a treaty of extradition. Fortunately, however, the question need not be so decided, but can and must be decided against the background of the actual conduct of the two nations involved, acting through the political branches of their governments.

" In *Terlinden* v. *Ames*, 1902, 184 U.S. 270, 22 S.Ct. 484, 489, 46 L.Ed. 534, where the question for decision was whether an extradition treaty between the United States and the Kingdom of Prussia had survived the absorption of Prussia into the German Empire, it was contended that this treaty ' had been terminated by

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[1 See *Annual Digest*, 1927–1928, Case No. 364.]

operation of law' as the result of the formation of the German Empire. In deciding that the treaty had survived, the Court relied heavily upon the intention of the parties as revealed by the conduct of their executive departments. '. . . [W]e think that on the question whether this treaty has ever been terminated, governmental action in respect of it must be regarded as of controlling importance.' 184 U.S. at page 285, 22 S.Ct. at page 490. '. . . [I]t cannot be successfully contended that the courts could properly intervene on the ground that the treaty under which both governments had proceeded, had terminated by reason of the adoption of the Constitution of the German Empire, notwithstanding the judgment of both governments to the contrary.' 184 U.S. at pages 289–290, 22 S.Ct. at page 492.

"The consummation of the treaty of peace with Italy in 1947 containing Article 44 providing for 'notification' by the United States of each pre-war bilateral treaty it desired to keep in force or revive, the ratification of that treaty by the United States Senate, the subsequent notification by our State Department with regard to the extradition treaty, and the conduct of the political departments of the two nations in the ensuing nine years, evidencing their unqualified understanding that the extradition treaty is in full force and effect, all make it obvious that the political departments of the two governments considered the extradition treaty not abrogated but merely suspended during hostilities. There is, to be sure, a certain circuity of reasoning in deciding that the parties did not need to make a new treaty of extradition for the reason that they did not in fact make one. Yet it is exactly that pragmatic and cautious approach that, if the question is doubtful, the authorities enjoin. *Terlinden* v. *Ames*, 184 U.S. 270, 22 S.Ct. 484, supra. 'A construction of a treaty by the political department of the Government, while not conclusive upon a court called upon to construe such a treaty in a matter involving personal rights, is nevertheless of much weight.' *Charlton* v. *Kelly*, 1913, 229 U.S. 447, at page 468, 33 S.Ct. 945, at page 952, 57 L.Ed. 1274. See Judge Mack's scholarly opinion in *The Sophie Rickmers*, D.C.S.D.N.Y. 1930, 45 F.2d 413,[1] and Judge Cardozo's eloquent discussion in *Techt* v. *Hughes*, 1920, 229 N.Y. 222, 128 N.E. 185, 11 A.L.R. 166.

"It is our conclusion that the treaty of extradition between the United States and Italy was not terminated but merely suspended during the war, and that it is now in effect.

"We turn briefly to the claim that the Commissioner improperly admitted evidence identifying the appellant as the Tommaso Argento who had been charged in Italy with murder.[2] This evidence consisted

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[[1] See *Annual Digest*, 1929–1930, Case No. 280.]

[2] The entire authenticated record of the trial proceedings in Italy was before the Commissioner, and the appellant apparently does not question the sufficiency of that evidence to sustain the charge that *a* Tommaso Argento had been convicted *in absentia* of committing a murder in Italy.

sisted of the sworn statements of three individuals in Italy identifying two photographs, and of records relating to the appellant which had been filed under the now repealed Alien Registration Act of 1940, 54 Stat. 670; compare 8 U.S.C.A. § 1302, and which were produced at the hearing by an employee of the Naturalization and Immigration Service of the United States Department of Justice.

"The sworn statements were taken *ex parte* in Italy without the knowledge of the appellant or his counsel. They were obviously hearsay, and clearly would have been inadmissible in a criminal trial in the United States. But that is not the test. The only question to be answered under the statute is whether the statements were 'properly and legally authenticated so as to entitle them to be received for similar purposes by the tribunals,' of Italy. 18 U.S.C.A. § 3190. *Bingham* v. *Bradley, U. S. Marshall*, 1916, 241 U.S. 511, 517, 36 S.Ct. 634, 60 L.Ed. 1136. It was the unambiguous testimony of an expert in Italian law that they were.

"Although this evidence was properly admitted, however, its sufficiency to identify the appellant would be extremely doubtful without the additional evidence contained in the records filed under the Alien Registration Act. The appellant contends that those records, and copies made from them, were improperly admitted, because Congress has expressly made them confidential, to be released only by the Attorney General.[1] The appellant correctly points out that there was no showing before the Commissioner that the Attorney General had consented to the production of the records in question.

"It is unnecessary to consider whether rejection of the records would have been the appropriate sanction to apply if there had been an affirmative showing that the Attorney General had not consented to their production. We are of the view that the appellant's contention cannot prevail for the reason that, since there was no such showing, it must be presumed that the Attorney General did consent. *United States* v. *Chemical Foundation*, 1926, 272 U.S. 1, 14–15, 47 S.Ct. 1, 71 L.Ed. 131.

"The appellant has apparently been a law-abiding person during the thirty years that he has been in this country. To enter a judgment that will result in sending him back to life imprisonment in Italy, upon the basis of the record before the Commissioner, does not sit easily with the members of a United States court, sensible of the great Constitutional immunities. For the reasons expressed in this opinion, however, we conceive it our obligation to do so. As correctly stated by District Judge Connell, 'The guaranties [the appellant] seeks in this country have no relation to offenses which have been committed within the jurisdiction of the demanding country.' *Neely* v. *Henkel*, 1901, 180 U.S. 109, 21 S.Ct. 302, 45 L.Ed. 448."

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[1] "All registration and fingerprint records made under the provisions of this subchapter shall be confidential, and shall be made available only to such persons or agencies as may be designated by the Attorney General." 8 U.S.C.A. § 1304 (b).

[Reports: 241 F.2d 258; *certiorari* denied, 355 U.S. 818, 2 L.Ed.2d 35, 78 Sup. Ct. 23 (1957).]

NOTE.—The above case is noted in *University of Detroit Law Journal*, 34 (1957), p. 639; and *University of Pennsylvania Law Review*, 106 (1958), p. 617.

War—Effect on Treaties—Treaty for Mutual Enforcement of Judgments in Civil Matters—Whether Suspended by War between Contracting Parties—The Law of Italy.

SOCIETÀ FORNACI DI STAZZANO *v.* RANCILLO.

Italy, Court of Cassation. May 3, 1957.

THE FACTS.—The Franco-Italian Convention of June 3, 1930, on the Enforcement of Judgments in Civil Matters provided that the judgments of the courts of one of the Contracting Parties can be enforced in the other where an action is concerned with land situate in the country which exercises jurisdiction. During the Second World War, a French court gave judgment in favour of the respondent in an action concerning land situate in France, and the Court of Genoa, in accordance with the Franco-Italian Convention, held the French judgment to be enforceable in Italy, notwithstanding that at the time when the French court exercised jurisdiction France and Italy were at war. The appellants contended that the Court of Genoa was wrong in applying the Convention, on the ground that the Convention was suspended and therefore of no effect while France and Italy were at war.

Held: that the Convention remained in force while France and Italy were at war, and the appeal therefore failed. (1) France, in notifying Italy under Article 44 of the Peace Treaty with Italy of 1947 of the treaties between the two countries which it was desired to " keep in force or revive ", had failed to draw a distinction between those treaties which it was desired to " keep in force " and those which it was desired to " revive ", and that it was therefore impossible to draw the inference that the present Convention—which was one of the treaties referred to in the French Note—was one which France regarded as having been suspended for the duration of the war between the two countries. (2) The nature of the Convention was not such as to make its continuing validity incompatible with a state of war between the two countries.

The Court said: " The Court of first instance held that by virtue of the Franco-Italian Convention on the Execution of Judgments in Civil and Commercial Matters, of June 3, 1930, the courts of each of the Contracting Parties in whose territory any land the subject of a dispute is situate are competent to determine the dispute, notwithstanding that the parties may be nationals of the other

Contracting Party. The Court of Reims and, on appeal, the Court of Appeal of Paris exercised jurisdiction over a tenancy of land situate in France, and the Court of first instance held that these French courts were entitled to do so in accordance with the Convention of June 3, 1930. Accordingly, the Court of Genoa gave effect to the foreign judgment.

" The appellants contest the decision of the Court of Genoa, on the ground that when the judgment of the Court of Appeal of Paris was given Italy and France were in a state of war and the above-mentioned Convention was therefore suspended. They further say that if the Convention did not apply, and as both parties were Italian citizens, the jurisdiction of the Italian courts could not be displaced by the jurisdiction of a foreign court. It is contended that the suspension of the Convention during the Second World War should be inferred from the will of the Contracting Parties. In fact, by a Note addressed to the Italian Government in pursuance of Article 44 of the Peace Treaty with Italy, the French Government informed the Italian Government of the treaties concluded with Italy before the war which it desired to keep in force or revive. The present Convention was among those treaties. Further, it is said that the suspension of the Convention ought to be inferred from its nature, which, as the Convention deals with judicial assistance between the Contracting Parties, necessarily presupposes the existence of peaceful relations between them. This Court cannot accept either of these arguments. It is true that, according to Article 44 of the Peace Treaty, each of the Allied Powers was entitled to notify the Italian Government of treaties concluded with the Italian Government before the war and which it was desired to keep in force or revive. It is also correct that by a Note of March 1, 1948, the French Government sent to the Italian Government a list of bilateral treaties concluded with Italy before the war, including the above-mentioned Convention, which it was desired to keep in force or revive. The French Note does not draw any distinction between treaties to be kept in force and treaties to be revived, with the result that the Note itself does not solve the problem whether we are concerned with the one or the other. We cannot, therefore, infer from the French Note, which was accepted by the Italian Government, any consensus of the Contracting Parties that the Convention had lost its validity *bello pendente* and only became valid again as from the date of the Note itself.

" We must now examine the question whether the Convention of 1930, by reason of its nature, lost its validity as a result of the state of war between Italy and France. This question must be decided, taking into account the effect of a state of war on the validity of treaties, in accordance with customary international law as set out by learned writers. With regard to treaties concluded with a view to war (such as the Hague Conventions of 1899 and 1907), a state of war is one of the conditions of their entry into force. With regard to other types of treaties a distinction is made: it is generally held that war renders ineffective those treaties which, by their intrinsic nature, are incompatible with a state of war (political treaties, treaties of alliance, commerce and navigation, treaties of protectorate, etc.). On the other hand, the continuing validity of those treaties is generally recognized *bello pendente* which, by their nature, by reason of the interests which they protect and by reason of the upheaval which would be caused by their unexpected cessation, are not considered incompatible with a state of war (such as conventions of private international law, labour conventions, conventions dealing with the enforcement of judgments, bankruptcy, and the legal status of aliens). In doubtful cases writers suggest that the intention of the Parties at the time of the conclusion of a treaty must be ascertained. The wishes of the Parties must always be taken into account in order to determine the effect and duration of treaties, *viz.*, whether—where a treaty does not contain express provisions governing the matter—the Parties have assumed the existence of peaceful relations between them as a condition of the continuing validity of a treaty. In the present case—where we cannot ascertain the intention of the Parties, at the time the treaty was made, as to whether it should continue to apply in the event of war, and where we cannot infer any particular intention from the French Note, as stated above—we are of opinion that the Convention has remained in force *bello pendente*, having regard to its content (enforcement of judgments) which is not incompatible with a state of war."

The Court then dealt with, and rejected, the further contention of the appellants that the judgments of the French courts were contrary to the Italian *ordre public* on the ground, *inter alia*, that the appellants had not been given an opportunity to defend the action in accordance with the Italian law of procedure. The Court held that as far as procedural requirements were concerned the *lex fori* must apply, and that the proceedings had been conducted in accordance with the French law of procedure and were therfore valid.

[Reports: *Giurisprudenza italiana*, 110 (1958), Part I, Section I, col. 510; *Rivista di Diritto Internazionale*, XLII (1959), p. 121.]

iv.—On Enemy Subjects with regard to—

(a) THEIR PERSONAL STATUS IN THE TERRITORY OF THE BELLIGERENT. *PERSONA STANDI IN JUDICIO*

War—Effects of Outbreak of—On Enemy Subjects—Their Personal Status—*Persona Standi in Judicio*—Restoration of—At Termination of War—Termination of Power to Seize Enemy Property—By Unilateral Action—The Law of the United States of America.

See p. 932 (*Niehaus & Co. et Al.* v. *United States*).

(b) THEIR PROPERTY AND OTHER RIGHTS

War—Effects of—On Enemy Property—Sequestration of—Compatibility of Subsequent Confiscation with General International Law—Relation of Municipal Legislation to Treaties—Vienna Treaties of 1815 and Protection of Private Property—Applicability to Procedural Provisions of Municipal Law—The Law of Holland.

PRINCE SALM-SALM *v.* THE STATE OF THE NETHERLANDS AND THE NEDERLANDS BEHEERS-INSTITUUT.

Holland, District Court of The Hague. June 28, 1954.

Court of Appeal of The Hague. November 8, 1956.

Supreme Court. June 21, 1957.

THE FACTS.—Until the Netherlands Decree on Enemy Property (*Staatsblad* No. E 133) came into force in 1944/5, the plaintiff, a German national and a descendant and the present Head of the former princely house of Salm-Salm, owned certain real estate situated in the Netherlands. By virtue of the Decree, his property became vested in the State of the Netherlands and was thereafter administered by the Nederlands Beheers-Instituut (Office for the Administration of Enemy Property). The plaintiff brought an action *in rem* before the District Court at The Hague to recover his property. He claimed (a) that the Decree on Enemy Property could not apply to his property, because the State of the Netherlands by adhering to the Vienna Treaties of 1815 had guaranteed to the then reigning Prince Constantin of Salm-Salm and his descendants the undisturbed possession of their private property, and (b) that the Netherlands Decree on Enemy Property had no binding force, since it was based on confiscation of private property of enemy subjects while international law permits in regard to such property only the taking of measures of a conservatory nature and any confiscation requires the assent or approval of the State whose nationals are concerned.

Held (by the District Court): that it had no jurisdiction to decide on the action.

The Court said, with regard only to argument (a): "The guarantee to which the plaintiff refers was laid down in Article 14 (c) of the 'Bundes-Acte des deutschen Bundes' of June 8, 1815.[1] According to Article 118 of the Final Act of the Congress of Vienna of June 9, 1815, the Bundes-Acte was deemed to be incorporated in the Final Act. The plaintiff claims that, therefore, the State of the Netherlands, as one of the parties to the Final Act of Vienna, was also bound by that guarantee. This cannot be accepted. Even if the scope of the said 'guarantee' could be extended so far, it would, as appears from the words 'in allen Bundesstaaten' in the first sentence of Article 14 of the 'Bundes-Acte', relate only to property situated within the territory of the German Confederation. It cannot be otherwise, since 'die souveränen Fürsten und freien Städte Deutschlands' [the Soverign Princes and Free States of Germany] could not conclude a convention dealing with rights of immovable property situated outside the territory of the German Confederation. The incorporation of the 'Bundes-Acte' into the Final Act cannot mean that the parties to the Final Act took upon themselves the guarantee of immovable property of mediatised, formerly sovereign, German Princes which was situated outside the territory of the German Confederation. Nor can it be deduced from Article 64 of the Final Act of Vienna that the guarantee of Article 14 of the 'Bundes-Acte' is of a wider scope and would thus apply to territories outside the German Confederation. Article 64 does not go beyond saying that the special provisions of the 'Bundes-Acte' would have the force of a treaty as though they were incorporated in the Final Act.

"The plaintiff also relies on Article 43 of the Final Act. This Article is of no avail to him because it only envisaged territories which were specifically mentioned and which under Article 24 of the Final Act would be annexed to the Kingdom of Prussia. The real estate which the plaintiff seeks to recover is not situated within one of those regions. The Decree on Enemy Property therefore applies to the plaintiff's property. That being so, this Court has no jurisdiction to adjudicate on the present action. The plaintiff should have lodged an appeal with the Judicial Division of the Council for the Restoration of Legal Rights against the decision of the Nederlands Beheers-Instituut which refused to restore his property to him."

On appeal,

[[1] See Martens, *Nouveau Recueil des Traités*, II, pp. 353 *et seq.*, 369 *et seq.* Article 5 of the Bundes-Acte provides: "In order to assure to the former ancient States of the Empire [*Reichsstände* and *Reichsangehörige*] mediatised in 1806 and in the subsequent years the enjoyment of equal rights in all countries belonging to the Confederation, and conformable to the relations at present existing between them, the Confederated States establish the following principles: . . . *c*. With regard to themselves, their families and their property [the Heads of the Houses of the Mediatised Princes and Counts] are generally to retain all the rights and privileges attached to their possessions. . . ." (Trans. Hertslett, *Map of Europe by Treaty*, vol. I, pp. 202–203.)]

Held (by the Court of Appeal of The Hague): that the judgment of the Court below must be confirmed. The Court refused to examine argument (a), and dealt only with argument (b).

The Court said: "[Whatever may have been the previous] tendency in international law, it must be acknowledged that during and after the Second World War it has become an accepted principle of international law that the States which were the victims of Germany in an unprovoked war of aggression were entitled to seize such German property as was within their jurisdiction and utilize it towards making compensation for the enormous damage inflicted upon them. They are further entitled to set off the proceeds of such property against the reparation claims which those States will present once a peace treaty is concluded with Germany. This principle has also been embodied in the Paris Agreement of January 14, 1946, as supplemented by the Protocol signed by the Netherlands in Brussels on March 15, 1948. Article 6 (1) (A) of that Agreement reads:

> "'A. Each Signatory Government shall, under such procedures as it may choose, hold or dispose of German enemy assets within its jurisdiction in manners designed to preclude their return to German ownership or control and shall charge against its reparation share such assets . . .'[1]

"On August 31, 1951, the Allied High Commission in Bonn promulgated Law No. 63, which affirms the legality of the transfer and liquidation of German property carried out in Allied States. This Law further declares inadmissible any claim presented and any legal proceedings started by former owners as regards such transfer or liquidation. An express confirmation of these measures by future treaties of peace—however logical such a confirmation might be—does not constitute an essential condition for their legal validity. In this connection it should be observed that the German Federal Republic in the sixth chapter of the Convention on the Settlement of Matters Arising out of the War and the Occupation, concluded at Bonn on May 26, 1952, with the United States of America, France and Great Britain, and amended by the Protocol on the Termination of the Occupation Régime in the Federal Republic of Germany (Paris, October 23, 1954), accepted the obligation not to bring claims against the transfer and liquidation of German property situated abroad and to indemnify the former owners of such property.

On further appeal,

Held (by the Supreme Court): that the appeal must be rejected. The Court referred to the appellant's argument that the Final Act of the Congress of Vienna of June 9, 1815, made unlawful the application to his property of both the substantive and the special procedural provisions of the Netherlands Decree on Enemy Property, since the Treaty of Vienna was by its very nature superior to any municipal decree so that its effects could neither be set aside nor limited by such Decree.

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[1] Agreement on Reparation from Germany, etc. (*Treaty Series*, No. 56 (1947)).

Rejecting this argument, the Court said: " The Decree on Enemy Property enacts among other things that title to property located in the Netherlands which belongs to enemy subjects becomes *de jure* vested in the State at the moment when the Decree enters into force, and a special procedure is established with respect to acts of the Nederlands Beheers-Instituut. If property in the Netherlands belonging to the appellant, who at the time when the Decree entered into force was an enemy subject, had been excluded from the operation of this Decree by virtue of the Treaty of Vienna of June 9, 1815, title to his property would not have passed to the State. This would not, however, support the argument that the appellant, who desires a decision of a Netherlands court on the title to his property, would be exempted from Netherlands procedural law, including the setting up of special tribunals competent to review the acts of the Nederlands Beheers-Instituut. The Court of Appeal rightly ruled that the appellant's action should be dismissed, since the acts of the Nederlands Beheers-Instituut relating to the property in question had not been reversed by the tribunal specially created to that end. The ordinary courts cannot review these acts, since they are not competent to do so. The Court of Appeal therefore was correct in not examining the argument of the appellant relating to the Treaty of Vienna of June 9, 1815."

[Reports: *N.J.*, 1957, Nos. 82 and 492.]

War—Effects of Outbreak of—On Enemy Property—Trade Marks —*Situs* of Trade-Marks.

See p. 435 (*Amato Narodni Podnik* v. *Julius Keilwerth Musikinstrumentenfabrik*).

vii.—Trading with the Enemy

War—Effects of Outbreak of—Trading with the Enemy—Testamentary Bequest to Enemy Alien Residing in Enemy Territory —Whether Prevented by Operation of Law from Accepting the Bequest—The Law of Australia.

In re BUDWILOWICZ, DECEASED.

Australia, Supreme Court of South Australia. August 27, 1957.

(Reed J.)

THE FACTS.—By his will a testator gave part of his estate to his trustees upon trust for his sister absolutely, " but should my said sister survive me and be restrained by the operation of law from accepting this bequest or should my trustees fail to locate and identify or cause to be located and identified my said sister within a period expiring two years from after my decease then and in every such case upon trust " for a named charitable organization.

The testator died in 1947. His sister, who was located and identified by the trustees within two years from the testator's death, was an enemy alien who at all relevant times resided in Germany. The state of war existing between Australia and Germany was not terminated until 1952. It was argued on behalf of the sister that the relevant Trading with the Enemy legislation did not operate so as to preclude her from being a beneficiary under the will.

Held: that the bequest to the testator's sister did not take effect. The relevant Trading with the Enemy legislation prevented an enemy alien from " accepting " a bequest under a will.

Reed J. said: " The originating summons in this matter was taken out by the plaintiff company as the executor and trustee of the will and codicil of the testator, who died on November 2, 1947. The will was executed on September 2, 1947, and the codicil was added on October 24 of the same year.

" The first question is whether upon a true construction of the will and codicil of the testator, and in the events that have happened, the trust in favour of the defendant Helene Oestreich has failed by reason of the fact that she was at the date of the death of the testator and still is an enemy residing at Berlin Stahnsdorf, 3 Ahornweg, which is in the Russian Zone of that city. The next question is, if the question asked in paragraph 1 be answered in the negative, whether the plaintiff should pay the money, the subject of the trust in favour of the defendant Mrs. Oestreich, to the Controller appointed under National Security (Enemy Property) Regulations, or how otherwise should the said trust moneys be dealt with.

" It appears that the only portion of the will and codicil which is relevant to the present matter is paragraph 4 of the will. The testator gave the whole of his estate to his trustee upon trust to realise and get in the same at such time and generally in such manner as his trustee, in its absolute discretion should think fit, and out of the net proceeds of such realisation, he directed his trustee to pay all his just debts, funeral and testamentary expenses, all death duties and the memorial expenses and pecuniary legacy referred to in the previous paragraph of the will, and subject as aforesaid he directed his trustee to divide the whole of his estate whether original or converted and as to as well the capital thereof as the income thereof into five equal parts, and to stand possessed thereof upon certain trusts, the first of which was as follows:

" '(a) As to two (2) such parts upon trust for my sister Helene Oestreich of Ahornweg 3 Stahnsdorf Berlin Germany absolutely but should my said sister predecease me or should my said sister survive me and be restrained by the operation of law from accepting this bequest or should my trustees fail to locate and identify or cause to be located and identified my said sister within a period expiring two years from after my decease then and in every such case upon trust as to such two parts for Adelaide Children's Hospital (Incorporated).'

"At the time of the death of the testator the state of war which had existed for some years between Australia and Germany had not yet come to an end. It was terminated on May 8, 1952.

" It is agreed that Mrs. Oestreich was located and identified by the trustee within two years from the death of the testator, and it appears that at all relevant times she has been residing at the address stated in the will.

" Section 3 (1) of the Trading with the Enemy Act, 1939–1952 (Cth.) defines ' enemy subject ' to mean ' any person, firm or corporation trading with whom or with which would be deemed to be trading with the enemy within the meaning of sub-section (2) ' of that section. The effect of sub-s. (2) is that a person shall be deemed to trade with the enemy if he performs or takes part in any act or transaction prohibited in one way or another, according to the provisions of the sub-section, or any act or transaction which at common law or by statute constitutes trading with the enemy.

" Regulations 11 and 16 of the National Security (Enemy Property) Regulations (Cth.) were also referred to. Under the provisions of reg. 11 (1) the plaintiff was under a duty to inform the Controller of Enemy Property within one month after the time when any property held or managed by it for or on behalf of Mrs. Oestreich came into its possession or under its management or control (if she were entitled under the will), and by notice in writing to communicate the fact to the Controller. The plaintiff was also under a duty to furnish the Controller with such particulars in relation thereto as the Controller might require. Regulation 11 (1) (e) required the plaintiff that it should comply with any directions given to it by the Controller in respect of the property, and should not, without the consent in writing of the Controller, pay, deal with or dispose of the property except in accordance with directions given to it by the Controller in respect thereof. By reg. 16 it is provided (*inter alia*) that the provisions of the Regulations shall apply with respect to any property held or managed for or on behalf of an enemy subject, of which notice has not been given to the Controller under the Regulations.

" It was contended for the defendant Mrs. Oestreich that no provision of the law precluded her from being a beneficiary under the will of the testator, notwithstanding the fact that she was an enemy subject: see, for example, *In the Estate of Jacob Schiff*.[1] The argument then proceeded to the proposition that the only disability to which she was subject by reason of her alien character was that the right to receive her share of the estate was postponed until the termination of hostilities. It was contended that that was the position at common law, and, furthermore, that the legislation of the Commonwealth and the regulations made thereunder had no further effect upon her rights. Upon that reference was made to a number of cases, from which some quotations may be made. Thus in *In re Münster*,[1] Russell J. cited the statement of Lord Finlay L.C. in *Hugh Stevenson & Sons* v. *Aktiengesellschaft für Cartonnagen Industrie*:[2]

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[1] [1915] P. 86.

> " ' It is not the law of this country that the property of enemy subjects is confiscated. Until the restoration of peace the enemy can, of course, make no claim to have it delivered up to him, but when peace is restored he is considered as entitled to his property with any fruits which it may have borne in the meantime.'

And further, the statement of Lord Haldane:

> " ' The law of this country does not in general confiscate the property of an enemy. He cannot claim to receive it during the war, but his right to his property is not extinguished; it is merely suspended.'

Russell J. proceeded to say:

> " ' The passages no doubt accurately state the law of this country apart from the provisions of any statute or of the treaty of peace.'

In *In re Gourju's Will Trusts; Starling* v. *Custodian of Enemy Property*[3] the testator directed his trustees to hold the income of his residuary estate upon protective trusts for the benefit of his widow during her life. By s. 33, sub-s. 1 (i) of the Trustee Act, 1925 (Imp.), the widow became entitled to receive the income until any event happened whereby, if the income were payable during the trust period to her absolutely, she would be deprived of the right to receive the same or any part thereof. At all material times the widow was resident in an area in France in relation to which the provisions of the Trading with the Enemy Act, 1939 (Imp.), and the orders made thereunder, had been applied. It was held that, on the making of the Trading with the Enemy (Specified Areas) Order, 1940 (Imp.), an event had happened whereby the widow had been deprived of the right to receive the income of the residuary estate, so that that income was thenceforth held upon the discretionary trusts defined by s. 33 (1) (ii) of the Trustee Act, 1925 (Imp.), and was not payable to the Custodian of Enemy Property. Mr. Legoe[4] relied upon the remarks of Simonds J. (as he then was) at p. 29 of that case as a further authority for the proposition that the regulations to which refrence has already been made do not deprive an enemy alien who is a beneficiary under a will of his interest thereunder, but merely cause ' the beneficial ownership to be and remain in statutory suspense or abeyance during the period in question ': *cf. In re Münster.* Mr. Legoe also relied on a distinction which he drew between the provisions of s. 33 (1) (i) of the Trustee Act, 1925 (Imp.), the effect of which was to deprive the widow of the right to receive the income of the residuary estate, and the language of paragraph 4 (a) of this will, namely, ' be restrained by the operation of law from accepting this bequest.' The contention is that, if a beneficiary is deprived of the right to receive income or some other interest under a will, the right has ceased to exist, whereas, if a beneficiary's right to receive income or other property is merely postponed, the right is not extinguished, and will be enforceable at the termination of the period of postponement. It was further contended that, in the absence of some act on the part of Mrs. Oestreich, her interest under the will would not be forfeited, and upon that reference was made to *In re Hall; Public Trustee* v. *Montgomery.*[1]

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[1] [1920] 1 Ch. 268, at p. 278.

[2] [1918] A.C. 239, at pp. 244, 247.

[3] [1943] Ch. 24.

[4] Counsel for Mrs. Oestreich.

" It was also submitted on behalf of Mrs. Oestreich that the words ' should my said sister survive me and be restrained by the operation of law from accepting this bequest ' constitute a condition subsequent, with the consequence that, construing the words strictly, there has been no forfeiture of the vested interest to which she became entitled on the death of the testator. For that contention reliance was placed on *In re Gourju's Will Trusts; Starling* v. *Custodian of Enemy Property, In re Furness,*[2] and *In re Pozot's Settlement Trusts; Westminster Bank Ltd.* v. *Guerbois.*[3] I do not take that view of this provision. Although that part of the gift which follows, and which related to the locating and identifying of Mrs. Oestreich, may be regarded as having been framed on the assumption that the gift is vested, I do not consider it proper to use it to govern the construction of the earlier condition. I agree with Mr. Skipper's[4] contention that that condition is the first provision to which attention must be given, and that it determines the question whether Mrs. Oestreich took any interest under the will at all. If she did, then the plaintiff was bound to make the attempt to locate and identify Mrs. Oestreich. If she did not, the gift to the Adelaide Children's Hospital took effect. In order to determine that question, the relevant time was the death of the testator: *cf. Powell* v. *Rawle,*[5] *In re Goldsmith; Brett* v. *Bingham,*[6] *In re Avard, deceased; Hook* v. *Parker.*[7]

" In my opinion, the conditional gift to Mrs. Oestreich did not take effect, and the Adelaide Children's Hospital is entitled to the two-fifths parts of the residuary estate. The question is as to the intention of the testator. The will was made at a time when the state of war between this country and Germany was still in existence. The testator clearly framed the provisions of clause (a) of paragraph 4 of the will with regard to the possibility that his sister might have died or disappeared, or might be prevented by some provision of the law from receiving at once the property of which he desired her to be the recipient. It seems to me to be clear that the testator had in mind the uncertainties of the situation which existed at the time when the will was made. The legislation and regulations, to which reference has already been made, undoubtedly had the effect of preventing Mrs. Oestreich from claiming payment of the interest or capital of the share of the estate in question so long as those provisions continued in force, that is to say, until such time as the existing state of war should be brought to an end. The word ‘ accepting ’ therefore should not be read in the sense of consenting to be a legatee under the will of the testator. If it is of any relevance, there is no doubt that Mrs. Oestreich is prepared to be a legatee under her brother's will, and her main concern has been to receive as soon as possible what she regards as her share in the estate. That aspect, however, is not in my view what the testator had in mind. The trusts of the residuary estate took effect upon the death of the testator, and the interests under paragraph 4 of the will thereupon became vested so far as they were capable of being vested. In the ordinary course of the administration of the estate it might have been some time before the plaintiff was in a position to pay the interests bequeathed by paragraph 4 of the will. It might even have been that the state of war would have come to an end before it was in a position to make those payments. That, however, is not conclusive of the matter. The first thing to be ascertained on the death of the testator, so far as Mrs. Oestreich is concerned, was whether there was any provision of the law which prevented her from ‘ accepting ’ the bequest. If she was then entitled to accept it, the plaintiff had a period of two years within which to locate and identify her. Upon the questions, what meaning should be attributed to the word ‘ accepting ’, Mr. Legoe's argument carries the matter a considerable distance in favour of his client. Where it fails, in my view, is that it is not in accord with the intention of the testator, as shown by the language of the will. What the testator had in mind was a distribution of his residuary estate, when it had been realised, and in any event an immediate vesting of the gifts of the shares contained in it, upon the assumption that the various beneficiaries who took those shares would be the absolute owners thereof, unfettered by any provision of the law from complete enjoyment of their respective interests, and, so far as might be, entitled to demand payment or transfer of those interests, without the consent or interference of any other person.

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[1] (1944) Ch. 46.
[2] [1944] 1 All E.R. 575.
[3] [1952] Ch. 427.
[4] Counsel for the Adelaide Children's Hospital (Incorporated).
[5] (1874) L.R. 18 Eq. 243.
[6] [1947] Ch. 339.
[7] [1948] Ch. 43.

" For these reasons question 1 in the summons will be answered in terms which will give effect to the view I have taken of the relevant provisions of the will. Question 2 therefore does not require an answer.

" I may add that there has been no suggestion that the course pursued by the plaintiff with regard to the ascertainment of the rights of the defendants under paragraph 4 (a) of the will has, or can have, any bearing upon the construction of the will. Indeed, the plaintiff apparently assumed in the first place that Mrs. Oestreich might be entitled to a share in the residue. After some correspondence with the Secretary to the Commonwealth Treasury, the plaintiff, in a letter dated January 20, 1950, sought his permission to remit to her the share in the estate to which at that time the plaintiff appears to have thought she was entitled. In answer to that letter the Delegate of the Controller of Enemy Property said that 'it would thus appear that the " operation of the law " still restrains the trustee from paying the bequest to Frau Helene Oestreich.' The originating summons was subsequently issued on August 22, 1951, and it requires the determination of the questions asked in it, notwithstanding the course which the plaintiff took, and the circumstance that the Controller took no action with regard to the share in question."

[Report: *State Reports* (*South Australia*), 1957, p. 252.]

War—Effects of Outbreak of—Trading with the Enemy—Termination of Power to Seize Enemy Property—By Unilateral Action—At Termination of War—Right of Alien to Sue—Restoration of Right—The Law of the United States of America.

See p. 932 (*Niehaus & Co. et Al.* v. *United States*).

War—Effects of Outbreak of—Trading with the Enemy—Authority Given to Agent Before Outbreak of War—Principal and Agent Resident in Different Territories, Both Occupied by Same Enemy—Whether Authority of Agent Determined by War.

See p. 945 (*The Chartered Bank of India, Australia and China* v. *Wee Kheng Chiang*).

VI.—Enemy Character

i.—Of Individuals

War—Enemy Character—Of Individuals—Residence in Enemy Territory in Time of War—Voluntary Residence in Order to Avoid Internment—The Law of the United States of America.

BROWNELL *v.* OEHMICHEN.

United States, Court of Appeals, District of Columbia Circuit.

February 28, 1957.

THE FACTS.—The plaintiff brought this action against the Attorney General under Section 9 of the Trading With the Enemy Act (40 Stat. 419, as amended, 50 U.S.C.App. § 9), to establish her right to certain property vested by the Alien Property Custodian in 1947, 1950, and 1951.

The plaintiff and her deceased husband, both German nationals, had entered the United States in 1934 and conducted a business there. Shortly after the declaration of war with Germany they were arrested as enemy aliens, and Mr. Oehmichen was interned. Mrs. Oehmichen voluntarily joined him in internment. Beginning in May 1942, the Oehmichens from time to time filed requests for repatriation to Germany, and were eventually repatriated in January 1945. In 1948, Mr. Oehmichen died, and the plaintiff came back to the United States, where she subsequently became a citizen.

Section 9 of the Trading With the Enemy Act permits any person not an enemy to institute a civil action for the recovery of property seized by the Alien Property Custodian. Section 2 of the Act defines " enemy " to include

> "Any individual . . . of any nationality, resident within the territory (including that occupied by the military and naval forces) of any nation with which the United States is at war."

The Attorney General maintained that Mrs. Oehmichen had quite clearly been resident within enemy territory in time of war and therefore was not entitled to bring an action for the recovery of her property. The plaintiff contended that the Oehmichens had sought repatriation in order to avoid the rigors of life in an internment camp and the hostility of their fellow internees. The United States District Court held that the Oehmichens were not " resident " in enemy territory because they had sought repatriation " to escape internment and the emotional problems created thereby." On appeal,

Held: that the judgment of the District Court must be reversed and judgment entered dismissing the case for lack of jurisdiction. The plaintiff and her husband were " enemies " within the meaning of the Trading With the Enemy Act by reason of their being residents of enemy territory. Mere discontent with the conditions in a well-run internment camp is not the compulsion which would translate otherwise voluntary repatriation into departure under duress.

The Court said: " The Oehmichens were citizens of Germany and were actully living on German territory during the war. If they had had their way they would have been in Germany for the duration of the war. In May, 1942, Mr. Oehmichen executed and filed a petition for repatriation ' In the event of my internment ' and further petitioned that his wife be permitted to accompany him ' to my native land '. Thereafter letters and petitions were filed July 8, 1942, July 26, 1942, September 2, 1942, and September 4, 1942. All these requests for repatriation were made while Mr. Oehmichen was at Ellis Island and before he was sent to the internment camp in Texas. They were made before he experienced internment.

" The record shows that at the internment camp the authorities provided a wide range of recreational activities, including movies twice a week, a huge swimming pool, baseball, tennis and badminton. There was a thirty-bed hospital. Mrs. Oehmichen testified that the food supply was very good and very adequate—' Yes, very, definitely.' Mrs. Oehmichen cooked for her husband. They were supplied certain items of furniture, and if they wanted anything else they could buy it. They had a radio and also had their dog sent down from New York. Mrs. Oehmichen testified, in respect to the living conditions: ' However, we would have put up with that, if we wouldn't have had the Nazi pressure in the camp.'

" In May, 1943, and January and February, 1944, they renewed their appeals for repatriation. On June 27, 1944, Mr. Oehmichen filed a letter addressed to the Officer in Charge of the camp, advising him, ' Should a review of my case result in a decision qualifying me for a parole, you are advised that I would not accept same.' Thus he refused freedom in America. Surely that choice was not induced by difficulties in internment.

" It is argued that under the rule of the *Guessefeldt* case[1] the Oehmichens were not possessed of the requisite intention to make them ' resident within ' Germany. We think that case does not apply here. Guessefeldt was visiting in Germany and was physically restrained from leaving it. The Court held that, being under such restraint and seeking at all times to return to the United States, he was not resident within Germany.

" The Oehmichens were in Germany by their own free choice. The explanation that because of difficulties with pro-Nazis they were compelled to return to Nazi Germany is singularly unimpressive. As a legal matter we are of opinion that mere discontent with conditions in a well-run internment camp is not the compulsion which would translate otherwise voluntary repatriation into departure under duress. Internment is the established international treatment of resident enemy aliens by all civilized countries.[1] The Oehmichens chose to return to an enemy country rather than to undergo that established treatment.

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[1] *Guessefeldt* v. *McGrath*, 1952, 342 U.S. 308, 72 S.Ct. 338, 96 L.Ed. 342 [*International Law Reports*, 1952, p. 580].

" If the argument of Mrs. Oehmichen were valid, all German citizens in the United States at the outbreak of the war could have returned promptly to Germany, exercising a wish not to be interned here, lived there until the war's end, and returned here to claim they had never been resident in Germany. Under her argument no German national residing in the United States prior to the war, and moving by choice to Germany during the war, would have become resident in Germany, as every such person was faced with the possibility of internment here. We think the statute reflects no intention to achieve such a result.

" We do not have in this case anything resembling the facts depicted in such cases as *Guessefeldt, supra, Acheson* v. *Murakami,*[2] *Kaku Nagano* v. *McGrath,*[3] or *Yaichiro Akata* v. *Brownell.*[4] The Oehmichens were willing residents of Germany."

Edgerton C.J. dissented. He expressed the view that an alien who had been long resident in the United States, who chose repatriation to enemy territory in preference to internment in the United States, and who always intended to return to the United States when the war was over, was not a " resident " of enemy territory within the meaning of the Trading With the Enemy Act. In his dissenting opinion, he said:

" The question is: If aliens who have long been resident in the United States choose repatriation to an enemy country in preference to imprisonment in the United States during a war, and always intend to return to the United States as soon as the war is over, are they, within the meaning of the Trading with the Enemy Act, ' resident ' in the enemy country during their sojourn there? I think not.

" The District Court made the following undisputed findings, among others. The requests for repatriation to Germany ' were made solely to escape internment and the emotional problems created thereby ' and ' were clearly limited to repatriation during the time that internment was expected to last, *i.e.*, the duration of the war. . . . Plaintiff and her husband at all times intended to return to the United States after the end of hostilities '. They retained ' a fixed determination ' to do so. Accordingly, 'At no time while they were in Austria or Germany did plaintiff or her husband seek employment or engage in business except for plaintiff's husband's employment with the United States Army of Occupation. Plaintiff's husband was offered opportunities to engage in business in Germany which he did not accept. . . . After plaintiff's furnishings were stored [here], both she and her husband, while in the United States and in Europe, refused offers to buy their automobile and certain household appliances at premium prices because they planned to use these possessions again upon their return to the United States.'

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[1] See full discussion in *Johnson* v. *Eisentrager*, 1950, 339 U.S. 763, 772 *et seq.*, 70 S.Ct. 936, 94 L.Ed. 1255 [*Annual Digest*, 1949, Case No. 153].

[2] 9 Cir,, 1949, 176 F.2d 953 [*Annual Digest*, 1949, Case No. 60].

[3] 7 Cir., 1951, 187 F.2d. 759.

[4] D.C.D. Hawaii, 1954, 125 F. Supp. 6 [*International Law Reports*, 1955, p. 921].

" It is true that Oehmichen's place of confinement when he first asked for repatriation was Ellis Island. But he and his wife did not choose to return to Germany in order to avoid Ellis Island. They knew that internment for him was in prospect. The court correctly states that they ' chose to return to an enemy country rather than to undergo ' internment. Their internment was legal and in accordance with international usage, but it was nonetheless imprisonment. Appellee and her husband never had ' any doubt ' that they were ' in prison '. No one similarly situated would have any doubt. The internment camp was surrounded by a ' very high ' barbed-wire fence, kept lighted at night. There were watchtowers and armed guards. The shelters had no plumbing. Water had to be carried in pails about a hundred feet. The bathhouses were about 500 feet away from the shelters. The fact that the food was good and there were recreation facilities did not turn the prison into something else.

" In explanation of the fact that she and her husband once refused parole, appellee testified: ' We felt that parole was like for any ordinary criminal. Mr. Oehmichen would have to report to a parole officer. And Mr. Oehmichen did not want to be in a waiting room with a criminal who might knock him on the shoulder and say: Buddy, how long have you been in? And that was the objection of Mr. Ochmichen to be released on parole. He did not feel he had done anything he needed to be paroled for. . . . He wanted to be released without any ties attached to it. I mean, parole meant that he was paroled of some guilt, which he did not feel he had. There was no guilt. Q Am I correct in saying that he felt by applying for parole, it was acknowledgement of guilt? A That is right. Q And he felt he would be treated as any other criminal? A Any ordinary criminal. Q Now, did you share that feeling, Mrs. Oehmichen? A At the time, yes.' When they learned that the conditions of parole would be less drastic than they had supposed, appellee requested her husband's release. Parole was then refused. When they left the United States, the alternative was not parole but continued imprisonment.

" I do not reach appellee's other contention."

[Reports: 100 App. D.C. 214, 243 F.2d 637; *certiorari* denied, 355 U.S. 842, 2 L.Ed.2d 50, 78 Sup.Ct. 49 (1957).]

NOTE.—In *Klein* v. *Brownell*, 155 F.Supp. 386 (E.D.N.Y. 1957), the United States District Court for the Eastern District of New York *held* that an American citizen, resident in Germany from 1905 to 1941, had remained voluntarily in that country after the outbreak of war between the United States and Germany and was accordingly not entitled to recover his property in the United States which had been vested under the Trading With the Enemy Act.

ii.—Of Corporations

War—Enemy Character—Of Corporations—Non-Enemy Shareholders—Protection of Rights of—In Proportion to Their Interests—The Law of the United States of America.

KAUFMAN *ET AL. v.* BROWNELL; ATTENHOFER *ET AL. v.* BROWNELL.

United States, Court of Appeals, District of Columbia Circuit.

June 20, 1957.

THE FACTS.—This case represented a further procedural stage of *Kaufman* v. *Société Internationale pour Participations Industrielles et Commerciales S.A.* (reported in *International Law Reports*, 1951, Case No. 161) and of *Société Internationale pour Participations Industrielles et Commerciales S.A.* v. *Brownell, Attorney General, et Al.* (reported *ibid.*, 1955, p. 184).

Commencing in February 1942, the Attorney General or his predecessors had issued a series of vesting orders by which, under the Trading With the Enemy Act, 40 Stat. 411, as amended, 50 U.S.C. App. §§ 1-40, the United States had seized some 93 per cent. of the stock of General Aniline & Film Corporation, said to have been property of foreign nationals or owned by or held for I.G. Farbenindustrie A.G. of Germany. In 1948, Société Internationale, a Swiss corporation formerly called I.G. Chemie but then commonly known as "Interhandel", had begun an action for the recovery of these assets.

The Kaufman group of innocent non-enemy shareholders were allowed to intervene to protect their interest in I.G. Chemie (*Kaufman* v. *Société Internationale, supra*), and intervention by the Attenhofer group was also allowed over the opposition of the Kaufman group (see *Kaufman et Al.* v. *Pine*, 344 U.S. 891, 97 L.Ed. 689, 73 Sup. Ct. 214 (1952)). Some 2,488 stockholders intervened; the complaints of 720 were dismissed; and the remaining 1,768 stockholders owned a total of 41,683 shares, representing 15.439 per cent. of the total outstanding stock of I.G. Chemie at the time of vesting. When the Attorney General announced on February 21, 1957, a proposed public sale of 75 per cent. of the vested General Aniline & Film stock, the interveners sought to enjoin the sale of any of the vested shares on the bases set forth at the beginning of the quoted portion of the opinion. The district Court denied the motion for an injunction, and the interveners appealed.

Held: that the judgment of the Court below must be affirmed. The United States Trading With the Enemy Act did not entitle the innocent non-enemy stockholders to enjoin the sale of the assets of the corporation, since adequate provision could be made for such stockholders, having severable interests in the corporate assets, through the reservation from sale of a quantity of stock adequate to answer such stockholder claims.

The Court said: "Appellants in the Kaufman group claim, in effect, that theirs is a corporate derivative action which entitles them ultimately to the return of ' the innocent proportion ' of the vested assets and that such portion may well exceed 80% of the vested property.

"Appellants in the Attenhofer group claim that the District Judge misconstrued the decision of the Court in Kaufman v. Société Internationale, erred in holding that the various appellants represent only themselves and not all nonenemy stockholders of Interhandel and further, briefly, erred in holding that retention of 25% of the vested stock is sufficient in view of the respective claims.

" Both groups insist that § 9(a) of the Trading with the Enemy Act[1] requires that *all* vested property here involved ' shall be retained ' by the Custodian once suit is brought and until final judgment. Without our particularizing as to further details of the grounds upon which reversal is sought, we turn to the *Kaufman* case which we deem controlling.

" The Court pointed out, as it supplied the background upon which intervention was permitted, that petitioners ' admitted the right of the Custodian to retain an interest in the seized assets proportional to the stock ownership of enemy stockholders.'[2] Thus the question was, said Mr. Justice Black,

> " ' What *part* of the assets of a corporation organized under the laws of a neutral country may the Custodian retain where *part* of the corporate stock is owned by enemies, *part* by American citizens, and *part* by nonenemy aliens?'[3]

" The answer, in paraphrase, ran to the effect that all corporate assets may be seized, whereupon consideration must be given to the plight of innocent stockholders whose innocent interests are not required to be confiscated. Accordingly,

> " ' Our holding is that when the Government seizes assets of a corporation organized under the laws of a neutral country, the rights of innocent stockholders to an interest in the assets proportionate to their stock holdings must be fully protected. This holding is not based on any technical concept of derivative rights appropriate to the law of corporations. It is based on the Act which enables one not an enemy as defined in § 2 to recover any interest, right or title which he has in the property vested. The innocent *stockholder* may not have title to corporate assets, but *he* does have an interest which Congress has indicated should not be confiscated merely because some others who have like interests are enemies.'[4]

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[1] 50 U.S.C.A.Appendix, § 9 (a).
[2] 343 U.S. at page 158, 72 S.Ct. at page 612.
[3] *Ibid.* (Emphasis supplied.)
[4] 343 U.S. at pages 159–160, 72 S.Ct. at page 613. (Emphasis supplied.)

" The Kaufman petitioners there had attacked the position of the corporation, Interhandel, which sought return of ' all its assets ' on the theory they would suffer if ' whatever return is obtained must be divided among enemy and nonenemy shareholders in proportion to their stock holdings.'[1]

" The Government, agreeing with the position of the corporate management, argued that if nonenemy stockholders were to be given any standing, they should be limited to individual suits for money judgments against the Custodian. ' Petitioners claim a proportional right or interest in the specific assets of Interhandel . . .'[2] Having so taken account of the respective arguments, and permitting maintenance of the corporate action, the Court then cut through the ' corporate veil ' and allowed—*in that corporate action*—the ' nonenemy stockholder *in his own right* [to] . . . assert *his* nonenemy character in order to protect *his own interest* from the enemy taint caused by other stockholders.'[3]

" To us the Court is speaking clearly, succinctly and positively. To avoid multiplicity of actions by thousands of individual shareholders, a corporate action may be brought as one had been brought. In that action an individual stockholder might intervene, and on the basis of his own entitlement, his individual right might be asserted. If he could not prove his right, that ended the matter, but at least he might intervene to show his own nonenemy character. Thus, the petitioners, represented then by the Kaufman group, were allowed to intervene over the strong dissent which saw the majority permitting a friendly stockholder to withdraw his contribution to the funds of the corporation.[4]

" We are no longer concerned with the problem of a corporate recovery, for the corporation's suit has been dismissed.[5] We thus conclude as did the Court, that each innocent nonenemy stockholder[6] permitted to intervene in the corporate suit, has a ' severable interest in corporate assets seized by the Custodian . . .'[7] When his right is established and the extent of that severable interest is shown, the courts have ' adequate equitable power and procedural flexibility to protect all interests,'[8] including that of the Government.

" Section 9(a) of the Act provides that when the court in an equity action finds an individual claimant's interest has been established, it shall order the ' payment, conveyance, transfer, assignment, or delivery . . . of the money or other property . . . or the interest therein to which the court shall determine said claimant is entitled '; not the property or interest therein of some *other* claimant, or even of all claimants similarly situated, but of that to which '*said claimant*' is entitled, as established in the suit he instituted. '[S]uch money or property' commanded to be retained pending final judgment or decree can only be that to which claim is made by the claimant authorized by § 9 to institute the action reflecting his own 'severable' right.

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[1] *Id.* 343 U.S at page 160, 72 S.Ct. at page 613.

[2] *Id.* 343 U.S. at page 161, 72 S.Ct. at page 613.

[3] *Ibid.* (Emphasis supplied.)

[4] 343 U.S. at page 168, 72 S.Ct. 611.

[5] *Supra*, note 2.

[6] *von Opel* v. *Brownell*, 1957, 100 U.S. App. D.C. 341, 244 F.2d 789 [see Note (II) *nfra*, p. 910.]

[7] 343 U.S. at page 161, 72 S.Ct. at page 614.

[8] *Ibid.*

" It follows that the intervenors here were not entitled to enjoin the sale of assets aggregating in value some $100,000,000 pending ascertainment (1) of their right and (2) the extent of their respective interests following the establishment of their severable rights.

" But, it is argued, the District Court in any event erred in finding that the interests of the intervening groups did not exceed 25% of the vested assets, indeed that it was error to find such interests amounted to only 15.439% of the total outstanding stock of I. G. Chemie at the date of vesting. We cannot say the District Court abused its discretion or otherwise erred in retaining 25% of the vested assets to answer to such claims and interest as shall be established."

[Report: 247 F.2d 553.]

NOTE.–(I) The above case, which turned upon the interpretation of the law of the United States, is reported here because of its relationship to the Order of the International Court of Justice dated October 24, 1957, in the *Interhandel Case* (*Switzerland* v. *United States of America*), reported *supra*, p. 870, and the Judgment of the Court in the same case given on March 21, 1959: *I.C.J. Reports*, 1959, p. 6.

See also *Brownell et Al.* v. *Kaufman et Al. and Société Internationale pour Participations Industrielles et Commerciales, S.A.*, reported *infra*, p. 911.

(II) *Von Opel* v. *Brownell*, 100 App. D.C. 341, 244 F.2d 789 (1957), *certiorari* denied, 355 U.S. 878, 2 L.Ed.2d 108, 78 Sup. Ct. 141 (1957), was a further stage in the litigation reported *sub nom. Uebersee Finanz-Korporation, A.G.* v. *McGrath* (see *International Law Reports*, 1952, Case No. 126), and also dealt with intervention by a national of a neutral State. In the *Von Opel Case* the intervener, a national of Liechtenstein and owner of all the shares of Uebersee, a Swiss corporation, was denied recovery of the property of Uebersee vested by the United States under the Trading With the Enemy Act. The fact that German nationals held a usufructuary interest in the intervener's shares in Uebersee precluded the intervener from being an innocent stockholder within the holding in *Kaufman* v. *Société Internationale pour Participations Industrielles et Commerciales, S.A.* ("*Interhandel*"), reported in *International Law Reports*, 1951, Case No. 161.

War—Enemy Character—Of Corporations—Non-Enemy Shareholders—Protection of Rights of—Against Recapitalization of Corporation—The Law of the United States of America.

BROWNELL *ET AL.* v. KAUFMAN *ET AL.* AND SOCIÉTÉ INTERNATIONALE POUR PARTICIPATIONS INDUSTRIELLES ET COMMERCIALES, S.A. (I.G. CHEMIE).[1]

United States, District Court, District of Columbia. October 10, 1956.

Court of Appeals, District of Columbia Circuit. November 21, 1957.

THE FACTS.—This case represented a further procedural stage of *Kaufman* v. *Société Internationale pour Participations Industrielles et Commerciales S.A.* (reported in *International Law Reports*, 1951, Case No. 161) and of *Société Internationale pour Participations Industrielles et Commerciales S.A.* v. *Brownell et Al.* (reported *ibid.*, 1955, p. 184).

The case arose on three motions for preliminary injunctions to restrain the defendant, the Attorney General of the United States, from proceeding with a proposed plan to recapitalize or otherwise change the capital structure of General Aniline & Film Corporation. By reason of the vesting of the stock of General Aniline & Film Corporation, the Attorney General had secured control of the corporation and intended to vote in favour of the proposed plan. One of the three motions was filed by Société Internationale; the other two by the Kaufman and Attenhofer groups, consisting of non-enemy stockholders who had been allowed to intervene (see *Kaufman et Al.* v. *Brownell*, reported *supra*, p. 907).

The plan of recapitalization called for the retirement of certain treasury shares, the reduction of the capital of the corporation, the issue of new shares, and the reclassification of outstanding shares. The proposed recapitalization was designed to simplify an excessively complicated capital structure and to simplify and clarify the rights of shareholders. Of the two new classes of shares to be established, one would be freely transferable, while the other would be restricted as to ownership and transfer to American nationals in accordance with the regulations of the Office of Alien Property Custodian.

Held (by the District Court, *sub nom. Société Internationale, etc., et Al.* v. *Brownell, Attorney General, et Al.*); that the injunction should issue on behalf of the intervening plaintiffs. The proposed plan would violate Section 9 (*a*) of the Trading With the Enemy Act (40 Stat. 419, as amended, 50 U.S.C. App. § 9 (a)), which provides that if suit should be brought against the Alien Property Custodian (the predecessor of the Attorney General), the money or property in question should be retained until the suit had been finally decided. The exchange would alter the rights and privileges pertaining to the stock in such a manner as to impair valuable rights and modify the present nature and character of the stock. Section 9(*a*) of the Act would be nullified if the Attorney General were to be allowed to change the basic stock structure of the corporation.

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[1] Commonly known as "Interhandel".

The Court said: " The movants, as above stated, are the plaintiff, herein called Interhandel, and the intervenors above named. Interhandel claims to be the owner of 2,050,000 shares of Common B stock and 455,448 shares of Common A stock of General Aniline & Film Corporation, which defendant's predecessor vested under the Trading With the Enemy Act. Action for its recovery was instituted by Interhandel, but this action now has been dismissed with prejudice. It would serve no useful purpose to recount the various proceedings in this Court and in the appellate tribunals preceding this dismissal, nor the proceedings thereafter. The record speaks for itself, and on that record cogent argument has been made that plaintiff Interhandel, in its action, has no standing to seek an injunction in the present posture of the case. However, I am not required to reach that point, as the decision hereinafter set forth makes it unnecessary, and a ruling on the question will be deferred pending outcome of its present appeal.

" There remain the claims of the intervenors. They allege that they are stockholders of plaintiff Interhandel, assert a non-enemy status, and seek their proportionate share of the seized property under the authority of *Kaufman* v. *Société, etc.*, 343 U.S. 156, 72 S.Ct. 611, 96 L.Ed. 853.[1] . . .

" The question raised is whether the proposed plan, if consummated, violates Section 9(*a*) of the Trading With the Enemy Act, 50 U.S.C.A. Appendix, § 9(*a*) which provides that ' if suit shall be so instituted, then such money or property shall be retained in the custody of the Alien Property Custodian . . . as provided in this Act, and until any final judgment or decree which shall be entered in favor of the claimant shall be fully satisfied . . . or until final judgment or decree shall be entered against the claimant or suit otherwise terminated.'

" In other words, would the stock vested from Interhandel be ' retained ' under the proposed plan, within the meaning of the statute? Clearly it would not be retained in a literal sense. That is conceded, but defendant argues that it would be substantially retained, with no rights of real value lost, and that their plan is merely an act of administration of the property, dictated by good business practices and more particularly in order to provide a more attractive means for equity financing. Intervenors, however, contend that the plan would take from the existing stock valuable rights and change its nature and character, and that it therefore is forbidden by the statute requiring retention by defendant until final disposition of the action.

[[1] See *International Law Reports*, 1951, Case No. 161.]

" The authorities on this point have been collected, cited, and discussed in intervenors' briefs, and it is unnecessary to repeat them for the purpose of this memorandum. Suffice it to say that they hold that the defendant is under the duty to preserve the integrity of the seized property, once suit has been instituted.

" In my opinion, the proposed plan is far from an exchange of one piece of paper for another, or an exchange similar to that of exchanging an amount of money for the same amount in different denominations, which appears to be the net result of defendant's argument. On the contary, as I see it, the exchange would alter the rights and privileges pertaining to the stock in such a manner as to impair valuable rights and modify the present nature and character of the stock. In other words, it would substitute one property right for a different property right, and cause irreparable injury to intervening petitioners. It would enhance the rights now incident to Common A stock to the detriment of the Common B stock. It does maintain the ratio of dividends of ten to one, presently in favor of the Common A stock, accomplished by the giving of four shares of new stock for one share of present A stock, and the giving of 4/10 of a share of new stock for the present B stock, and providing that the new stock shall share equally in dividends. But in so doing, it increases the voting rights of the present Common A stock and decreases the voting rights of the present Common B stock. The plan also abolishes the liquidation rights incident to Common A stock, the preemptive rights of Common B stock, and the redemption provision incident to Common A stock, which is advantageous to Common B stock.

" The contention of defendant that the proposed plan is wise and desirable for future financing, in the opinion of experts, is not a legal reason for contravening the statute. The intervenors apparently have a different view of what is wise and desirable to be done with the property they claim to be their own, and are entitled to the protection of the statute.

" Neither am I impressed by the argument of defendant that liquidation rights are of no value because liquidation at the moment appears to be remote. It is still a right, and whether remote or not (and none of us can see into the future), it is also one that deserves protection. I see no necessity for going into the question of what would happen today in case of liquidation, extensive aguments on which have been made based on book value and estimated value. The fact still remains that each share of present Common A stock, in case of liquidation, has a $75 preference, after which the assets are distributable in equal parts to holders of Common A and Common B shares, and this would be eliminated under the proposed plan with detrimental results.

" Nor do I see validity in the argument of defendant that the change in voting rights is of no consequence. Under the proposed plan, Common A shares would be increased to four votes instead of one, and Common B shares would be reduced to 4/10 of a vote instead of one. Moreover, the non-American intervenors now permitted to buy any newly issued shares, under the proposed plan would be prevented from purchasing any of the more than 1,800,000 new Class B shares, because they are to be restricted as to ownership and transfer to American nationals. Furthermore, if defendant should sell any of the non-Interhandel shares vested in him—and he is considering such a sale, according to the proxy statement—they would likewise be converted into the new Class B restricted common shares unavailable for purchase by the non-American intervenors. The practical effect of this would be further to impair intervenors' ability to protect their voting position in the corporation.

" So far as preemptive rights are concerned, the present charter gives Common B shareholders the right to subscribe for additionally authorized common stock, over the presently authorized three million shares, at $1 per share. The defendant contends that the preemptive rights are without value because the chances of any newly authorized Common B stock ever being issued at $1 per share ' are remote.' The remoteness of a right would affect its value, but it is still one of the incidents of ownership.

" Nor can I follow the argument that because Common A shares are not traded or listed on any stock exchange, the redemption right which is based on market price as shown by average quotations is illusory and without value. I cannot forecast that at a future date it will not be listed on a recognized stock exchange.

" Lastly, I cannot read into Section 9(*a*) of the Trading With the Enemy Act, which provides for retention and which defendant does not claim has been repealed, the power to do what is proposed by virtue of the provisions of Sections 5(*b*) and 12 of the Act, 50 U.S.C.A. Appendix, §§ 5(*b*), 12. If read as defendant contends, the ' retention ' provision would be nullified in cases like the instant one, wherein defendant wishes to change, as he does here, the basic stock structure of the corporation whose stock he has vested.

" It should further be borne in mind that in this case the defendant has not planned to do as he proposes by reason of circumstances beyond his control, such as bankruptcy, perishability of the property vested, lack of control in putting the plan into effect. As above stated, the defendant here is in control of the corporation.

" Under these circumstances, and balancing the equities, I reach the conclusion that an injunction should issue on behalf of the intervening plaintiffs against the defendant, as prayed. . . ." [Report: 145 F. Supp. 494.]

On appeal,

Held (by the Court of Appeals, *per curiam*): that the injunction must be continued in effect. Decision would be withheld as to whether the proposed recapitalization would violate Section 9(*a*) of the Trading With the Enemy Act, pending the outcome of *Société Internationale pour Participations Industrielles et Commerciales S.A.* v. *Brownell, Attorney General, et Al.* (reported in *International Law Reports*, 1955, p. 184), as to which *certiorari* had been granted by the Supreme Court (355 U.S. 812; 2 L.Ed.2d 30; 78 Sup.Ct. 61 (1957)).

The Court said: "On October 14, 1957, the Supreme Court granted the petition of the Société Internationale Pour Participations Industrielles et Commerciales, S. A., for writ of *certiorari* to review the decision of this court in *Société Internationale etc.* v. *Brownell*, 100 U.S.App.D.C. 148, 243 F.2d 254; 78 S.Ct. 61.[1] This occurred subsequent to the order of the District Court in the present case enjoining the Attorney General, as successor to the Alien Property Custodian, from voting the stock of General Aniline and Film Corporation for, or otherwise proceeding with, a recapitalization of that corporation. The ownership of the stock is the underlying subject matter of the case now pending in the Supreme Court and, to a lesser degree, of this case.

"In view of this situation we think that at least for the time being the injunction should be continued. Questions involving the ownership of the stock are likely to be decided by the Supreme Court at its current term. Thus the positions of the parties to the instant case might be altered, and a clearer approach afforded to the important legal questions involved.

"Relying upon the principle that supervening events may be considered by an appellate court in determining a just disposition of the matter on appeal,[2] we will continue in effect the injunction but will withhold a decision as to whether or not the recapitalization would bring about such a change in the vested property as to cause it no longer to be retained as required by section 9(*a*) of the Trading With the Enemy Act.[3] Decision of that question we think should await disposition by the Supreme Court of the main litigation now there pending, or the further order of this court. In event no further order of this court is entered prior to decision by the Supreme Court, parties to the present appeal may, within 15 days after the Supreme Court has acted, file with this court such memoranda or motions as they may be advised."

[Report: 251 F.2d 374.]

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[1] [See *International Law Reports*, 1955, p. 184.]

[2] An appellate court has "power not only to correct error in the judgment entered below but to make such disposition of the case as justice may at this time require. . . . And in determining what justice now requires the Court must consider the changes in fact and in law which have supervened since the decree was entered below." *Watts, Watts & Co.* v. *Union Austriaca*, 248 U.S. 9, 21, 39 S.Ct. 1, 63 L.Ed. 100; *Schaff* v. *R. W. Claxton, Inc.*, 79 U.S. App.D.C. 207, 144 F.2d 532. And see *Vandenbark* v. *Owens-Illinois Glass Co.*, 311 U.S. 538, 543, 61 S.Ct. 347, 85 L.Ed. 327; *In re Morris White Handbags Corp.*, 2 Cir., 77 F.2d 827; *State of Washington* v. *United States*, 9 Cir., 214 F.2d 33, 47 note 14.

[3] 40 Stat. 419 (1917), as amended 50 U.S.C.A. Appendix, § 9(a).

NOTE.—The above case, which turned upon the interpretation of the law of the United States, is reported here because of its relationship to the Order of the International Court of Justice dated October 24, 1957, in the *Interhandel Case* (*Switzerland* v. *United States of America*), reported *supra*, p. 870, and the Judgment of the Court in the same case given on March 21, 1959: *I.C.J. Reports*, 1959, p. 6.

See also *Kaufman et Al.* v. *Brownell; Attenhofer et Al.* v. *Brownell*, reported *supra*, p. 907.

iii.—Of Ships

Enemy Character—Of Ships—Ships which are Neutral Property and Sailing under Non-Enemy Flag—Assimilation by Virtue of Dutch Legislation to Ships Under Enemy Flag—Ships of States with which Diplomatic Relations Have Been Servered and which have Taken Up an Attitude Contrary to Dutch Interests—Construction of Municipal Legislation—Non-Enemy Interests.

THE NYUGAT.

Holland, Supreme Court. January 13, 1956.

(Donner C. J.; van der Meulen, Hyink, Smits and Boltjes JJ.)

THE FACTS.—On April 13, 1941, the Netherlands destroyer *Kortenaer* stopped and searched the *Nyugat*, a vessel sailing under the Hungarian flag, outside the territorial waters of the former Dutch East Indies in the Timor Sea. Since December 1940 the *Nyugat* had been under a time charter for the Australian Wheat Board. She had loaded a cargo of flour in Adelaide destined for Taku Bar (China), and was now on her way to Manila, her first port of call. The *Kortenaer* took her into Surabaya, where she was sunk the following year.

The plaintiffs, a Swiss company, asked for a declaratory judgment by the Supreme Court to the effect that the *Nyugat* had been unlawfully stopped, searched, captured, deviated from her course, taken into Surabaya and put into use, and that they were entitled to claim compensation for any damage arising from these acts and for the eventual loss of the *Nyugat*. The plaintiffs based their claim on the following allegations: Everything that had happened to the *Nuygat* was illegal. The vessel was Swiss property. It was true that she had formerly belonged to a Hungarian company, but the plaintiff company became the owners of the ship in 1941, having already held all the shares in the Hungarian company before they acquired title to the vessel. The shareholders had been and still were exclusively Swiss. The ship was entitled to sail under the Swiss flag, and subsequently, when transferred, under the Panamanian flag. She sailed for the benefit and in the cause of the Allies; and the Hungarian flag was at the time of her capture a neutral flag. At no time after the transfer of sovereignty from the Netherlands to Indonesia on December 27, 1949, was there a court in Indonesia competent to hear this case, it was contended. The plaintiff company was a non-enemy person within the meaning of the Netherlands Prize Rules of June 3, 1940 (London *Staatsblad* No. A 2); the *Nyugat* was neutral property; she sailed under a non-enemy flag and she was never declared good and lawful prize, nor was she liable to condemnation. The authority responsible for the capture within the meaning of the Prize Rules could not reasonably claim to be entitled to make that capture.

On behalf of the defendant State of the Netherlands, it was contended as follows: In connection with their life-and-death struggle with the German Reich, the Netherlands severed diplomatic relations with Hungary on April 9, 1941. The *Kortenaer* was a man of war within the meaning of Article 1 of the Prize Rules and was under the supreme command of the Governor-General of the Dutch East Indies. When the Hungarian captain of the *Nyugat* heard that Great Britain had declared war on Hungary, he decided to make for a Japanese instead of a Chinese port. The pro-Allied members of the crew frustrated that decision by sabotage. The mate/wireless operator several times gave the position of the *Nyugat* over the radio so as to put Allied warships on her track. The chase, stopping and visit of the *Nyugat* was effected in consultation with the Australian Government, which did not trust the captain, who had intimated his intention to scuttle his ship if she were stopped by British warships. After the capture, the Prize Commissioner of the Dutch East Indies instituted prize proceedings before the High Court of Justice in Batavia, but, owing to the Japanese occupation, the case could not be pursued and it was not subsequently resumed. The *Nyugat* had been entered on the Hungarian Shipping Register on November 24, 1934. There was no evidence that the title to the *Nyugat* had passed to the plaintiffs at the moment of capture. The only material fact was, under what flag the *Nyugat* was sailing when she was captured. It was therefore irrelevant whether the plaintiffs were entitled, before the capture, to let her sail under the Swiss or the Panamanian flag. Only after capture, *viz.*, on April 28, 1941, did the Hungarian Government give permission for the *Nyugat* to be struck off the Hungarian register. The captain and officers of the *Kortenaer* did not act upon the instructions of the defendant Government, but upon those of the Netherlands Indies authorities. Consequently, this claim should have been brought against the Republic of Indonesia. By virtue of Article 23 of the Prize Rules, the commanding officer of the *Kortenaer* was competent to capture the *Nyugat*, as he had good reason to believe that ship and cargo were liable, wholly or in part, to be condemned as good and lawful prize. The *Nyugat* was an enemy ship within the meaning of Article 15 of the Prize Rules. The German Reich had enlarged its influence in countries like Hungary to such an extent that sea Powers like Great Britain and the Netherlands were led to regard all traffic in Hungarian ships as being tainted. For the same reason the *Nyugat* was to be regarded as an enemy ship. On the same grounds, the defendant State of the Netherlands counterclaimed for the condemnation of the *Nyugat* as lawful prize.

In the course of the proceedings the State of the Netherlands accepted responsibility for the capture, and withdrew its defence that the plaintiffs should have brought their claim against the Republic of Indonesia. On the other hand, the plaintiffs added to their pleadings the following argument: the *Nyugat* had never been an enemy ship within the meaning of the Prize Rules of June 3, 1940. The amendments to those Rules could not be relevant because they had all been promulgated after the date of the capture of the *Nyugat*. The Royal Decrees by which these amendments were introduced were not retroactive. The extension which they gave to the notion of " enemy ship " was contrary to international law and, in particular, to prize law. The same applied to any possible retroactive effect.

Held: that both the claim and the counterclaim must be dismissed. On the claim: the *Nyugat* had been rightly captured, the Hungarian flag having been the subject of an enactment under which she was deemed to be an enemy ship. On the counterclaim: the Supreme Court was not competent to condemn in prize.

The Court said: " Condemnation as prize within the meaning of the Prize Rules of the Kingdom of the Netherlands of June 3, 1940 (London *Staatsblad* No. A 2) must be understood as meaning a judicial decision pronounced on the initiative of the State, and declaring that a vessel has been lawfully captured and that title to the prize thus taken has consequently accrued to the State. Such a judgment is binding on all those whose interests are concerned with the prize and cannot, therefore, be given until all the interested parties, known as well as unknown, have been cited so as to enable them to protect their rights. The Prize Rules, which do not themselves contain any provision on legal procedure, assume that a regulation to this effect and laying down the further formalities to be observed in an action for condemnation would be given in a separate enactment. Such a regulation existed in the former Dutch East Indies, Surinam and Curaçao, but not in the Netherlands. A condemnation cannot, therefore, be pronounced by a Netherlands court.

" Invoking Article 71 of the Prize Rules,[1] the plaintiffs argued that the mere fact that the captured vessel had not been duly declared good and lawful prize was sufficient to entitle them to a

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[[1] Article 71 provides: " Captured ships, aircraft or cargoes which are not condemned shall be delivered to the parties entitled thereto."]

favourable decision, assuming, of course, that the plaintiffs were the 'parties entitled'. Article 71 did not, however, apply to a case such as the present. The provision cannot be construed to mean that if a condemnation is impossible for lack of procedural rules, the 'rightful claimant' can claim damages because the ship was not returned to her owners, irrespective of whether the capture was lawful or not and irrespective of whether, as in the present case, the prize was sunk after the capture. It has not been asserted, nor was there any evidence, that this sinking can be blamed on the State nor that the wreck was or could have been salved and that the value thereof had gone or would go to the State.

[The Court went on to point out that it must first be ascertained whether the capture had been lawful, and continued:] "Under Article 51 of the Prize Rules,[1] enemy ships—after having been captured pursuant to Article 23 *et seq.*—are condemned as such. Article 15 of the Prize Rules originally ran as follows:

> "'Besides ships recognizable as enemy ships by the flag under which they sail or in any other way, the term "enemy ships" also comprises:
>
> "'(a) those ships which, even though entitled to sail under a non-enemy flag, are owned by, or sail on behalf of, an enterprise in which predominantly enemy interests are involved, and
>
> "'(b) those which have been transferred to a non-enemy flag with the intention of evading the consequences which the status of enemy ship entails.'

By Royal Decree of July 10, 1941 (London *Staatsblad* No. B 58), a second paragraph was added to Article 15 which read as follows:

> "'The expression "enemy ships" shall also be deemed to mean ships sailing under a non-enemy flag to be determined by Us.'

This second paragraph of Article 15 was in its turn cancelled by Article 1 of the Royal Decree of January 7, 1942 (London *Staatsblad* No. C 1) and replaced by a new second paragraph, which thereafter remained unchanged. This new second paragraph runs:

> "'By enemy ships are also meant ships sailing under a non-enemy flag to be determined by Us, including those ships which have sailed under such a flag as from the date of the breach of diplomatic relations between the Kingdom and the State of the flag in question or as from the time at which that State must be deemed to have taken an attitude contrary to the interests of the Kingdom of the Netherlands.'

By Royal Decree of July 21, 1941 (London *Staatsblad* No. B 59) the flags of four States, including Hungary, were determined, under Article 15, paragraph 2, in its wording of July 10, 1941, to be 'non-enemy flags'; this would cause vessels sailing thereunder exceptionally to be regarded as enemy ships. No such determination was made

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[[1] Article 51 provides: "Enemy ships and aircraft are captured as such."]

after the second amendment of Article 15 by the Decree of January 7, 1942.

" On behalf of the State, it was argued that it follows from the new paragraph 2 of Article 15 of the Prize Rules established by Decree C 1, read with Decree B 59, that a ship which, whilst sailing under the Hungarian flag, had been captured before Decree C 1 became operative, must be deemed to be an enemy ship at the time of her capture provided, as was the case in regard to the *Nyugat*, that diplomatic relations between the Netherlands and Hungary had already been severed or that Hungary had assumed an attitude contrary to the interests of the Netherlands before the capture. The plaintiffs contended that the extension which was given in the Decrees to the meaning of the term ' enemy ' was in violation of the generally accepted notions of the law of prize and that these principles do not, moreover, permit the giving of retroactive effect to provisions of prize law. It is true that a Netherlands court is generally not free to refuse to apply a provision of a Netherlands law on the ground of violation of such general principles in so far as they have not been established in a treaty. But as it may not lightly be assumed that the Netherlands legislative authorities intended to deviate from the general principles of prize law, an interpretation of the Decrees in a sense incompatible with those principles would be permissible only if the text of the Decrees compelled the court to interpret them in that sense.

" For a correct understanding of the scope of the new Article 15, paragraph 2, of the Prize Rules, the following facts are of substantial importance.

"About the beginning of April 1941 Hungary came under such strong pressure from Germany to grant her military assistance that she was practically compelled to attack Yugolsavia, on April 11, 1941. Similar pressure was exercised by Germany on Roumania and Bulgaria, with like result. Italy was, since June 10, 1940, at war with England and France. In connection with these events diplomatic relations between the Netherlands and Hungary were severed on April 9, 1941, and those between the Netherlands and Italy, Roumania and Bulgaria on other dates in 1941. These events were evidently also the reason why, by Decree B 59, the flags of Hungary, Italy, Roumania and Bulgaria were ' determined to be non-enemy flags ' under Article 15 of the Prize Rules. By the subsequent Royal Decrees B 87 and B 100, the flags of Finland and Thailand were similarly determined, for similar reasons. Such determination was not made with regard to the flags of other States, clearly because there was less need therefor. The only ship already captured at the time of the promulgation of Decree C 1 with regard to which the new paragraph 2 of Article 15 could operate, was the *Nyugat*.

"Article 15, paragraph 2, finally established by Decree C 1, differs from the provisions of the preceding Decree B 58 only in that the words 'shall . . . be deemed to mean' were changed to 'are . . . meant', and that the passage starting with the word 'including' was added to the original text thus amended. In the light of the above facts it is beyond doubt that the amendment by Decree C 1 was intended to provide that ships sailing under a non-enemy flag 'determined' as enemy by the Crown and which had already been captured were to be deemed to be enemy ships for the purpose of condemnation, provided that their capture had taken place after diplomatic relations between the Netherlands and the State concerned were severed, or that that State had assumed an attitude contrary to Netherlands interests by participating in the struggle at the side of the enemy, but irrespective of whether the prize was taken before or after the coming into force of Decree C 1 and/or before or after the 'determination' of the flag. By Decree C 1 the words 'are . . . meant' were now to be read instead of 'shall . . . be deemed to mean'. Evidently that served to show that the new paragraph 2 of Article 15 was considered to be an interpretative provision. The underlying thought must have been that the flag of a State which, as was the case with Hungary, had become an instrument in the hands of the enemy to such an extent that it joined the enemy and participated in battle, must, according to the correct interpretation of the law of prize, be deemed to be an enemy flag as regards the Netherlands, notwithstanding the absence of a declaration of war. On this reasoning there can be no question of violation by the Crown of one of the generally accepted principles of public international law.

"Nor can the Court accept the argument of the plaintiffs that the defendant was not in a position to invoke Decree B 59 because Decree B 58 on which it relied had been cancelled by Article 1 of Decree C 1 and because, consequently, Executive Decree B 59 also had lapsed. Since Decree C 1 was meant only to determine further the purport of Decree B 58, it is obvious that there was no occasion for enacting a new Executive Decree on the same lines as Decree B 59.

"It must therefore be assumed that the *Nyugat*, when she was captured on April 13, 1941, was sailing under an enemy flag and in consequence was capable of condemnation unless any other circumstance should be a bar thereto. . . .

"The plaintiffs in their argument invoked the first paragraph of Article 77 of the Prize Rules[1] under which enemy ships which

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[[1] Paragraphs 1 and 3 of Article 77 provide as follows:

"1. Within the limits set by that Convention, enemy ships to which Article 3 of the VIth Convention of The Hague of 1907 (*Staatsblad* 1910, No. 73) relative to the Status of Enemy Merchant Ships at the Outbreak of Hostilities refers, and which have left their last port of sailing before the commencement of the war and are found at sea unaware of the outbreak of hostilities, are not liable to confiscation. They may, however, be seized on the understanding that they will be returned to their owners after the war without compensation or be requisitioned or even destroyed on payment have left their last port of sailing before the beginning of the war and are found at sea unaware of the outbreak of hostilities, are not liable to capture, read with the third paragraph which provides that if, as in the present case, not all the belligerents are parties to the Sixth Convention of The Hague of 1907, the relevant exemption shall as regards co-signatories to the Convention apply ' on terms of reciprocity '. The plaintiffs claimed that such reciprocity existed because Hungary had no warships at the time. The Court rejected this argument because, for the existence of reciprocity, it would be necessary that Hungary should have made a declaration to that effect in regard to the Netherlands.

" Finally, reference was made by the plaintiffs to Article 74 of the Prize Rules,[1] which provides that in the case of aship captured on account of her character, the Prize Court can, where non-enemy interests are concerned, make a recommendation to the Crown that from the proceeds or the value of the prize a reasonable payment shall be made to the interested parties. That provision could be applied by analogy in an action like the present, but there were no reasons to do so because it was not alleged, nor was there any evidence, that any ' proceeds or value ' as referred to in the Article were extant."

[Report: *N.J.*, 1956, No. 141.]

NOTE.— I. Article 89 of the Law of April 18, 1827, on the Judicature and the Administration of Justice provides, *inter alia*, that the Supreme Court takes cognizance in first instance of all matters pertaining to prizes and booty which are brought into port by men-of-war of the State. The case reported above is the first prize case ever to come before the Netherlands Supreme Court since its creation as a Prize Court in 1827. Under Article 90, an appeal, called " review ", lies to the same Court sitting with an enlarged bench of seven Judges (Articles 359–375, in particlar Article 368, of the Code of Civil Procedure). Such an appeal was in fact lodged in the present case, and in March 1959 the judgment given at first instance was affirmed. This judgment in review will be reported in a subsequent volume of the *International Law Reports*.

II. When on May 10, 1940, the Netherlands became a belligerent in the Second World War, draft Prize Rules were ready but had not yet been

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of compensation and subject to the obligation to take care of the safety of the persons on board and the preservation of the ship's papers.

" 2. . . . .

" 3. The exemption referred to in this Article shall apply:

" (a) with regard to States co-signatories to the Convention, if all the belligerents are parties to the Treaty;

" (b) with regard to States co-signatories to the Convention, if not all the belligerents are parties to the Treaty, on terms of reciprocity;

" (c) with regard to States not co-signatories to the Convention, on terms of reciprocity."]

[1] Article 74 provides: " In the case of a ship or aircraft captured on account of its enemy character or of a cargo seized for the same reason, the Prize Court may, where non-enemy interests are concerned, submit to the Crown the recommendation that from the proceeds or the value of the prize thus taken a reasonable payment shall be made to the interested parties."]

enacted. The Netherlands Government-in-Exile in London promulgated the Prize Rules by a Royal Emergency Decree dated June 3, 1940, which had the force of law (London *Staatsblad* No. A 2). As the Supreme Court had ceased to exist as a Prize Court owing to the occupation of the Netherlands, there was no reason for the Government to promulgate Executive Prize Court Rules for the Netherlands proper, as it did for the then Netherlands Indies (Indonesia) and for Surinam and Curaçao. In principle, however, the Prize Rules of June 3, 1940, applied for the whole of the Kingdom of the Netherlands with all its component territories.

III. Under Article 65 of the Constitution, Netherlands courts are forbidden to apply any law which is contrary to a treaty or any other international agreement entered into by the Netherlands. In the case reported above, the Supreme Court held, incidentally, that Netherlands courts are bound to apply a statute which is contrary to a rule of unwritten public international law. That question had never previously been examined, and the correctness of the *obiter dictum* is necessarily open to question.

iv.—Of Goods

War—Enemy Character—Goods of Enemy Origin Owned by Neutral Citizens—Seizure of Goods by Belligerent—Law of Seizing Power Reserving Ultimate Fate of Goods Until after Cessation of Hostilities—Fate of Goods to be Determined " Equitably "—The Law of France.

Re CARGO HOLLANDAIS BILDERDIJK.

France, Conseil des Prises. November 27, 1957.

THE FACTS.—A French Decree of November 27, 1939, provided —as far as here material—that goods of enemy origin (whether or not enemy-owned) were liable to seizure if loaded at neutral ports on ships leaving such ports after December 4, 1939. The same Decree provided that after the conclusion of peace the *Conseil des Prises* would determine the ultimate fate of all goods seized " in accordance with equitable principles and having regard to all the circumstances ". A Dutch vessel left the port of Rotterdam after December 4, 1939, with several hundred cases of German wine on board. The wine, which was owned by a Dutch firm and consigned to the United States of America, was seized by the French authorities, and after the war the Dutch owners claimed damages.

Held: that although the wine had been lawfully seized, the Dutch owners were entitled, " in equity and having regard to all the circumstances ", to an indemnity equivalent to the value of the wine seized.

The Court said: "According to Article 1 of the Decree of November 27, 1939, the authorities were entitled to insist on the unloading in French ports of goods of enemy origin, goods coming from enemy territory, and goods owned by enemies, where such goods had been loaded in non-enemy ports on ships leaving such ports after December 4, 1939. The Decree was enacted as a measure of reprisal against acts of the German Government designed to prevent all maritime trade between the Allies and non-belligerent countries, and it was intended to paralyse all maritime traffic between Germany and the rest of the world. In order to achieve this end it was not limited to the seizure of goods owned or consigned by enemies, but it also authorized the seizure of goods of enemy origin without any restriction. The German origin of the 535 cases of wine here in issue is not disputed, nor is it disputed that they left Rotterdam on board the *Bilderdijk* after December 4, 1939. The goods were therefore lawfully seized. Article 4 of the Decree of November 27, 1939, provides that after the conclusion of peace the *Conseil des Prises* shall determine, ' in equity and having regard to all the circumstances ', the fate of all goods seized or the proceeds of requisition or sale, as the case may be. The record of the case shows that the goods were of German origin and that before they left Rotterdam, a neutral port, on a neutral ship, namely, the *Bilderdijk*, for a neutral country, namely, the United States of America, they had become neutral property since before the outbreak of war. The goods were owned by the firm of Kruskal, whose registered office is at Rotterdam and whose directors, who had long since acquired Dutch nationality, were arrested by the Germans, interned in a concentration camp and deprived of their property. There is no need in this case to deal with the action taken by the German Armistice Commission, which simply acted on the basis that the goods were of German origin. By granting to the firm of Kruskal an indemnity of 750,000 francs we are taking into account all the relevant circumstances, and we hold: (1) that the 535 cases of Rhine wine forming part of the cargo of the Dutch vessel *Bilderdijk* were lawfully seized; and (2) that the State shall pay to the firm of Kruskal . . . the sum of 750,000 francs in all."

[Report: *Revue générale de Droit international public*, 1959, p. 336.]

IX.—Prisoners of War

Prisoners of War—Duty of Obedience to Captor State—Unauthorized Communication with Enemy as Prohibited by Own State—The Law of the United States of America.

UNITED STATES *v.* OLSON.

United States, Court of Military Appeals. January 4, 1957.

THE FACTS.—The accused, a soldier of the United States Army, was charged under Article 104 of the United States Uniform Code of Military Justice (but should, as later held by the Court of Military

Appeals, have been charged under the corresponding Article 81 of the Articles of War supplanted by the Uniform Code) with aiding the enemy in Chinese prisoner of war camps in Korea. Olson had engaged in propaganda against the United States and in favour of the detaining forces. He was found guilty by a court-martial, and the findings and sentence of the court-martial were affirmed by an Army board of review (CM383583, 20 C.M.R. 461). The accused appealed to the Court of Military Appeals, contending, *inter alia*, that a prisoner of war, by reason of his obligation to turn over his arms to the enemy and to obey the enemy, does not fall within the category of persons who can "relieve or attempt to relieve the enemy with arms, ammunition, supplies, money, or other thing."

Held: that the decision of the board of review must be affirmed. In addition to dismissing a number of contentions by the accused which turned on issues of the domestic law of the United States, the Court held that the duty of obedience which a prisoner of war owes to the enemy did not relieve that person of his obligation of allegiance to his own country or give him licence to commit treason.

The Court said in part: "Defense counsel, as a second theory applicable to this issue, urges that the prosecution must fail because prisoners of war do not fall within the class of persons who can commit the offense of aiding or relieving the enemy by doing the sort of acts alleged in the first portion of the pertinent Article of War. Article of War 81 provides:

> "'Whosoever relieves or attempts to relieve the enemy with arms, ammunition, supplies, money, or other thing, or knowingly harbors or protects or holds correspondence with or gives intelligence to the enemy, either directly or indirectly, shall suffer death or such other punishment as a court-martial or military commission may direct.'

"Although not clearly spelled out in the brief, the theory here seems to be that the Government plainly elected to proceed under the first clause of the quoted Article (Article 104(1) of the new Code); that the enemy must be relieved with a tangible article or object similar to those specified (arms, etc.) to commit this offense, and that prisoners of war are required to surrender such items upon capture. From this it is reasoned that Congress must have intended to cover only persons who are not within the physical control of the enemy and that they alone can be found guilty of this offense. It should be added that counsel seeks to differentiate this case from *United States* v. *Dickenson*, 6 USCMA. 438, 20 CMR. 154,[1] where we held that prisoners of war could be guilty of communicating or corresponding with, or holding intercourse with the enemy in violation of Article 104(2) of the Code. In net effect, therefore, counsel agrees that prisoners of war are within the class of persons punishable for the doing of the other kinds of acts prohibited by Article of War 81.

[[1] See *International Law Reports*, 1955, p. 926.]

"We believe the argument to be singularly devoid of merit. Article of War 81, *supra*, provides that, 'Whosoever relieves or attempts to relieve the enemy' commits an offense under the Article, and the Code is just as sweeping, for it punishes 'any person' who aids the enemy. Even if we agree that the phrase 'or other thing' refers only to tangible objects—a question we will discuss in the second issue—no exemption is provided for prisoners of war, or for anyone else, for that matter, Without exploring the niceties of any constitutional question which might be raised with respect to civilians, it is clear that any person subject to military law, as was the accused, was within the sweep of all parts of Article of War 81.

"It is true that a prisoner of war is bound to obey local laws of the enemy, and always risks retaliation if he fails to deliver up his possessions. But it strikes us that that alone does not compel placing a restricted meaning on the plain words of the statutes. Accused's position is not essentially different from that of American citizens interned within enemy territory. And in such cases it has uniformly been held that the existence of an area of permissible obedience to a foreign power is not a license to commit treason. The obligation of allegiance which attaches to citizenship continues to rest upon the shoulders of one so situated. *Gillars* v. *United States*, 182 F.2d 962, 978-980 (C.A., D.C., Cir.) (1950),[1] *Chandler* v. *United States*, 171 F.2d 921 (C.A. 1st Cir.) (1948), cert. den 336 U.S. 918, 69 S.Ct. 640, 93 L.Ed. 1081.[2] We can visualize instances where it might be difficult to determine whether property was surrendered pursuant to capture or given freely to aid an enemy. Happily, this is not such an instance. But even it if were, the Congressional enactment cannot be warped by us to exclude a class merely because the choice is a hard one. . . ."

[Reports: 7 U.S.C.M.A. 460, 22 C.M.R. 250.]

War—Prisoners of War—Status of—Person Captured by Enemy Forces and Convicted of War Crimes Committed Before Capture—Whether Prisoner of War in Technical Sense—Interpretation of German "Law on Returning Citizens" of January 24, 1956.

PRISONER OF WAR (CONVICTED WAR CRIMINAL) (GERMANY) CASE.

German Federal Republic, Federal Administrative Court. July 8, 1957.

THE FACTS.—A German Law of January 24, 1956, provided—as far as here material—that German nationals who had been members of military or para-military forces and had been made prisoners of war and subsequently released after May 8, 1945, were entitled, on their return to Germany, to be classified as "returning citizens"

[1 See *International Law Reports*, 1950, Case No. 81.]
[2 See *Annual Digest*, 1948, Case No. 97.]

(such classification giving them the right to certain financial benefits). The applicant became a member of the " Waffen S.S." in March 1945, and was taken prisoner by the United States armed forces in April of that year. He was then extradited to Luxembourg, where he was sentenced to a term of imprisonment for war crimes committed in that country before his capture by the United States forces. On his return to Germany after his release from imprisonment in Luxembourg, he applied for classification as a " returning citizen ". His application was refused on the ground that a person kept in captivity for extraneous reasons, *viz.*, by reason of his conviction as a war criminal, could not be classified as a prisoner of war. The applicant appealed against that decision.

Held: that the appeal must be allowed. The term " prisoner of war " in the Law of January 24, 1956, must be interpreted in accordance with the relevant international conventions. According to these conventions, a person captured by enemy forces while a member of the armed forces of his country was a prisoner of war.

The Court said: " We must proceed on the premise that the Law of January 24, 1956, is designed to define the term ' prisoner of war ' in the accepted sense. This term is to be interpreted in accordance with international law. The legal position of prisoners of war is laid down in the Hague Regulations of October 18, 1907, and more especially in the Geneva Convention of July 27, 1929, relative to the Treatment of Prisoners of War, the place of which has now been taken by the Geneva Convention of August 12, 1949. There can be no doubt that the Geneva Convention of 1949, although it did not come into force in the Federal Republic until March 3, 1955, was known to the Legislature when the Law of June 19, 1950 (the predecessor of the Law of January 24, 1956) was enacted, and that it formed the basis of the views of the Legislature on the legal status of prisoners of war.

"The position in the present case is accordingly as follows: Before his capture in April 1945 the applicant was performing military service, because service in the ' Waffen S.S.' was considered military service within the meaning of German military law. The applicant therefore belongs to the categories of persons referred to in Article 4 of the Geneva Convention, with the result that on his capture by the American forces he became a prisoner of war. The fact that he was captured on German territory is immaterial, because, as far as the status of a prisoner of war is concerned, the decisive factor is not the place of capture but the fact that a person falls into enemy hands (*cf.* Article 4 of the Geneva Convention). The applicant did not lose this status as a result of his being extradited to Luxembourg. It follows from Article 12 of the Geneva Convention that the transfer of a prisoner of war by the Detaining Power to another Power does not affect the legal status of a person *qua* prisoner of war. Nor did the applicant lose his legal status as a prisoner of war by reason of the fact that he was held responsible for acts alleged to have been committed in Luxembourg before his capture and that he was convicted of those acts in that country. This follows from Article 85 of the Geneva Convention. When judging the legal status of a prisoner in the light of international law we are therefore not concerned with the reason for his continuing captivity, but only with the reason for his capture."

The Court then dealt with the interpretation of the Law of January 24, 1956, in the light of the above-mentioned rules of international law, and concluded as follows: "Accordingly, the applicant was a prisoner of war at the time of his release from imprisonment in Luxembourg. As all the other conditions required for obtaining the classification of a ' returning citizen ' are satisfied, the requisite certificate should have been issued."

[Report: B Verw GE, vol. 5, p. 186.]

NOTE.—In a judgment given on the same day, the Federal Administrative Court dismissed the claim for compensation as a " prisoner of war " of a person who had been captured by the French armed forces in April 1945, had then been released in June of the same year, and re-arrested by the French occupation authorities in January 1949, whereafter he had been convicted by a French military tribunal of war crimes committed prior to his first capture. The Court *held* that on his release from the sentence of imprisonment imposed by the French military tribunal the applicant could not be regarded as a prisoner of war. (B Verw GE, vol. 5, p. 191).

In a judgment dated May 15, 1952, the same Court dismissed the claim for compensation as a " prisoner of war " of a person who in October 1946 had been deported from Berlin to the Soviet Union by the Soviet army of occupation. The Court *held* that the applicant in that case had been " captured in causal connection with events directly connected with the conduct of hostilities during the Second World War." (B Verw GE, vol. 5, p. 64).

XI.—Non-Hostile Relations Between Belligerents, Especially Armistices

War—In General—Non-Hostile Relations between Belligerents—Armistices—The Korean Conflict—Effect of Armistice as Terminating War—When War Terminated for Purposes of United States Military Law.

See p. 929 (*United States* v. *Shell*).

XII.—Termination of War

War—Termination of—By Cessation of Hostilities Under an Armistice—The Korean Conflict—When War Terminated for Purposes of United States Military Law.

UNITED STATES *v.* SHELL.

United States, Court of Military Appeals. March 15, 1957.

THE FACTS.—The accused was, upon a plea of guilty, convicted by a court-martial of being absent without leave from his unit in the United States from August 4, 1953, to January 4, 1956, in violation of Article 86 of the Uniform Code of Military Justice (10 U.S.C. § 886). The unauthorized absence began eight days after hostilities in Korea ceased, pursuant to the signing of the Korean Armistice of July 27, 1953. Article 43 of the Uniform Code of Military Justice (10 U.S.C. § 843), provides a two-year statute of limitations for the offence of absence without leave but stipulates that the limitation does not apply if the offence is committed " in time of war ".

The accused petitioned for review on the ground that his absence without leave had begun after the termination of the Korean Conflict by the Armistice of 1953 and that prosecution therefor accordingly was barred by the two-year statute of limitations.

Held: that the findings and sentence of the court-martial must be reversed and the record referred to a board of review for further proceedings. For the purposes of United States military law, the state of war in Korea ended on July 27, 1953, when the actual hostilities were brought to an end by the Armistice.

In an opinion otherwise devoted to issues of the military law of the United States, the Court said: " While certain circumstances which were not argued before us on appeal—and which require an affirmance of the findings and sentence—would make it possible for us to avoid answering the question we elected to hear, we believe that the orderly administration of military justice demands that we end uncertainty concerning the termination of the Korean wartime period. We, therefore, proceed to decide the original granted issue.

"Article 43(*a*) of the Code, *supra*, provides in pertinent part:

> " ' A person charged with desertion or absence without leave in time of war . . . may be tried and punished at any time without limitation.'

"Article 43(*c*) of the Code, *supra*, sets out a two-year statute of limitations for absence without leave in time of peace in the following terms:

> " ' Except as otherwise provided in this article, a person charged with any offense is not liable to be tried by court-martial . . . if the offense was committed more than two years before the receipt of sworn charges and specifications by an officer exercising summary court-martial jurisdiction over the command. . . .'

" Thus, in deciding whether the two-year period of limitation bars prosecution of accused's offense, we are confronted with the problem of determining whether or not his absence, beginning August 4, 1953, occurred during time of war.

" In holding that offenses committed during the Korean conflict were perpetrated during a time of war within the meaning of the language of the Code, we reasoned that war does not result only from a formal declaration by Congress, but can exist in fact, without a declaration, and that its existence is to be determined by the realities of the situation as distinguished from legalistic niceties. *United States* v. *Bancroft*, 3 USCMA 3, 11 CMR 3;[1] *United States* v. *Gann*, 3 USCMA 12, 11 CMR 12; *United States* v. *Ayers*, 4 USCMA 220, 15 CMR 220; [2] *United States* v. *Taylor*, 4 USCMA 232, 15 CMR 232. The factors which, considered collectively, compelled our finding of a ' time of war,' are set out in *Bancroft, supra*, and its allied cases. Of crucial importance in all of the cases, however, was the existence of armed hostilities against an organized enemy. In *Bancroft*, noting among other things the presence of Americans on Korean battlefields and the casualties involved, we said (3 USCMA 3, 6):

" ' . . . Moreover, we believe that battle conditions, where many lives depend upon the proper performance of hazardous duty by each and every individual, require that peacetime sentences with regard to military offenses be discarded and the more severe wartime sentences be invoked. It would indeed be an insult to the efforts of those servicemen who are daily risking their lives in defense of democratic principles to hold that peacetime conditions prevail. Conceding that other courts in certain civilian cases have held that a formal declaration of war is a condition precedent to a state of war, the reasons which are influential there are not persuasive here. For our purposes we need not get into the refinements of those cases which interpret the terms of a contract nor decide whether we are engaged in a de facto or de jure war. Practical considerations are more important . . . when The President, as Commander-in-Chief, ordered members of the armed services into the conflict, he involved this country in hostilities to such an extent that a state of war existed; and that Congress, when it used the phrase " in time of war " in the military Code, intended the phrase to apply to that state regardless of whether it was initiated or continued with or without a formal declaration.'

Similarly, we said in *Gann, supra* (3 USCMA 12, 13):

" ' . . . The factors which make certain offenses—of which the present is one—more heinous and reprehensible in time of war depend upon the existence *in fact* of substantial armed hostilities—regardless of whether those hostilities have been formally declared to constitute " war " by action of the Executive and Congress.'

" In *Ayers*, we also applied a ' yardstick of practicality,' and approved the previous holdings in *Bancroft* and *Gann* in these words (4 USCMA 220, 221):

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[1] [See *International Law Reports*, 1953, p. 586.]

[2] [*Ibid.*, 1954, p. 423.]

" ' . . . The hostilities existing at that time in Korea must be equated to a state of war for purposes of military criminal law.'

"And in *Taylor*, we used that same pragmatic approach, cited with approval our decision in *Ayers*, and said (4 USCMA 232, 237):

" ' In construing Article 43(*a*)—which removed all limitations on the prosecution of certain offenses committed " in time of war "—we determined that an absence without leave transpiring during the period of actual hostilities in Korea might lawfully be punished at any time.'

" Manifestly, if, in the absence of formal Executive or Legislative action, a collection of factors compels a conclusion that a state of war is being maintained, when those factors or a substantial part thereof no longer exist, a contrary deduction may be required. It is true, as we indicated in *United States* v. *Sanders*, 7 USCMA 21, 21 CMR 147,[1] that various official actions in other governmental departments were considered to be circumstances touching on the ultimate issue before us, but they were only straws in the wind which we used to support our holding in that case, and were not essential to the decision. There we held that the Korean war had ended by June 4, 1955, at least, but we did not hold that it had not terminated before that date.

" In the instant case, we see a vast change from the conditions found in *Bancroft* and its companions. On July 27, 1953, an armistice was effectuated between the United Nations Command, of which our forces are a part, and the enemy command. Korean Armistice Agreement, Senate Document No. 74, 83d Congress, Ist Session, page 98 (1953); 99 Cong Record 9858. Pursuant to its terms '. . . a complete cessation of all hostilities in Korea by all armed forces ' was accomplished. Armed combat ended and battlefield conditions ceased; there was no more shooting and there were no more battle casualties; a Demarcation Line and Demilitarized Zone were established; and war prisoners were repatriated. Assessing the situation existing as of that time, we note the absence of many of those factors upon which we predicated our previous holdings that we were at war. Thereafter, it was no longer necessary to provide the logistical support essential to maintain combat operations in terms of both quality and quantity. American troops no longer had to be rotated to equalize combat duties. Patrolling, while no doubt still intensive, no longer was aimed at penetration into enemy territory. A buffer zone was established to prevent just that sort of activity. The kind of medical support required in a combat situation no longer had to be furnished. Last, and perhaps most important, the whole theory upon which the presence of our troops in Korea was premised changed with the signing of the Armistice. We were no longer there to repel aggression; thereafter our mission was to maintain a peaceful *status quo*. Our military situation was that of immediate readiness, not armed conflict.

[[1] See *International Law Reports*, 1955, p. 896.]

"Some argument is advanced that, following our holding in *Sanders, supra,* we must require more than an armistice in order to find the war to have ended. A careful reading of that opinion will disclose that the Presidential Proclamation and Executive Order cited therein were relied on by us as indicative of an independent assessment of the situation by others, and an Executive determination that at that time a state of war did not exist, for which reason wartime benefits were ended. While it may be repetitious, we again say that nothing said there forbids a holding here that the war ended prior to the time critical in *Sanders.* There we left the precise time undetermined, but we have concluded it is better by far to fix a day certain for the Services than to reach the same result by a course of *ad hoc* decision. We, therefore, hold that the Armistice in Korea on July 27, 1953, ended those actual hostilities essential to a finding of 'time of war,' and hence that for the purposes of military law the state of war terminated on that date. . . .'

(Quinn C.J. concurred, on the ground that the Korean conflict had never been a "time of war" as to offences committed in the United States.)

[Reports: 7 U.S.C.M.A. 646, 23 C.M.R. 110.]

NOTE.—The Court of Military Appeals gave a decision identical with that in the above case in *United States* v. *Busbin,* 7 U.S.C.M.A. 661, 23 C.M.R. 125.

War—Termination of—Right of Alien to Sue—Restoration of Right—Termination of Power to Seize Enemy Property—By Unilateral Action—The Law of the United States of America.

NIEHAUS & CO. *ET AL. v.* UNITED STATES.

United States, Court of Claims. July 12, 1957.

THE FACTS.—This was an action by a Costa Rican corporation and five nationals and residents of Germany to recover the value of property taken into the possession of the United States by the Director, Office of Alien Property, purporting to act under authority of the Trading With the Enemy Act (40 Stat. 411, as amended, 50 U.S.C.App. §§ 1–40). Subsequent to January 1, 1947, the five natural persons had acquired equitable interests in deposits and securities owned by the plaintiff corporation and on deposit in two banks in New York. On July 26, 1951, the Director, Office of Alien Property, purported to vest this property in the Attorney General. The plaintiffs maintained that the President of the United States had, before the purported vesting of the property, limited the vesting power to the vesting of German property and rights which were located in the United States before January 1, 1947, and that, the property having been taken without authority of law, the plaintiffs were entitled to sue for, and to secure, its recovery notwithstanding the fact that Section 9(*a*) of the Trading With the Enemy Act (quoted in the text of the opinion) conferred a right to sue only on a person " not an enemy or ally of enemy ". On defendant's motion to dismiss,

Held: that the defendant's motion to dismiss must be denied. A purported seizure or " vesting " of enemy property, which seizure or vesting was not authorized by statute, was a nullity and did not affect the title of the enemy owner. The enemy owner was, during the war, disabled from vindicating his title by suit. When the war ended and the courts were again open to him, he could vindicate his title in whatever court should have jurisdiction of his case. The President had, in this instance, terminated the liability to vesting of property in the United States acquired by Germans after December 31, 1946, and the plaintiffs were therefore entitled to recover the property which had been improperly taken from them.

The Court said: " The plaintiffs assert that the President of the United States, by virtue of section 5 of the Trading with the Enemy Act, had the power to designate ' when ' and ' upon what terms ' the property or interests of foreign nationals should be taken by the United States; that the President, before the date of the purported vesting of the plaintiffs' property, had limited the vesting power to the vesting of German property and rights which were located in the United States before January 1, 1947; that the natural plaintiffs did not acquire their rights in the property in question after that date.

" The plaintiffs conclude from the foregoing that the action of the officials in ' vesting ' their property was without any authority or warrant in law, and that they are, therefore, entitled to the property. They are, no doubt, aware that this court cannot order the restoration of the property *in specie*, hence we treat their suit as a suit for its value.

" The Government has made a motion to dismiss the petition on the grounds that this court has no jurisdiction of the subject matter of the action, and that the petition fails to state a cause of action upon which the court may grant relief. It points to section 7(*c*) (4) of the Trading with the Enemy Act which says that ' the sole relief and remedy ' of any person having any claim to property which has come into the hands of the Alien Property Custodian ' shall be that provided by the terms of this Act.' The Government then points to section 9(*a*) of the Act, which says:

> " 'Any person not an enemy or ally of enemy claiming any interest, right, or title in any money or other property which may have been conveyed, transferred, assigned, delivered, or paid to the Alien Property Custodian or seized by him hereunder . . . may institute a suit in equity in the United States District Court for the District of Columbia or in the district court of the United States for the district in which such claimant resides, . . . to establish the interest,

right, title, or debt so claimed, and if so established the court shall order the payment, conveyance, transfer, assignment, or delivery to said claimant of the money or other property so held by the Alien Property Custodian. . . .'

" One's first impression might be that the Government is urging that the plaintiffs should have sued in the United States District Court. But a more careful perusal of section 9(*a*) discloses what the plaintiffs point out and the Government admits, *viz.*, that the plaintiffs cannot, under 9(*a*), sue in the District Court. That section confers the right to sue only upon a person 'not an enemy or ally of enemy.' The plaintiffs were undoubtedly enemies until the war ended and are still technical enemies within the meaning of section 9(*a*).

" If the seizure of the plaintiffs' property was without warrant of law, as the plaintiffs assert, and if section 7(*c*) (4) is applicable in providing that the only relief for one whose property is seized as enemy property is that to be found in the statute, and no relief is to be found in the statute, we have a remarkable situation. Suppose the actual war has long since ended with the unconditional surrender of the enemy, but for sufficient reasons our country does not officially declare the legal termination of the war. Also for adequate reasons we are spending large sums of money and making every effort to rehabilitate the enemy country. That requires, among other things, foreign trade. The President, under the power given him in section 5, officially determines that property brought into this country or acquired in this country by an ' enemy ' after the date of his determination may not be vested. Property is so brought in or acquired. An overzealous Alien Property Custodian purports to ' vest ' it.

" In the case supposed, there is no relief under section 9(*a*) because the victim cannot show that he is ' not an enemy.' Is there no relief in any court, or are such a person and his property outlawed? While the legal state of war continues, our law denies such an enemy any right to prosecute a suit, either with regard to an unauthorized taking by the Government, or a wrongful taking by an individual, or on any account whatever. When the official state of war ends, and the courts are again open to former enemies, such a person may bring suit against an individual who has taken his property while he was disabled from suing. The plaintiffs urge that they may similarly sue the Government, which is in possession, of property illegally taken from them by the Government's official.

" The Government says sections 7(*c*) (4) and 9(*a*) are applicable. If they are, the answer which they give is that there is no relief for such a person. The Government frankly states that, in its view, there is no judicial relief for these plaintiffs in any court. The word enemy in section 9(*a*) undoubtedly includes a former enemy. If not, every former enemy whose property is in the hands of the Custodian could sue, as soon as the war was officially declared to be at an end.

" The Government says that, if the statute is interpreted to outlaw, so far as claims against the Government are concerned, one who has lawfully and, indeed, at the invitation of the Government, brought property into this country, that means only that Congress has asserted, in such cases, the Government's historical immunity from suit. This is probably a correct conclusion. *Lynch* v. *United States*, 292 U.S. 571, 54 S.Ct. 840, 78 L.Ed. 1434. But the obvious unfairness of such treatment naturally makes one doubt that the statute should be so interpreted, if it will bear a more humane interpretation.

" The plaintiffs urge, in effect, that section 7(*c*) (4), in its statement that the only relief for one whose property has been taken by the Custodian is the relief ' provided by the terms of ' the Trading with the Enemy Act, refers only to property lawfully taken, and as to which, if the party from whom it is taken has a right to relief, he can obtain it under section 9(*a*). The case of the vesting of property which the Custodian claims was owned by an enemy, but which non-enemy persons assert that they owned, is a frequent example of such suits.

" There is no dispute about the power of the United States, under international law and our Constitution, to confiscate enemy property found in the United States in wartime. *United States* v. *Chemical Foundation*, 272 U.S. 1, 47 S.Ct. 1, 71 L.Ed. 131. But in this country, the power in the executive to confiscate does not automatically arise from the mere existence of a state of war. The Supreme Court, in an opinion by Mr. Chief Justice Marshall, said in *Brown* v. *United States*, 8 Cranch 110, 3 L.Ed. 504:

" ' The universal practice of forbearing to seize and confiscate debts and credits, the principle universally received, that the right to them revives on the restoration of peace, would seem to prove that war is not an absolute confiscation of this property, but simply confers the right of confiscation.'

The Court held that no statute authorized the confiscation of the property there in question, and that the seizure was a nullity. The necessity for statutory authorization of confiscation of the property of enemies was recognized in *Miller* v. *United States*, 11 Wall. 268, 78 U.S. 268, 20 L.Ed. 135, opinion by Mr. Justice Strong, and in *Silesian-American Corporation* v. *Clark*, 332 U.S. 469, 475, 68 S.Ct. 179, 92 L.Ed. 81,[1] opinion by Mr. Justice Reed.

" The doctrine of these cases is that an enemy does not lose his substantive rights in property, merely because of the existence of war, or as a result of a physical act of seizure by persons purporting to act for the Government, unless there is an applicable statute declaring automatic forfeiture or authorizing seizure.

"As we have said, enemies were, during the period of the war, disabled from resorting to our courts in any kind of case. *Johnson* v.

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[1] See *Annual Digest*, 1947, Case No. 88.]

Eisentrager, 339 U.S. 763, 776, 70 S.Ct. 936, 94 Ed. 1255.[1] The official termination of the war removed the disability to sue. In *The Adventure*, 8 Cranch 221, 3 L.Ed. 542, opinion by Mr. Justice Johnson, it is said:

> " 'Although property of that description [enemy property in the United States] is liable to be disposed of by the legislative power of the country, yet, until some act is passed upon the subject, it is still under the protection of the law, and may be claimed after the termination of war, if not previously confiscated.'

In *Hanger* v. *Abbott*, 6 Wall. 532, 73 U.S. 532, 18 L.Ed. 939, opinion by Mr. Justice Clifford, it was held that an enemy creditor could, after the termination of the war, sue upon the debt since the debt had not been confiscated.

" The authorities cited and sound reasoning lead, we think, to the following conclusions. A purported seizure or ' vesting ' of enemy property, which seizure or vesting is not authorized by statute, is a nullity, and does not affect the title of the enemy owner. He is, during the war, disabled from vindicating his title by suit. When the war ends, and our courts are again open to him, he may vindicate his title in whatever court may have jurisdiction of his case.

" It is necessary now to determine whether the ' vesting ' of the plaintiffs' property was authorized by statute. As we have seen, section 5 of the Trading with the Enemy Act lodges in the President the authority to designate when and upon what terms property of foreign nationals shall be vested.

" On July 9, 1951, the President addressed a letter to the Vice President, 97 Cong.Rec., part 6, pp. 7762–7764, explaining what the United States, Britain and France had done to rehabilitate the German Federal Republic, and requesting the Vice President to lay before the Congress, for its consideration, an attached draft of a proposed Joint Resolution to terminate the state of war which existed between the United States and Germany. In the letter are the following statements:

> " ' Ending the state of war with Germany will have many tangible benefits. Germans who wish to travel or to do business here will receive the status accorded to nationals of other friendly governments. They will no longer be classed as enemies. While Germans have been permitted to have commercial relations with this country since the Presidential proclamation of December 31, 1946, declaring hostilities at an end, German citizens are still subject to certain disabilities, particularly with respect to suits in United States courts. General disabilities of this kind will be eliminated by the termination of the present state of war.
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> . . . .
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> ' Furthermore, it is not intended that the termination of the state of war shall in any way change or alter the program, which Congress has authorized, of seizing, under the Trading with the Enemy Act, German property in this country on or before December 31, 1946, and

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[1] See *Annual Digest*, 1949, Case No. 153.]

using the proceeds to pay just and legitimate claims arising from the war in accordance with the War Claims Act of 1948. [50 U.S.C.A.Appendix, § 2001 et seq.] The vesting of German property under this program does not extend to property acquired since the resumption of trade with Germany on January 1, 1947, following the cessation of hostilities. It is limited to German property and rights located here before or during the period of hostilities.'

" The plaintiffs say that this official communication proves that the President had, under his section 5 power, eliminated the liability to vesting of property in this country acquired by Germans after December 31, 1946. The Government says that the letter was only an explanation to Congress of a policy and a justification for requested legislation, which had no legal significance.

" The statement was a statement by the President of the United States, the official primarily responsible for the conduct of our relations with other countries, the official to whom Congress had delegated the power to determine when and on what terms alien property should be seized. If the President and his legal advisors did not know what he had determined the law to be, the country was at sea. If he did know what property he had determined, some years before, should be liable to vesting, and what property should not be so liable, his agents should have, in the several intervening years, acquired the same information.

" We are not willing to decide that the plaintiffs' property, at the time and in the circumstances alleged in the petition, was subject to lawful vesting, in the face of the statement of the President of the United States, to whom Congress had delegated the power referred to above, that it was not so subject. We therefore regard the purported vesting as unauthorized and illegal, and as having no effect upon the plaintiffs' title to their property.

" Under the decisions of this and other courts, this court has jurisdiction of the case as a case ' founded upon any Act of Congress,' within the meaning of our jurisdictional act, 28 U.S.C.A. § 1491(2). When an official of the United States, purporting to act under a statute, acquires money which money is turned over to the United States, it has been held that this provision of the jurisdictional act is satisfied, and the person from whom the money was taken may sue in this court. In *Clapp* v. *United States*, 127 Ct.Cl. 505, 117 F. Supp. 576, *certiorari* denied 348 U.S. 834, 75 S.Ct. 55, 99 L.Ed. 658, the problem was discussed at some length. *Carriso, Inc.*, v. *United States*, 9 Cir., 106 F.2d 707, and *Ross Packing Co.* v. *United States*, D.C., 42 F.Supp, 932, are in accord."

Whitaker J. dissented on the ground that jurisdiction to recover property seized by the Alien Property Custodian was expressly denied the Court. In his dissenting opinion, he said:

" I think jurisdiction to recover property seized by the Alien Property Custodian is expressly denied this court by section 9(f) of the Trading with the Enemy Act, *supra*. It reads:

> " 'Except as herein provided, the money or other property conveyed, transferred, assigned, delivered, or paid to the Alien Property Custodian, shall not be liable to lien, attachment, garnishment, trustee process, or execution, or subject to any order or decree of any court.'

Numerous cases cited in the defendant's brief support this view."

[Reports: 139 Ct.Cl. 605, 153 F.Supp. 428.]

NOTE.—The above case is noted in *Georgetown Law Journal*, 46 (1958), p. 515, and *University of Pennsylvania Law Review*, 106 (1958), p. 1054.

War—Termination of—Factual Cessation of Hostilities—Absence of Formal Treaty of Peace—Termination of Second World War as Between Holland and Germany.

REMBRANDT PAINTING CASE.

Holland, District Court of Rotterdam. April 6, 1956.

THE FACTS.—On July 3, 1940, the defendant in this action bought from the plaintiffs, art dealers, a painting by Rembrandt at the price of 100,000 guilders. It was orally agreed that in certain circumstances the defendant would make a subsequent payment of 25,000 guilders. The defendant confirmed this in a letter to the plaintiffs, stating (so far as relevant for the international law aspect of this case):

" . . . Moreover, I confirm to you my promise to pay you an additional amount of 25,000 guilders after the present war has been terminated by a peace treaty to which the Governments now involved and those which may yet become involved in it are parties. . . . Should I sell the painting of my own free will before peace is concluded for a higher price than . . . 100,000 guilders, I shall also pay you the excess up to a maximum of the additional payment promised. . . ."

In 1953 the plantiffs claimed payment of the sum of 25,000 guilders from the defendant, stating that all the conditions to which the further agreement referred had been fulfilled. In his defence the defendant contended that, although the war had in fact come to an end, it had not been terminated by a peace treaty as expressly stipulated in the letter to the plaintiff.

Held: that the claim must succeed.

The Court said: " The parties differ on the meaning of the words 'after the present war has been terminated by a peace treaty to which the Government now involved and those which may yet become involved in it are parties '. According to international law it is not a Government, but only a State represented by a Government, that can be a party in a war or to a treaty, seeing that, save for certain exceptions irrelevant for the present purpose, only States are subjects of international law. There is no rule of international law in existence according to which the mere disappearance of the

Government of a State brings about the end of a war which originated at a time when that Government was in power. Therefore, the meaning of the passage in which mention is made of a peace treaty to which Governments involved in the war and Governments which may yet so become involved are parties is, considered by itself, not clear. For that reason the Court must examine what the parties meant by this passage.

" The letter in question was written at a time when the Second World War was still in its first year and the United States, the Soviet Union and Japan were not yet involved in it, whilst the overseas territories of the Kingdom of the Netherlands were not yet a theatre of military operations. At that moment it could not be foreseen what States were still going to participate in the war, whether the said overseas territories would be spared from warlike operations, and in what manner the war would be terminated. International law knows of only three ways in which a war can be terminated, to wit: (1) by the coming into force of a peace treaty between the belligerents; (2) by a debellatio accompanied by annexation of the territory of the losing State; and (3) by the definitive cessation of hostilities without one of the belligerent States becoming extinct. In the Second World War the Netherlands found themselves in a state of war with Germany, Italy and Japan. Peace treaties have meanwhile become operative as between the Netherlands and Italy as well as between the Netherlands and Japan. In the nineteenth and twentieth centuries the most usual form in which wars were terminated is that of a peace treaty coming into force. In a peace treaty the relative powers of the former belligerents are generally stabilized and their future legal relations regulated. This stabilization and regulation can also be effected otherwise than by a peace treaty coming into operation. That took place with regard to Germany. Since the Allied Powers after the unconditional surrender of Germany did not go to the length of annexing the territory of the former German Reich, Germany has not ceased to be a State. Since up till now no peace treaty has been concluded either, the state of war between the Netherlands and Germany must be assumed to have come to an end in the manner referred to in (3) above. As appears from the Decree-Proclamation of July 23, 1951, the Netherlands Government does not consider the Netherlands to be any longer in a state of war with Germany. Political relations with the German Federal Republic have since been stabilized and normalized.

" It must be assumed that the parties to the agreement under examination, who do not appear to have had any special knowledge of international law, in July 1940 considered the possibility that the war would spread still farther, and deemed it likely that the war would terminate by the process of peace treaties coming into operation. Starting from the fact that in July 1940 the parties could hardly have themselves formed a clear idea of the development of future international relations or have been conscious of the juridical possibilities outlined above, one must conclude that the only reasonable meaning of the passage under consideration is that the parties to the agreement had in mind that, once the hostilities between the Netherlands and those States with which this country was then already at war or could so become had ceased, a stabilization of the relative powers and a re-establishment of normal legal relations—or, in other words, a situation of peace—would come into existence. A further argument in favour of the correctness of this conclusion and against the submission that the parties to the agreement intended to make their contract dependent on the coming into operation of formal peace treaties between all the States involved in the Second World War, is to be found in what the defendant wrote elsewhere in his letter: 'Should I sell the painting of my own free will *before peace*'—and not *before a peace treaty*—'is concluded'. A situation of peace now exists between the Netherlands and all the States with which the Netherlands was at war."

The defendant also relied on the fact that a state of war still technically existed between Japan and the Soviet Union. The Court dismissed this argument on the ground that it cannot reasonably be assumed that the purely technical continuance of a state of war between other States far from the Netherlands could be of any importance for parties entering into an agreement in the Netherlands concerning juridical acts to be performed there.

[Report: *Netherlands International Law Review*, III (1956), p. 408.]

NOTE.—The proposition in the judgment that a war can only be terminated by, *inter alia*, a *debellatio* which is accompanied by annexation of the territory of the losing State, is perhaps controversial. In fact, the "Declaration [of Berlin] Regarding the Defeat of Germany and the Assumption of Supreme Authority with respect to Germany [by the Allied Governments]" of June 5, 1945 (*Germany No. 1* (1945), *Cmd.* 6648), expressly states that "the assumption . . . of [supreme authority with respect to Germany, including all the powers possessed by the German Government, the High Command and any state, municipal, or local government or authority] does not effect the annexation of Germany." But it will not be seriously denied that the unconditional surrender of Germany was most complete *debellatio*.

War—Termination of—Invalidation of Looted Bonds—Board for the Validation of German Bonds in the United States—Decisions of—Review in Municipal Courts Pursuant to Treaty—Scope of Review—The Law of the Federal Republic of Germany and of the United States of America.

See p. 774 (*Abrey* v. *Reusch et Al.*).

III.—Occupation of Enemy Territory

ii.—Legislative, Judicial and Administrative Functions of the Occupant

Belligerent Occupation—Judicial Functions of Occupant—Validity of Sentence of Court Set Up by Occupant—Occupation During War in Violation of General Treaty for the Renunciation of War, 1928—Judgment of International Military Tribunal at Nuremberg —War Against and Occupation of Poland in 1939—Whether Occupation in Legal Sense of Term—Official Acts of German Reich and Its Functionaries in Occupied Poland—Whether Permitted by Hague Regulations of 1907.

N. *v.* B.

Poland, Supreme Court. April 13, 1948.

The Facts.—During the German occupation of Poland in the course of the Second World War, one Konstanty N. smuggled a mare across the frontier from Lithuania. He was caught by the Germans and sentenced to six months' imprisonment, while the mare in question was confiscated, put up for sale by auction, and bought by one Kazimierz B. After the war N. sued B. for recovery of the mare and a foal born to her. The Court of first instance held that both the confiscation and the sale by auction were lawful in view of the provisions of the Hague Regulations of 1907 respecting the laws and customs of war on land. N. appealed to the District Court, which reversed the judgment of the Court below and ordered that the mare and foal in dispute be restored to him. The District Court held that the confiscation by the occupying authorities had been illegal, on the ground of Article 46 read in conjunction with Article 52 of the Hague Regulations. This was so, the Court said, because these provisions allowed requisitions only for the needs of the occupying army, while private property in occupied country was immune from confiscation. B. then appealed to the Supreme Court against the decision of the District Court. In his appeal he said that smuggling was a punishable offence under Polish law; that, again under Polish law, the mare in question could have been confiscated and put up for sale by auction; that every Polish national was entitled to take part in such auction; and that, by availing himself of this right, he had duly paid for the mare which he bought.

Held: that the appeal must be dismissed. The German Reich and its officials did not enjoy, in connection with the factual taking possession of Poland in 1939, the right to perform, as against Polish citizens, acts of State which the Occupant of enemy territory was entitled under the Regulations to carry out in accordance with the laws and customs of war on land. Consequently, the decision of a

German court or agency which found a Polish citizen guilty of smuggling and sentenced him to imprisonment and confiscation of the object in question (*viz.*, the mare), was unlawful and could not deprive him of his property.

The Court said: " It is one of the grounds of appeal that the German Reich, in connection with the occupation of Poland in 1939, had the right to punish crimes committed by Polish citizens in so far as the acts involved would be punishable under the Polish law, and [the right] to confiscate, within the limits allowed by Polish regulations, articles which were the object of the crime.

" The Supreme Court does not regard this view as being correct.

" The International Military Tribunal at Nuremberg in its Judgment of September 30 and October 1, 1946,[1] explains, by invoking the Pact of Paris of August 27, 1928, . . . that ' the solemn renunciation of war as an instrument of national policy necessarily involves the proposition that such a war is illegal in international law ', and that ' war for the solution of international controversies undertaken as an instrument of national policy certainly includes a war of aggression, and such a war is therefore outlawed by the Pact' .[2] . . . By virtue thereof the International Military Tribunal declared the war commenced by Germany against Poland in 1939 to be an illegal war, and the accused, the perpetrators thereof, to be guilty of crimes against peace, in accordance with Article 6 (*a*) of the Charter of the International Military Tribunal (annexed to the London Agreement of August 8, 1945). . . .

" The same attitude was taken by the Supreme National Tribunal [of Poland] in its decision of July 7, 1946, in *In re Greiser*,[3] where the Court further explained that ' the so-called occupation of Polish territory by force of arms was not an occupation in the true meaning of the word, but constituted an unlawful seizure of another's territory by force and compulsion '.[4]

" By virtue of what was established by the decisions cited and by virtue of the legal attitude adopted therein, in which the Supreme Court concurs, it must be held that the German Reich and her functionaries did not have, in connection with the factual taking possession of Poland in 1939, the right to perform, as against Polish citizens, acts of State which an Occupant was entitled to carry out in accordance with the laws and customs of war on land. For there is no justification for adopting the view that rights which can be acquired in accordance with international agreements by a State which occupies the territory of another State in the course of a lawful war, could equally be acquired by a State which obtained

[[1] See *Annual Digest*, 1946, Case No. 92 (*sub nom. In re Goering and Others*).]

[[2] *Ibid.*, at p. 209.]

[[3] *Ibid.*, Case No. 166.]

[4] *Państwo i Prawo*, 1946, No. 7, p. 74; [see *Annual Digest*, 1946, Case No. 166, at p. 388].

power over the territory of another State by waging an illegal war and by committing, through its organs, an international crime.

"It would be equally unjustified to recognize that officials of the German Reich enjoyed in the years from 1939 to 1945 the right to perform acts of State with respect to Polish citizens; for the factual power in the territory of Poland had been exercised by German official persons (directly or through their subordinates) who took part in criminal organizations having as their aim the perpetration of crimes, that is, members of the National-Socialist German Workers' Party, the *Schutzstaffeln*, the Secret State Police, the Security Service, or the leadership corps of the German administration in the so-called Government General.[1]

"For these reasons, the decision of the German authorities sentencing the plaintiff to imprisonment and confiscation of the mare in dispute was illegal, and the plaintiff could not therefore lose the property in his horse. Were the said decision to have been given by a German court of justice, it would be equally void by virtue of Article 1 of the Decree of June 6, 1945, on the binding force of judicial decisions rendered at the time of the German occupation in the territory of the Polish Republic.[2]

"The unlawful activity of the German officials that caused the plaintiff to lose possession of the mare in dispute remained connected with the war; the acquisition of the said mare by the defendant through sale by auction was therefore null and void by virtue of Article 3, paragraph 1, of the Decree of March 8, 1946, on abandoned and ex-German property.[3]

[Report: *Państwo i Prawo*, 3 (1948), No. 8, p. 142.]

Belligerent Occupation—Judicial Functions of Occupant—Power of Occupant to Hear Appeals from Judgments Delivered before Occupation—Officer of Occupying Forces Deciding Appeal in Absence of Civil Courts—Articles 23 [h] and 43 of the Hague Regulations, 1907—The Law of Sarawak.

ELLIN ANAK MASING *v.* THE KING.

Sarawak, Supreme Court. March 22, 1948.

(Hedges C.J.)

THE FACTS.—The appellant was convicted on December 4, 1941, in the Resident's Court at Sarikei, Sarawak, of murder, and was sentenced to death subject to the confirmation of the Supreme

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[1] See Article 4 of the Decree of July 31, 1944, on the personal responsibility of fascist-nazi criminals, *Dziennik Ustaw*, 1946, No. 69, item 377; Judgment of the International Military Tribunal at Nuremberg of September 30 and October 1, 1946 [*supra*].

[2] *Dziennik Ustaw*, No. 25, item 151.

[3] *Ibid.*, No. 13, item 87.

Court. At the trial there were some irregularities, and an appeal was lodged on December 14, 1941. Before the appeal could be heard the Japanese forces had occupied Kuching. The civil courts ceased to function, and consequently the appeal was brought to the attention of a Japanese officer, who reduced the sentence to one of ten years' imprisonment. It was contended, *inter alia*, by the appellant that this reduced sentence was valid.

Held: that the appeal must be dismissed. A decision of an officer of the occupying forces, given at a time when no civil courts were functioning, did not constitute a judgment of a court which must be respected at the end of the period of occupation.

Hedges C.J. said: " Section 371 (1) of the Criminal Procedure Code provides, *inter alia*, that no finding, sentence or order passed or made by a Court of competent jurisdiction shall be reversed or altered on account of any misdirection to the assessors unless such misdirection has occasioned a failure of justice. I accept the test put forward by the learned Attorney-General: could the assessors have given a different verdict if they had been properly directed? Applying this test I am satisfied that the conviction was right.

" In the course of his final address the appellant stated that his appeal was brought to the attention of a Japanese officer in January 1942, and as a result he was sentenced to ten years' imprisonment. An adjournment was granted to enable him to give evidence on this point. It appears that shortly after the Japanese forces occupied Kuching the appellant was taken before a Japanese police officer, named Takai, in the Central Police Station and sentenced to ten years' imprisonment in respect of the offence with which we are concerned. Evidence was given by Mr. John Chin, Court Interpreter, that no civil Courts were functioning at that time, and indeed it was not until some three months later—April 1942—that they began to function.

" It is a fundamental principle of international law that military occupation involves no transfer of sovereignty, but a millitary occupant acquires certain rights and becomes subject to certain duties. The British interpretation of Article 23 (h) of the Hague Regulations is that it prohibits an occupant of enemy territory from declaring extinguished, suspended, or unenforceable, in a court of law, the rights and the rights of action of the inhabitants. Article 43 provides that the occupant must respect, unless absolutely prevented, the laws in force in the country.

"A military occupant may suspend the judges and magistrates as well as other officials, but if he does so he must temporarily appoint others in their place. The decisions of courts during the period of Japanese occupation, given in accordance with Sarawak law or with such regulations as the enemy was lawfully entitled to prescribe, are *prima facie* valid. On this subject I will quote that eminent authority, Sir Arnold McNair, now a Judge of the International Court of Justice:

" 'Thus we apprehend that if the enemy were to occupy the Scilly Isles (we refrain from mentioning the Channel Islands because they have their own legal system) all the ordinary transactions of private law taking place in accordance with English law during the enemy administration, such as contracts, dispositions of movables and immovables, devolution of property by will or upon intestacy, and all normal official transactions such as the collection of ordinary taxes, would at the end of the occupation, be treated as valid, and all judgments, civil and criminal, given in accordance with the English law or with such regulations as the enemy was lawfully entitled to prescribe, would be respected.'

" In the case before me there were no civil courts functioning at the material date—January 1942—and there was no court competent therefore to entertain an appeal. In any case, a sentence of ten years' imprisonment was not in accordance with Sarawak law, but my decision rests on the ground that there was no competent Court.

" I order that the conviction is confirmed and the sentence of death is confirmed, but a strong recommendation for mercy is made and this will be forwarded to His Excellency the Governor."

[Report: Sarawak Supreme Court Reports, 1948, p. 1.]

Belligerent Occupation—Administrative Functions of Occupant—Liquidation of Banks—Settlement of Pre-occupation Debts in Accordance with Regulations of Occupant—Transactions Effected by Agent in Occupied Territory, the Principal being in Another, Unoccupied, Territory—Authority Given to Agent Before Outbreak of War—Territory in which Principal Residing Subsequently Occupied by Same Belligerent—Whether Agent's Authority Determined—The Law of Sarawak.

THE CHARTERED BANK OF INDIA, AUSTRALIA AND CHINA *v.* WEE KHENG CHIANG.

British Commonwealth, Judicial Committee of the Privy Council (*on appeal from the Court of Appeal of Sarawak, North Borneo and Brunei*).

(Lord Tucker, Lord Somervell of Harrow, and Mr. L. M. D. de Silva.)

March 25, 1957.

THE FACTS.—Prior to 1946 Sarawak was an independent State under the protection of the British Crown, who controlled its foreign policy and was responsible for its defence. By the law of Sarawak the law of England was, subject to certain qualifications, made the law of Sarawak. From December 24, 1941, until September 11, 1945, Sarawak was occupied by the Japanese. In 1946 Sarawak became a colony of the British Crown. On February 1, 1950, the Debtor and Creditor (Occupation Period) Ordinance, upon which the case turns, came into effect.

Prior to the occupation, the respondent carried on a banking business in Kuching under the name of the Bian Chiang Bank. The appellant was a company incorporated by Royal Charter which carried on a banking business with a branch office in Kuching. At the time of the occupation the respondent Bank had an account with the appellant with a credit balance of $242,641.48.

As from December 24, 1941, the Japanese "froze" all credit balances of customers of the appellant whose accounts were kept at the Kuching office. They closed down the respondent Bank. Some months later the Yokohama Specie Bank, a Japanese organization, was appointed by the Japanese authorities to act as the liquidator of a number of banks, including the appellant and the respondent Bank. The liquidator recovered debts, but no banking business in the ordinary sense was done prior to October 1944.

The respondent was in Singapore when the Japanese occupied Sarawak and he did not return there until after the liberation. Singapore was occupied by the Japanese in February 1942.

On October 16, 1940, before the Japanese had entered the war, the respondent wrote to the appellant informing it that Mr. Wee Hian Tech had authority to sign cheques for the respondent Bank. Mr. Lim Thian Liang also had authority to sign.

In September 1944, a military order made by the Japanese provided that 30 per cent. of the amount of the balances with the appellant might be refunded to customers. By October 10, 1944, the liquidator had liquid assets of the respondent Bank amounting to $273,386.47.

Shortly before October 10, 1944, the Japanese authorities established the Kyoei Bank. This Bank was a joint stock company under the law of Japan. It was to be an amalgamation of the respondent Bank and two other Chinese banks. Its object was to provide banking facilities for the customers of those three banks and, it may be, for others. On October 10, 1944, the appellant's liquidation account was debited with $72,792.44, being 30 per cent. of the amount of the respondent Bank's balance with the appellant. The respondent Bank's liquidation account was credited with that sum. Added to the sum of $273,386.47, this made $346,178.91. The respondent's liquidation account was debited and the Kyoei Bank was credited with that sum.

Also on October 10, 1944, a cheque for $72,792.44, signed by Wee Hian Teck on behalf of the respondent Bank, was drawn on the appellant. The cheque was payable to the Bian Chiang Bank or Bearer. (There was no suggestion that this cheque was signed under duress.) A receipt was also signed by Wee Hian Teck on behalf of the respondent Bank and addressed to the Yokohama Specie Bank as liquidator of the appellant.

During the occupation period the currency depreciated, and by October 1944 was worth 1/26 of its pre-occupation value. At the end of the occupation period the currency was valueless. At that date the Kyoei Bank collapsed, its assets consisting of about a million dollars in valueless currency.

After the termination of the occupation the appellant repaid to the respondent Bank the balance left in the account, namely, $169,849.04. The claim in the present case was for the $72,792.44. The respondent Bank claimed that the payment of this sum on October 10, 1944, was cancelled under the terms of the Debtor and Creditor (Occupation Period) Ordinance. The appellant, also relying on the Ordinance, submitted that the claim failed wholly or in part. The High Court of Sarawak found for the Chartered Bank of India, Australia and China. On appeal, the Court of Appeal of Sarawak, North Borneo and Brunei reversed the High Court's decision. The Chartered Bank then brought this appeal to the Judicial Committee of the Privy Council.

Held: that the appeal must be allowed. Where part of the pre-occupation balance of account of any person with a bank in Sarawak was, during the period of enemy occupation of Sarawak, credited to an account of that person with certain Japanese banks it must be regarded as valid payment to that person under the Debtor and Creditor (Occupation Period) Ordinance if he received a benefit from such payment: he did receive such a benefit if the sum in issue was used to repay his creditors. *Semble,* where an agent was appointed in one jurisdiction by a principal resident in another jurisdiction, both jurisdictions being occupied by the same enemy, the contract of agency was not necessarily abrogated as a matter of law.

The judgment of their Lordships was delivered by Lord Somervell of Harrow, who said: " The learned trial Judge accepted the appellant's submission that the ' payment ' was within the words of section 4 (1)[1] and was therefore a discharge to the extent of its face value of the pre-occupation debt. The respondent had sought to bring the transaction within the terms of section 4 (2)[1]

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[1] Section 4 of the Debtor and Creditor (Occupation Period) Ordinance, so far as is relevant, reads:

" 4. (1) Subject to the provisions of subsection (2) of this section, where any payment was made during the occupation period in Sarawak currency or occupation currency by a debtor or by his agent or by the Custodian or a liquidation officer purporting to act on behalf of such debtor, to a creditor, or to his agent or to the Custodian or a liquidation officer purporting to act on behalf of such creditor, and such payment was made in respect of a pre-occupation debt, such payment shall be a valid discharge of such pre-occupation debt to the extent of the face value of such payment.

" (2) In any case—

(a) where the acceptance of such payment in occupation currency was caused by duress; or

. . . .

(c) where such payment was made in occupation currency to a Custodian or liquidation officer in respect of a pre-occupation capital debt except where payment as aforesaid was caused by duress;

. . . .

such payment shall be revalued in accordance with the scale set out in the Schedule or section 7.[1] The learned Judge held that neither of these were applicable.

"The Court of Appeal held that the transactions came within the provisions of section 7 (3). Blagden, J., held that the transaction, looked at as a whole, amounted to a crediting of a percentage of the pre-occupation balance of the account of the respondent with the appellant, to the account of the respondent with the Kyeoi bank. Smith, Acting C.J., said,

'Section 7 (3) of the Ordinance No. 18 seems to me to have been drafted precisely to meet a case of this kind.'

Their Lordships agree with both these findings. Assuming that the transactions amounted to a payment within the general words of section 4 (1), if they had stood alone, the Ordinance must be construed as a whole and section 7 (3) which makes express reference to the Kyoei bank is clearly the applicable provision to cases such as the present which fall within its special terms. Similar reasoning leads to the rejection of the respondent's arguments that the case should be treated as falling within section 4 (2) (c) or section 7 (2).

"The next point is one of construction of the latter half of that part of section 7 (3) which precedes sub-paragraph (a). It is conceded that the respondent bank did not draw the whole or any portion of the amount so credited. The Court of Appeal held that the respondent bank did not have also to prove that it received no benefit. The

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of this Ordinance and shall be a valid discharge of such debt only to the extent of such revaluation."

[1] Section 7 of the Ordinance, so far as is relevant, reads:

"7. (1) A transfer of money by a customer to another account of that customer in the same bank or the renewal of a fixed deposit from time to time in the same bank shall not be deemed to be a payment by the bank to the customer for the purposes of this Ordinance.

(2) Subject to the provisions of subsection (3) of this section, a payment by a bank to a Custodian or liquidation officer of any pre-occupation credit balance or part thereof of a customer shall not be deemed to be a payment to the customer for the purposes of this Ordinance.

(3) Where during the occupation period the whole or a percentage of the pre-occupation balance of the account of any person with a bank was credited to an account of that person with a Japanese bank or the Kyoei bank and the account of such person with the first-mentioned bank was debited accordingly, such debit shall be deemed to be a payment to the customer unless he can prove that he did not draw the whole or any portion of the amount so credited to him, or that he obtained no benefit from such credit or part thereof, and in any such case—

(a) if the pre-occupation balance or the percentage thereof, as the case may be, was credited to such person's account with the Japanese bank or the Kyoei bank, as the case may be, otherwise than at the request or with the consent of such person or his agent, such debit, except to the extent of the face value of any amount which such person has failed to prove was not drawn by him or to the extent that he has failed to prove that he obtained no benefit from such credit, shall be cancelled and shall not be deemed to be a payment to the customer for the purposes of this Ordinance;

(b) if the pre-occupation balance or the percentage thereof, as the case may be, was credited to such person's account with the Japanese bank or the Kyoei bank, as the case may be, at the request or with the consent of such person or his agent, one half of the amount which, if paragraph (a) of this subsection applied, would be reinstated to the credit of such person in the first-mentioned bank shall be reinstated to the credit of such person in such bank."

debit was therefore not a payment to the respondent unless the appellant could show that the respondent ' requested or consented ', in which case the matter would fall under section 7 (3) (b). The appellant in the opinion of the Court of Appeal failed to do this and the claim therefore succeeded.

" The point of construction is not an easy one. Their Lordships have come to the conclusion reading the subsection, as it must be read, as a whole, that if the customer as here has not drawn, he must prove that he received no benefit from the credit, or from that part of it which was not drawn. This is not to read ' or ' as ' and '. If the customer has drawn, the payment is valid, *or* if he has received benefit the payment is valid. Put as it is in the negative form it would have avoided the ambiguity if some further words had been inserted. This construction is admittedly supported by the words used in subsection (a).

" The question then is whether the respondent succeeded in proving that he obtained no benefit. The learned trial judge apparently thought he had failed to do so. Blagden, J., in dealing with the question of interest thought there was some evidence that the respondent had obtained some benefit. There is no detailed consideration of the point as it did not arise on the view taken by either court below.

" Their Lordships are satisfied that there is sufficient material before them to decide the point. The respondent in his claim alleged that he obtained no benefit, on the assumption that the provisions of section 7 (3) on this matter were or might be applicable. It was plainly for the respondent to produce the evidence relevant to this point. The relevant facts can be briefly stated.

" On or about October 10 there was as has been stated transferred to the respondent bank's account with the Kyoei bank $346,178.91. This included the sum of $72,792.44 in issue in these proceedings. From that date down to the end of the occupation further sums of approximately $523,000 were collected. There were payments out to creditors of the respondent bank amounting to approximately $675,000. These payments out were plainly a ' benefit ' to the respondent. They may so far as the evidence goes all have been in discharge of pre-occupation debts. If one applies the ordinary principle of ' first in first out ', the sum in issue was used to repay creditors. The respondent would plainly have failed to prove no benefit.

" The respondent's argument was put in two ways. He submitted that there was always more than $72,792.44 in hand. This depended on a submission of fact which can be accepted for the purpose of considering the arguments on this point. If therefore this sum could be regarded as untouchable until all other assets had been exhausted it was never required to confer the admitted benefits on the respondent. There is clearly no reason why this sum should be put in any special position. Then it was said that if this $72,792.44 had never been transferred, everything that did happen would have happened, and the account would never have been overdrawn. If this argument were available for this item, it should be available for any other item. If one assumes, as might well be the case in a similar account, that no individual payment in exceeded the minimum credit throughout the period the account was operated, so that there would never have been an overdraft if any particular item had not been paid in, the customer would be able to show that he had received no benefit from any of the sums collected though he would have to admit that he had received benefit to the extent of $675,000 by payments out of the account.

"The proper principle to apply *prima facie* in considering whether the customer obtained or did not obtain any benefit from an amount credited is that of first in first out. If special circumstances might oust that principle there are none such here. Applying that principle the respondent failed to prove no benefit and the debit in the respondent's account with the appellant is to be deemed to be a payment.

"It is therefore unnecessary to consider the application of section 7 (3) (a) and whether by the signing of the cheque or otherwise the respondent had consented to the credit.

"It is desirable to refer briefly to the decision of the Court of Appeal on the question whether the authority was abrogated by operation of law.[1]

"The learned Acting Chief Justice referred to *Hangkam Kwingtong Woo* v. *Liu Lam Fong* [1951] A.C. 707 as supporting the view that the authority was not determined by the occupation of Sarawak although the respondent was at that time on the other side of the 'line of war' in Singapore. In the *Hangkam* case this Board had to consider the position in the courts of Hong Kong, applying English law as to trading with the enemy, after Hong Kong had been occupied by the enemy. As is stated in the judgment this is a plunge into the unknown, 'since the soil of England has not within the period of the development of the common law in this matter been occupied by the enemy'. In that case a principal had given a power of attorney to a person in Hong Kong, the principal being at the relevant time in Free China then in alliance with the British Crown. It was held that the courts of Hong Kong could not regard the principal, being one of its inhabitants, as an enemy, although on the other side of the line of war. A study of the case shows how special and difficult is the problem of applying the common law as to trading with the enemy in territories in enemy occupation. The Acting Chief Justice went on to hold that the position changed when the Japanese occupied Singapore in February, 1942. As from that date the respondent became an enemy. He may well have relied on an observation in the judgment in the *Hangkam* case (p. 719).

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[1] Section 2 (2) of the Debtor and Creditor (Occupation Period) Ordinance, so far as is relevant, reads as follows:

"2. (2) For the purposes of this Ordinance any person, who, immediately prior to the commencement of the occupation period, had authority (hereinafter referred to as his 'former authority') to act as agent for another (hereinafter referred to as his 'former principal') shall be deemed to have been the agent of his former principal to the extent that he continued, during the occupation period and while his former principal was absent, to act on behalf of his former principal in any matter which would have been within the scope of his former authority, notwithstanding that his former authority had, upon the commencement of, or during, the occupation period and while his former principal was absent, been determined in any of the following ways, that is to say—

(a) by operation of law, as a result of the occupation of the territory now comprising the Colony by the Occupying Power; . . ."

"'Suppose that the appellant had, instead of going to the territory of an ally, gone to Japan and thence sought to maintain some contractual relations with Chan' (the attorney). 'Then apart from any regulation which the occupying power might lawfully make, a court of Hong Kong would be bound to treat him as an enemy, to deny him access to its presence and to treat the contractual relation as determined.'

"It is common ground in this case that if the principal had remained in Sarawak the agency would not have been determined by operation of law. It is said that Singapore being a different territory and jurisdiction the principle that those in enemy occupied territory are enemies applied. Normally such persons would be on the other side of the line of war (*Sovfracht* v. *Van Udens Scheepvaart En Agentur Maatschappij* (*N.V. Gebr.*), [1943] A.C. 203[1]). In their Lordships' opinion the answer to the question might well turn, as suggested in the above passage from the *Hangkam* case, on the regulations made by the occupying Power. If adjacent jurisdictions such as England and Scotland were occupied by an enemy the question might well depend on the extent of interference with contractual intercourse, access to courts and so on. It would not be right in their Lordships' opinion to lay down as a matter of law that where two jurisdictions are occupied by the same enemy all contracts between those in such territories are necessarily abrogated.

"In the result the claim fails. Their Lordships will humbly advise Her Majesty that the appeal be allowed and the judgment of the learned trial Judge restored. The respondent must pay the costs here and in the Court of Appeal."

[Report: Privy Council Appeal No. 50 of 1954.]

[[1] *Annual Digest*, 1941–1942, Case No. 165.]

Belligerent Occupation—Act of Government of Occupied State—Whether Authorized by Occupying State—Sale of Surplus Property By One State to the Other—Agreement to Guarantee against Claims of Private Persons—The Law of the United States of America.

OAKLAND TRUCK SALES, INC. *v.* UNITED STATES.

United States, Court of Claims. April 3, 1957.

THE FACTS.—The plaintiff in January 1950 purchased from a German corporation, STEG, a quantity of surplus property of the United States Army which had been turned over by the United States to the German Government. STEG was a corporation formed by the German Government for the purpose of re-selling such property for the account of the German Government. After title to the property had passed to the plaintiff, but while the property was still in United States Army camps in Germany, the Army, about October 1, 1950, took possession of the property, refused to allow the plaintiff to remove it, and instructed STEG not to deliver it to the plaintiff. The plaintiff demanded compensation from the Army but was paid a sum considerably less than was claimed; it did not release the United States Government from liability.

This was an action to recover the remainder of the compensation to which the plaintiff contended it was entitled. The Government in its answer stated that the plaintiff had instituted an action in the German courts against the legal successor of STEG for failure to deliver the property; in that action, the plaintiff alleged that STEG voluntarily delivered to the United States Army the property which it had sold to the plaintiff. The Government also stated that under the Agreement between the United States of America and the Federal Republic of Germany regarding the Settlement of the Obligation of the Federal Republic of Germany to the United States of America for Surplus Property Furnished Germany, signed in London on February 27, 1953, Article VII (4 U.S.T. 923, T.I.A.S. No. 2797, 205 U.N.T.S. 103), the United States was obliged to reimburse Germany for any judgment which the plaintiff might recover in its German suit. The Government moved for judgment on the pleadings on the ground that the Court was denied jurisdiction under 28 U.S.C. § 1500. That section deprived the Court of Claims of jurisdiction over any claim with respect to which the plaintiff had initiated a suit against any person acting directly or indirectly under the authority of the United States.

Held: that the motion of the United States for judgment on the pleadings must be denied. Neither the German Government nor its public corporation was in 1950 an agency of the United States. The agreement of the United States to hold the German

Government harmless did not, even indirectly, make the latter an agency of the United States.

The Court said: ' The Government has now filed a motion for judgment on the pleadings, asserting that 28 United States Code § 1500 deprives this court of jurisdiction of this claim, because of the pendency of the plaintiff's suit in the German court.

" Section 1500 says—

> " ' The Court of Claims shall not have jurisdiction of any claim for or in respect to which the plaintiff or his assignee has pending in any other court any suit or process against the United States or any person who, at the time when the cause of action alleged in such suit or process arose, was, in respect thereto, acting or professing to act, directly or indirectly under the authority of the United States.'

The basis of the Government's contention is that the German public corporation, TREUAG, the defendant in the plaintiff's German suit is, in the circumstances, a person acting under the authority of the United States. The Government points to the agreements cited supra which said that the United States would credit the Federal Republic with the costs and judgments paid by the Federal Republic as a result of suits against it or its agencies relating to the disposition of surplus property, provided that the United States was given notice of such suits and an opportunity to participate in their defense.

" We think section 1500 is not applicable. The plaintiff sues in this court because, it says, the Government took its property and is therefore obliged to pay it just compensation. It sues in the German court because, it says, the German corporation sold the property to it, and then voluntarily turned over the possession of it to another person, the United States. The German corporation was an agency of the German Government and, no doubt, did whatever it was instructed by its government to do. But neither the corporation nor its government was an agency of the United States. It is likely that in October 1950 when the property was taken by the United States, the German Government was given some assurance, later embodied in the formal agreements cited above, that if it complied with the wishes of the United States it would be held harmless. But such a collateral assurance did not make it an agency of the United States, within the meaning of section 1500, unless the word ' indirectly ' is to be given an almost unlimited meaning.

" The plaintiff has been put in a position where it is necessary for it to bring its suit in this court in order to protect its interests. To its suit in the German court, the German equivalent of a demurrer was filed, apparently based on the assertion that the pertinent documents showed that the defendant TREUAG was compelled by *force majeure*, i.e. the American occupation authorities, to deliver the property to the United States, and therefore its delivery to the plaintiff was impossible, and was excused. The German court of first instance, the Landgericht, overruled the demurrer. The case has been appealed to the Oberlandesgericht, which, apparently of its own motion, has directed the plaintiff to procure and produce a certificate of the Ambassador of the United States about the question whether STEG, when it, in 1950, delivered the property to the United States, was, under the then Occupation Statute and a certain section of a law of the Allied High Command, performing an act as to which the German courts then and now had no jurisdiction without a special authorization of the Allied High Command.

"If the German courts should decide that they had no jurisdiction, or if TREUAG's demurrer should be sustained on appeal, on the ground of *force majeure*, the plaintiff would have no remedy in Germany. The United States would have taken the plaintiff's property, the Statute of Limitations would have run against a suit in this court, and the plaintiff would have no remedy anywhere. We are not disposed to stretch the meaning of section 1500 to produce this result.

"If the plaintiff recovers in the German courts, the United States, because it is bound by its agreement with Germany to, in effect, pay the judgment, would have discharged its liability. Because the litigation in the German courts has already progressed to the appellate court, and gives promise of being concluded with reasonable promptness, we shall not proceed with the case in this court until some further reason appears for our doing so."

[Reports: 138 Ct.Cl. 63, 149 F.Supp. 902.]

Belligerent Occupation—Joint Occupation—Occupation of Japan After Second World War—Responsibility of United States for Act of Supreme Commander for the Allied Powers in Japan—Legislative and Administrative Functions of Occupant—Act of Government of Occupied Territory Performed at Direction of Occupant—Retention of Seized Property by Government of Occupied Territory at Direction of Occupant—Whether Attributable to Occupant.

STANDARD VACUUM OIL COMPANY *v.* UNITED STATES.

United States, Court of Claims. July 12, 1957.

THE FACTS.—This was an action to recover damages for the alleged use by the United States of certain properties in Japan which were owned by the plaintiff Company. The property, which consisted of housing, had been seized by the Japanese Government from its American owner at the outbreak of war between the two countries. During the occupation of Japan after the surrender of that country, the Supreme Commander for the Allied Powers, acting on behalf of the Allied Powers, directed that Japan return to their owners certain properties which had been seized by Japan, but required that the housing in issue in this case be retained for the use of the occupation forces until no longer needed by them. The plaintiff maintained that these arrangements constituted a taking by the United States, for which compensation was required under the Fifth Amendment to the United States Constitution.

Held: that the plaintiff's petition must be dismissed. The property in question was taken from Japan by the Allied Powers and subsequently restored to the owners under a directive of the Supreme Commander for the Allied Powers. The occupation of the plaintiff's properties was accordingly not an act of the United States.

The Court said: " The paramount question to be answered here is whether the properties in question were taken by the United States, for which plaintiff can be compensated under the fifth amendment to the Constitution.

" The facts clearly show that the property in question was taken from plaintiff by the Imperial Government of Japan after the outbreak of hostilities, under the provisions of the Japanese Enemy Property Custody Law (No. 99 of December 22, 1941) and Japanese Imperial Ordinance Relative to the Enforcement of Enemy Property Custody Law (Imperial Ordinance No. 1179 of December 1941).

" Title to and custody of the properties were registered and recorded in the name of the Enemy Property Custodian appointed by the Japanese Ministry of Finance.

"At the time of seizure, Japan was a sovereign independent nation having power and jurisdiction over all property within its territory, and its actions with respect to plaintiff's properties were legally valid and divested the plaintiff of any interest in them. *Ricaud* v. *American Metal Co.*, 246 U.S. 304, 310, 38 S.Ct. 312, 62 L.Ed. 733; *Shapleigh* v. *Mier*, 299 U.S. 468, 471, 57 S.Ct. 261, 81 L.Ed. 355.[1]

" On August 14, 1945 (U. S. time) the Japanese Government accepted the provisions of the Potsdam Declaration of July 26, 1945, defining the terms for Japanese surrender, and offering to surrender unconditionally to the Allied Powers. This offer was accepted on the same day and the Japanese Government was ordered to cease hostilities and formally surrender to the Supreme Commander for the Allied Powers at a time and place to be designated by him. After the instrument of surrender was signed, the authority of the Japanese Government to rule the state was made subject to the Supreme Commander for the Allied Powers. The instrument of surrender was accepted by the Supreme Commander for the Allied Powers for the United States, the Republic of China, the United Kingdom, and the Union of Soviet Socialistic Republics, and in the interests of the other United Nations at war with Japan, and was also signed by representatives of nine powers at war with Japan.

[[1] See *Annual Digest*, 1935–1937, Case No. 14.]

Immediately thereafter General Douglas MacArthur was named Supreme Commander for the Allied Powers and commenced the military occupation and control of Japan.

" On September 3, 1945, the Supreme Commander for the Allied Powers issued a directive to the Japanese Government requiring it to place at the disposal of the occupation forces of the Allied Powers all local resources required for their use. Procurement regulations were established for the acquisition of facilities and the properties in question were subjected to demand from the Japanese Government.

" Under the Far Eastern Commission's policy decision and directive of March 6, 1947, the Supreme Commander for the Allied Powers was authorized to restore to the allied owner property which had been seized by the Japanese Government. Pursuant to such authorization, the Supreme Commander for the Allied Powers issued instructions to the Japanese Government concerning the procedure to be followed in effecting restoration of the property to the allied owner.

" The plaintiff filed demands for the return of each of the properties in question with the Supreme Commander for the Allied Powers, and supplemented them with final requests for restoration in accordance with procedures established by the Supreme Commander for the Allied Powers. In each of its final requests the plaintiff stated:

> " ' We understand that General Headquarters, Supreme Commander for Allied Powers, and the Japanese Government will be relieved of all preservation, maintenance and custodial responsibilities with respect to said property after the date set for restoration, consistent with the procedure for physical repossession of property under Procurement Demand.'

" Pursuant to such demands for the return of property and final requests for restoration, the Supreme Commander for the Allied Powers directed the Japanese Government to return the properties to the plaintiff. In those instances where the property was being used by the Occupation Forces, the plaintiff was informed that physical possession could not be effected until such time as the property was no longer required by the Occupation Forces.

" The military control and occupation of Japan under the sole executive authority of the Supreme Commander for the Allied Powers began on September 2, 1945, and from its inception the occupation of Japan was an allied undertaking and responsibility. The use of the properties in question was determined by the Supreme Commander for the Allied Powers to be necessary to the occupation of Japan.

" Thus the property was, because of the allied victory, legally taken by the Allied Powers from Japan and title restored under a directive of the Supreme Commander for the Allied Powers.

" It is to be noted at this point that all action taken was by the Supreme Commander for the Allied Powers, not by the United States. As was said in *Anglo-Chinese Shipping Company, Ltd.* v. *United States*, 127 F.Supp. 553, 554, 130 Ct.Cl. 361, 362:[1]

" ' . . . The occupation of Japan was a joint venture, participated in by the United States of America, the United Kingdom, China, and Russia; . . .'

This leaves no doubt but that occupation of plaintiff's properties was not an act by the United States but by the Allied Powers. There was no taking by the United States and thus the Government is not liable under the fifth amendment. See *Koki Hirota* v. *MacArthur*, 338 U.S. 197, 69 S.Ct. 1238, 93 L.Ed. 1902;[2] *Flick* v. *Johnson*, 85 U.S.App.D.C. 70, 174 F.2d 983.[3]

" To hold otherwise would be to open the door to claims of not only citizens but noncitizens alike for all occupancy by the Allied Powers, thus causing the United States to bear almost the entire financial burden, not only of the war but also of the peace. This we are not prepared to do.

" The unfortunate circumstances of war very often lead not only to human misery but to financial loss as well. It is unfortunate that plaintiff has received no compensation for the occupancy of the properties in question,[4] but on the other hand perhaps it is fortunate that plaintiff's property was preserved and protected by the Allied Powers' occupancy.

" There being no fifth amendment taking by the United States, plaintiff's petition is dismissed."

Madden J., with whom Jones C.J. joined, concurred separately on the ground that the Japanese Government, being responsible under international law for the housing of the armed forces of the Occupant, had actually taken the property and that the rental paid by the Japanese Government was the sole compensation to which the plaintiff was entitled. In his concurring opinion, he said:

> " When a defeated country is occupied, the victor has the right to impose upon the government of the defeated country the burden of housing the occupying troops. This would be true whether the occupation was that of a joint force, or by the forces of a single victorious nation. In the instant case the Supreme Commander for the Allied Powers exercised this right by issuing his directive to the Japanese Government. It then became the duty of the Japanese Government to make available to the occupying forces such housing as they selected and needed.
>
> " The Japanese Government had the duty to exercise its sovereign power to obtain the housing to comply with the directive of the Supreme Commander. It was not acting as an agent of the Supreme Commander, authorized and directed by him to secure housing for his troops at his nation's expense.

[[1] See *International Law Reports*, 1955, p. 982.]

[[2] See *Annual Digest*, 1948, Case No. 154.]

[[3] *Ibid.*, 1949, p. 422.]

[4] Plaintiff was, however, tendered the rent at the Japanese legal rate by Japan but refused to accept claiming it was not bound by the Japanese Rent Control Ordinance. Apparently Japan is willing to pay this amount today.

It was fulfilling its own obligation as a defeated and occupied sovereign. How it obtained the housing needed to fulfil that obligation was its own problem, governed by its own law. If its law was like our law, including our Fifth Amendment, it would have to pay for what it took for this public purpose, *i.e.* for fulfilling its obligation as an occupied nation.

" Japanese sovereignty, including its power to requisition property for a public purpose, extended, of course, to all the property within its territory, whether the private ownership of that property was in Japanese, British, Dutch, American, or any other citizens. In the instant case, the property selected by the occupying forces and requisitioned by the Japanese Government happened to belong to an American citizen. That fact would seem to be completely immaterial. The important thing was that the property was taken by the Japanese Government for the purposes of that government. There was, then, no taking by the United States. There was use by United States forces, or allied forces, of housing furnished to them by Japan.

" It seems that the Japanese Government, under its laws, which laws may have been dictated by the Supreme Commander, or may have been the existing laws of Japan, did pay rent for housing which it took from private persons in order to furnish it to the occupying forces. It tendered such rent to the plaintiff, at the rate which was legal under the laws of Japan. That is all that a Japanese or a Britisher or a Dutchman would have been entitled to and that is all that the plaintiff, an American, was entitled to, for its property in Japan and subject to Japanese laws. The plaintiff refused the tender. It made a mistake in doing so. Whether, under Japanese laws, the money is still available to it we do not know. That is a problem for it and the Japanese Government. Plaintiff's petition must be dismissed."

Whitaker J. dissented on the grounds that, although the occupation of Japan was a joint enterprise of the United States, Great Britain, Russia, and other Powers, each Occupant was responsible for the maintenance of its own forces and that the United States was under an obligation to pay compensation for the use of property of an American corporation, which property had been liberated from Japanese control. In his dissenting opinion, he said:

" I cannot agree with the opinions of the majority. In the first place, I do not agree with the reason assigned by Judges Laramore and Littleton for the nonliability of the United States to pay just compensation for the occupation of plaintiff's property, to wit, that it was an occupation not by the United States, but by the Allied Powers.

" The occupation of Japan was a joint enterprise of the United States, Great Britain, Russia and other Powers, but each Power was liable for the expense of the maintenance of its own forces. Food and clothing were purchased by the United States for its troops, by Great Britain for its troops, etc. Liability for these purchases was on the Government making them, and on it alone. The cost of quartering its troops was also the responsibility of the several Governments. That each of them was engaged in a joint venture with the others affords no escape from liability. See *Anglo-Chinese Shipping Co.* v. *United States*, 127 F.Supp. 553, 130 Ct.Cl. 361.

" However, there is in my mind a serious question of the liability of the United States on another ground. After the outbreak of war with Japan, plaintiff's property, located in Japan, was, under international law, enemy property, and during hostilities, at least, was liable to utilization, or even to destruction, by our forces with impunity; the owner had no redress against the United States therefor. *Juragua Iron Co., Ltd.* v. *United States*, 42 Ct.Cl. 99, affirmed 212 U.S. 297, 29 S.Ct. 385, 53 L.Ed. 520; *Herrera* v. *United States*, 222 U.S. 558, 32 S.Ct. 179, 56 L.Ed. 316; Oppenheim, *International*

Law (6th Ed.) Vol. II, section 140; Wheaton, *International Law* (7th Ed.) p. 248; Hyde, *International Law* (2d Rev. Ed) Vol. III, pp 1726–1731.

" Does this rule apply to the property of a citizen of the United States, or a corporation of the United States, after the formal surrender of the enemy?

" Technically, of course, the war is not over until the treaty of peace is signed, and occupation forces are a necessary aftermath of the surrender Also, it will not be disputed that during the period of occupation our Government could require the use of the property of a Japanese national, and that national would have no recourse against it. But does this same rule apply to the property of an American citizen or an American corporation after the enemy has surrendered? After the surrender, is the property of an American citizen still enemy property?

" The war was fought for the protection of American lives and property, for the protection of this property as well as other property of our citizens; it was fought to secure restoration of American property that had been seized by the enemy. This purpose was partly accomplished by the order of the Supreme Commander requiring the restoration of the property seized by the Japanese Government. The Japanese Government restored title to it, and would have restored possession except for its occupancy by the American Army. From that time on, Japanese sovereignty over this property was ended; its dominion and control over it was surrendered and the title of its former owner was recognized.

" Thereafter, this property could not in reason be classified as enemy property. It was the property of an American corporation, which had been liberated from the hands of the Japanese.

" Now, the right of the American Army of Occupation to use it in furtherance of the purposes of the occupation is not open to question; but when so used, it was used, not as enemy property, but as the property of an American corporation. Its owner was entitled to the same recompense as the owner of other property taken by the Government for public purposes, to wit, the payment of just compensation.

" The United States had the right, as the victor, to require the conquered enemy to pay the cost of occupation, including the rental value of plaintiff's property; but this does not mean that the United States can shift to Japan's shoulders the responsibility the United States is under to one of its own citizens for the taking of its property. It must compensate the citizen itself, and then look to Japan for restitution. *Seery* v. *United States*, 127 F.Supp. 601, 130 Ct. Col. 481.

" I think the plaintiff is entitled to recover the fair rental value of the property from the time title to it was restored to plaintiff by the Japanese Government, and until possession of it was restored to plaintiff by the United States Government."

[Reports: 139 Ct.Cl. 113, 153 F.Supp. 465; *certiorari* denied, 355 U.S. 893, 2 L.Ed.2d 191, 78 Sup.Ct. 266 (1957).]

Note.—The above case is noted in *Harvard Law Review*, 71 (1958), p. 1160.

Belligerent Occupation—Legislative Measures of Occupant—Racial Persecution by German Occupation Authorities in Holland—Anti-Jewish Legislation—Wrongful Application in Holland—Non-Recognition and Correction After the War.

PUBLIC MINISTRY[1] *v.* REGISTRATION OFFICER.

Holland, District Court of Zwolle. November 25, 1957.

THE FACTS.—On April 8,1940, shortly before the German invasion of Holland, one M., a Jew, of German nationality, resident in the Netherlands, registered the birth of a daughter, Marlies, at the Registrar's Office. During the occupation, in compliance with the "Zweite Verordnung zur Durchführung des Gesetzes über die Aenderung von Taufnamen und Vornamen"[2] promulgated in Germany on August 17, 1938 (*Reichsgesetzblatt* I-I, p. 104), the Registrar added to the first names of the father the name Israel, and to his wife's and their daughter's first names the name of Sara. In 1957, the *Openbaar Ministerie*[1] applied *ex officio* to the Court for an order striking out these Jewish names from the register of births.

Held: that the three added names must be struck out.

" The Court said: " The German Ordinance was intended to make a distinction between persons of Jewish and of non-Jewish blood. Application of this Ordinance in a Netherlands register of births runs counter to Dutch *ordre public.* The Registrar was, consequently, at fault in following the instructions contained in this Ordinance and in inserting the names Israel and Sara."

[Report: *N.J.*, 1958, No. 437.]

Occupied Territory—Administrative and Legislative Measures of Occupant—Illegal Annexation of Occupied Territory—Law Introduced by Occupant in Contravention of Articles 43 and 46 of Hague Regulations of 1907—Legislation Depriving Inhabitants of Right to Dispose of Property—Testamentary Dispositions.

In re WILL OF WINCENTY K.

Poland, Supreme Court. April 24 and May 5, 1948.

THE FACTS.—This case concerned the validity of a will executed during the Second World War by a Polish national in that part of occupied Poland which was annexed by Germany. At the commencement of the occupation, the law of succession in force in the territory concerned was that of the Code Napoléon, which gave full powers of testamentary disposition to the individual; but by an Ordinance of September 17, 1940, Polish nationals were deprived of the right to dispose of their property unless certain consents were obtained. The testator, Wincenty K., was illiterate and his will was written out by another person, who was not a notary public as required by the Code. The District Court held that the will was invalid as it did not satisfy the requirements laid down in the Code Napoléon. The "successor" appointed by Wincenty K. under his will appealed against that decision on the ground that under the legislation imposed by the German authorities it was impossible to obtain a notarial will. The Court of Appeal confirmed the judgment of the Court below. The successor then applied for cassation of the judgment.

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[1] *Openbaar Ministerie,* a Government Department charged not only with the prosecution of serious crimes but also with a number of other duties tending to the enforcement or clarification of the law in the public interest.

[2] " Second Decree for the bringing into force of the Law concerning the Changing of Baptismal names and forenames."

Held: that the application must be granted and the decision appealed against reversed. The testator was prevented from making a regular, *i.e.*, notarial, will by the measures imposed by the Occupant contrary to the Hague Regulations of 1907. In such circumstances a will made in irregular form must be admitted.

After explaining that the Code Napoléon, and not the post-war Law of Succession, was applicable to the case under consideration, the Court said: "The provisions of the Code Napoléon (Articles 970, 973, 976 and 977) prescribe that for the will of an illiterate person, except in special circumstances which are not present in this case (Articles 985, 988 *et seq.*), the notarial form must be used—that is, the will must be deposited with a notary public after compliance with certain formalities.

"It follows, however, from the facts extablished by the order appealed against that the will in the present case was made in 1942, during the German occupation. By virtue of the unlawful legislation of the occupation authorities—unlawful in view of Articles 43 and 46 of the [Hague] Regulations respecting the Laws and Customs of War on Land—namely, the Ordinance of September 17, 1940, concerning treatment of the property of Polish citizens (*Reichsgesetzblatt*, I, p. 1270), the said property was no longer capable of free disposal by the owners (Paragraph 4), who could dispose of it only with the permission of the competent agency (Paragraph 15 (1)), that is, the Commissioner for the Four-Year Plan, the Chief Trustee Administrator for the East, and the Reich Commissioner for Strengthening Pan-Germanism (Paragraph 12 (1)). Thus in the territories incorporated into the Reich it was not possible for a Polish national to make his will in the notarial form because in view of the above provisions a notary public would have had to refuse to draw up the will if the testator did not duly obtain the permission of the occupation authorities. The Code Napoléon, in envisaging in Articles 985 and 988 *et seq.* cases in which making a notarial testament was impossible, did not provide for a case where the impossibility had been caused by unlawful legislation by an Occupant during war; in those cases which the Code enumerated, a special form of will was provided, which consisted of the will being drawn up by a ' person worthy of confidence ', for example a justice of the peace or official of a municipality (Article 985), the commanding officer of a man-of-war or his deputy, or the writer of the vessel acting together with the captain or owner of the vessel (Article 988). Consequently, the lacuna in the provisions of the Code must be filled in on the basis of Article 3 of the General Principles of Civil Law, to the effect that wills made by illiterate Polish nationals during the occupation in territories incorporated into the Reich must be deemed valid provided that such wills were drawn up in the presence of two witnesses by ' a person worthy of confidence ', and provided that the lack of notarial form could not have been subsequently cured after the liberation of the country.

" It follows from the above that the grounds of application for cassation are justified in that the absence of the notarial form in the will of Wincenty K. should not have been regarded by the District Court as clearly invalidating the will under Article 78 of the Law of Succession Procedure, seeing that Wincenty K. died before the country had been liberated from the occupation and thus could not have cured the irregularity; consequently, the District Court wrongly dismissed the appellant's application for an order establishing her claim to the inheritance."

[Report: *Państwo i Prawo*, 4 (1949), No. 12, p. 111.]

Belligerent Occupation—Legislative Functions of Occupant—Legislation Affecting Private Property—Whether Lawful—Article 43 of Hague Regulations of 1907—Invasion and Occupation in Contravention of General Treaty for Renunciation of War, 1928—Whether State Committing Such Invasion Entitled to Rights of a Belligerent Occupant—Law in Force in Territory Thus Invaded—Contracts of Sale of Immovable Property During Occupation—Impossibility of Compliance with Requirement of Form of Notarial Act—Validity of Such Contracts.

B. *v.* T.

Poland, Supreme Court. March 19, 1949.

The Facts.—This was an action by Jan B. and others against Czesław and Hieronim T. for ejectment from and recovery of certain immovable property. When the case, in the course of appeal proceedings, came before the Supreme Court the Judges referred to the full Civil Chamber of the Supreme Court as a point of law the question of the validity of contracts of transfer of immovable property which were made in Poland during the German occupation between 1939 and 1945 and which, because of difficulties existing at the time, did not comply with the formal requirement of a notarial act.

Held: that such contracts were not necessarily invalid. " Contracts of transfer of immovable property made in writing in Poland under the rule of the Hitlerite invader between 1939 and 1945 without complying with the formal requirement of a notarial act are not, for that reason, invalid if such compliance was impossible because of difficulties resulting from the unlawful activity of the invader."

The Court said: " The point of law submitted for decision raises the question of the difficulties which existed under the rule of the Hitlerite invader in the years between 1939 and 1945 and which prevented compliance with the form of a notarial act in the making of contracts of transfer of immovable property. In order to establish the legal principle involved, it is necessary to consider whether such difficulties did exist and what was their nature.

" In the [Polish] territories ' incorporated ' into the Reich the Order of September 17, 1940, concerning the treatment of property of citizens of the former Polish State[1] permitted, and in some cases ordered, the sequestration and placing under the administration of a trustee of the property of Polish citizens. The sequestrated property could be confiscated whenever the public interest, in particular the defence of the Reich or the ' strengthening of Germanism ' required it. Under executive regulations dated May 30, 1941,[2] in every case involving immovable property confiscation was presumed to be necessary ' for the strengthening of Germanism '. The effect of the sequestration of property was the loss of the right of disposal of it. The fact that only Germans could act as notaries public in the territories incorporated into the Reich (para. 2 (5) of the Order of June 13, 1940, concerning the Organisation of the Courts in the Incorporated Eastern Territories: *Reichsgesetzblatt*, I, p. 907) ensured that any attempt to dispose, in the form of a notarial act, of sequestrated property would be ineffective.

" In the territory of the ' Government General ', the Order of January 24, 1940, concerning the Sequestration of Private Property in the Government General,[3] permitted the sequestration of and the appointment of a trustee-administrator for any private property which was required in connection with essential public works. Paragraph 7 of this Order provided that property liable to sequestration might be made subject to registration. In connection with this provision, the Order of the same day concerning the duty of registration of Jewish property in the ' Government General '[4] ordered the registration of all Jewish property at a specified time.

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[1] *Reichsgesetzblatt*, vol. I, p. 1270.

[2] *Mitteilungsblatt der Haupttreuhandstelle Ost*, 1941, No. 5, p. 195.

[3] *Verordnungsblatt des Generalgouverneurs für die besetzten polnischen Gebiete*, vol. I, p. 23.

[4] *Ibid.*, p. 31.

By paragraph 4 of that Order, property not registered was deemed to be *bona vacantia* and, in accordance with paragraph 8 of the Order concerning Sequestration of Private Property, was subject to confiscation. By virtue of these provisions the property of persons who, according to Nazi principles, were regarded as Jews underwent sequestration, trustee administration, or confiscation. Under para. 4 of the Order, sequestration of property resulted in a prohibition against alienation of it. Under para. 17 of the same Order, infringement of the Order and of the rules and regulations implementing and supplementing it were punishable by, *inter alia*, imprisonment. In this state of affairs, the making of contracts of transfer of sequestrated or confiscated immovable property in the form of a notarial act, that is, an act which was liable to come to the notice of the occupying authorities, was virtually impossible in the area of the 'Government General'.

"The above-described legislation introduced by the invader cannot be considered as binding.

"The Regulations respecting the Laws and Customs of War on Land annexed to Hague Convention No. IV of October 18, 1907, . . . regulate relationships arising from the temporary occupation of the territory of an enemy State during the war. According to Article 43 of the Regulations, the exercise of power passes only *de facto* into the hands of the Occupant, who is obliged to respect, unless absolutely prevented, the laws in force in the country. Thus the Regulations did not allow the German Reich to introduce its own or, indeed, any new legal system into the occupied territory of Poland. Besides, there is no ground for recognizing the Hitlerite invader as an Occupant in the sense of the said Regulations. For subsequent to the conclusion of Convention [No. IV] was signed the Pact of Paris of August 27, 1928, . . . prohibiting recourse to war as an instrument of national policy. In connection with the provisions of this Pact, the International Military Tribunal [at Nuremberg] in its Judgment of September 30 and October 1, 1946,[1] declared that the war commenced in 1939 by the Third Reich was an illegal war, and that the perpetrators of the invasion against Poland were guilty of a crime against peace under Article 6 (*a*) of the Charter of the Tribunal (annexed to the London Agreement of August 8, 1945). . . . Thus the Third Reich occupied Poland not in the course of a war constituting an action not prohibited by the law of nations, but in consequence of a crime against the law of nations. Therefore one cannot admit that the invader could acquire, by means of that criminal act, the same rights to the exercise of power in occupied territory as are acquired by a State which occupies enemy territory during the waging of a lawful war.

"The above principles correspond to the present practice of the Polish courts. In particular, the Supreme National Tribunal in

[[1] See *Annual Digest*, 1946, Case No. 92 (*sub nom. In re Goering and Others*).]

In re Greiser[1] adopted the view that the so-called ' occupation ' of Polish territory by force of arms was not an occupation in the true meaning of the word but constituted ' an unlawful seizure of another's territory by force and compulsion '. The decision of the Supreme Court of April 13, 1948 [in a case involving official acts of the occupation authorities in Poland],[2] . . . answered in the negative the question whether ' the German Reich and its officials enjoyed, in connection with the factual taking possession of Poland, the right to perform, as against Polish citizens, acts of State which the Occupant was entitled to carry out under the Regulations respecting the Laws and Customs of War on Land.'

"The unlawfulness of the assumption of any authority whatsoever by the Third Reich in Polish territory involves the invalidity of all legislation introduced by the invader.

" Consequently, the view must be accepted that in the territory subject to Nazi invasion there were binding, in principle, only the provisions of Polish law, including, again in principle, those provisions [of Polish law] which were maintained in force by the invader—the latter provisions, however, only because they had been enacted by the Polish legislator.

" Yet a doubt arises as to whether one can apply the provisions of the law in force in circumstances where Polish law, being in force, served the invader in the exercise of his unlawful administration and in carrying through the criminal purposes of that administration to the detriment of the Polish public interest.

" One can resolve that doubt by considering the fundamental premise of the existence of law, which is the social function of law.

" The function of law is to serve the interests of those who really govern a truly democratic State, that is, to serve the interests of the people. In a case where, as the result of such extraordinary circumstances as the invasion of a country, brought about by criminal organizations, the provisions of the law in force in fact serve the invader and not the lawful government of the invaded country, *i.e.*, its people, then such provisions do not fulfil their proper function, and consequently they cannot be applied.

" On the basis of this principle the question to be decided is whether and to what extent the provisions of Article 82 of the Law on Notaries Public should be applied to a contract of transfer of immovable property made under the rule of the Hitlerite invader in the years between 1939 and 1945.

" The purpose of the rule requiring a notarial act for contracts for the transfer of immovable property is to protect the citizen against too hasty decisions involving acquisition or alienation of such property; to ensure greater certainty as far as dealings in immovable property are concerned, by providing firm evidence that transfer of the property was in fact effected; and, finally, to facilitate supervision by the State over transactions involving immovable property, for fiscal, statistical or other purposes.

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[1] *Państwo i Prawo*, 1946, No. 7, p. 74; see *Annual Digest*, 1946, Case No. 166.]

[2] Reported *supra*, p. 941, *sub nom. N.* v. *B*.]

"In cases where transfer of immovable property has been unlawfully prohibited by the invader, the provisions of Article 82 of the Law on Notaries Public, which requires a notarial act, did not serve to protect transactions and ensure their supervision by the Polish State, but, in accordance with the intention of the invader, wholly frustrated those transactions, and at the same time enabled the invader to exercise full supervision over transactions involving immovable property, thus guaranteeing that his prohibitions would be effective.

"In this state of affairs the provisions of Article 82 of the Law on Notaries Public, so far as it requires the formality of a notarial act for contracts of transfer of immovable property, cannot be applied to cases where, because of difficulty resulting from the unlawful acts of the invader, compliance with the requirement of a notarial act was impossible. Those provisions, however, are to be applied so far as they prescribe a written form for the making of the contract; as a rule, compliance with that requirement was possible under the rule of the invader.

"In specific cases it will be for the party seeking to establish the validity of a contract of transfer of immovable property to prove that the contract in question was made under the rule of the invader; that there were difficulties (and their nature) preventing the making of the notarial act; and, in case of doubt, that the document containing the contract of transfer of the immovable property is accurate."

[Report: *Państwo i Prawo*, 4 (1949), No. 8, p. 98.]

Occupied Territory—Administrative and Legislative Measures of Occupant—Illegal Annexation of Occupied Territory—New Legal System Introduced by Occupant in Contravention of Articles 43 and 46 of Hague Regulations of 1907—German Occupation of Poland During Second World War—Sequestration and Confiscation of Property—German Notaries Public in Occupied Territory—Measures Altering Law as to Private Property—Validity of Wills Made in Disregard of Such Measures.

In re WILL OF JÓZEF K.

Poland, Supreme Court. May 21, 1949.

THE FACTS.—This case concerned the validity of a will executed during the Second World War by a Polish national in that part of occupied Poland which was annexed by Germany. At the commencement of the occupation, the law of succession in force in the territory concerned was that of the Code Napoléon, which gave full powers of testamentary disposition to the individual; but by an Ordinance of September 17, 1940, Polish nationals were deprived of the right to dispose of their property unless certain consents were obtained. The testator, Józef K., was illiterate and made his will orally before witnesses. The Court of first instance and the District Court both held the will to be invalid because it was not in notarial form as required by the Code Napoléon. The persons who were appointed " successors " under the will applied for cassation of the order of the District Court.

Held: that the application must be granted and the order of the District Court reversed. The testator was prevented from making a regular, *i.e.*, notarial, will by the measures taken by the Occupant contrary to the Hague Regulations of 1907. A will not made in notarial form was not *eo ipso* invalid, but the Court must enquire whether it expressed the actual intention of the deceased.

The Court said: " Whilst the applicants have admitted that substantive law has been encroached upon, they have contended that as Józef K., the testator, being both illiterate and of Polish nationality, and living in the territories incorporated into the Reich, could not make a notarial will which would comply as to its form with the provisions of the Code Napoléon, he made it in a form which was then open to him and that the will should be declared valid in accordance with Article 3 of the General Principles of Civil Law. The District Court wrongly decided that K.'s will, made orally before witnesses, was invalid.

" The plea is justified. According to the facts as found by the District Court, Józef K. made his will on May 15, 1943. Under Article XIX of the Introductory Provisions of the Law of Succession, it is the law in force at the moment of the making of a will which governs the form required for its validity—in this case the Code Napoléon. In accordance with these provisions, Jósef K., being illiterate, could only make his will ' by a public act ' (Article 969 of the Code Napoléon), that is, before a notary public. It should, however, be borne in mind that it was not possible for Józef K. to make his will in the form of a notarial act, since at the time when he was declaring his testamentary intention before witnesses there was in force in the territory incorporated into the Reich an Ordinance, enacted by the Occupant in contravention of Hague Convention No. IV concerning the Laws and Customs of War on Land of 1907, which made it impossible to comply with the form of will required by Polish law.

"Article 43 of the Regulations annexed to Hague Convention No. IV obliged the Occupant ' unless absolutely prevented ' to respect the laws in force in the country occupied; and Article 46 provided that ' private property . . . must be respected '. In view of these provisions, it was not lawful for the German Reich to introduce its own or, generally, a new legal system in the occupied territories of Poland. Nevertheless, the German Occupant, starting from the premise that the Polish State ceased to exist on September 1, 1939, introduced by virtue of the Incorporation Decree of October 8, 1939 (*Reichsgesetzblatt,* I, p. 2042) and through the Ordinance of September 25, 1941 (Ost-Rechtspflege-Verordnung: *ibid.*, p. 597), the laws and regulations which were in force in the Reich. Pending their formal introduction into the incorporated territories, these laws and regulations had binding force there if they concerned the branches of law enumerated in paragraph 1 of the Ordinance of September 25, 1941, *i.e.*, with few exceptions, the whole law of judicial procedure and the whole of private law.

" Moreover, the German Occupant introduced in the territories incorporated into the Reich a long series of restrictive measures having the effect of sequestrating and confiscating all property in Poland. The fundamental provisions on confiscation of the Polish nation's property were formulated in three Ordinances, namely: (1) Ordinance of January 15, 1940, concerning the property of the Polish State (*Reichsgesetzblatt,* I, p. 174); (2) Ordinance of February 12, 1940, concerning the public administration of agricultural and forestry enterprises and land (*ibid.*, p. 355); and (3) Ordinance of September 17, 1940, concerning the treatment of property of citizens of the former Polish State (*ibid.*, p. 1270).

" While the Ordinance relating to the sequestration of the property of the Polish State, mentioned above under (1), was the consequence of the German view on the extinction of that State, the Ordinances referred to under (2) and (3) intruded deeply into the private juridical domain of the individual. From the moment the Ordinance of February 12, 1940, took effect, persons previously entitled lost the right of administration, usufruct, and disposal of agricultural and forest land; these rights passed to a so-called Administrator-General.

" Under the Ordinance of September 17, 1940, which went the farthest, the property of Polish citizens in the Greater German Reich, including ' the incorporated Eastern Territories ', was subject to sequestration, trustee administration, and confiscation. Sequestration of property was obligatory if the owners were Jews or persons who had fled or were not merely temporarily absent; it was optional if sequestration was dictated by reasons of public welfare and was in the interests of the defence of the Reich or the strengthening of Pan-Germanism, or if the owner or other person entitled had immigrated to the Reich after October 1, 1918. In fact, all immovable and also, to a large extent, movable, property was subjected to sequestration and confiscation by virtue of secret regulations and executive regulations of May 30, 1941 (*Mitteilungsblatt der Haupttreuhandstelle Ost,* 1941, No. 5, p. 194), under which in every case involving immovable property it was assumed that confiscation was necessary for the strengthening of Pan-Germanism.

" It was expressly provided by paragraph 4 of the Ordinance of September 17, 1940, that property in the incorporated territories could no longer be freely disposed of by Polish citizens except, with the permission of the competent agency, in cases enumerated in this paragraph (paragraph 12).

" In view of the Ordinances referred to above and of the fact that only Germans could act as notaries public in the territories incorporated into the Reich (paragraph 2 (5) of the Ordinance of June 13, 1940, concerning the organization of the courts in the incorporated Eastern Territories: *Reichsgesetzblatt,* I, p. 907), citizens of the Polish State living in the territories incorporated into the Reich were deprived of the right to dispose of their property and in consequence could not make notarial wills, as no German notary—obliged as he was to foster the strengthening of Pan-Germanism—would execute such a will, while no public authority would consent, for a similar reason, to a Polish citizen disposing of his immovable property.

" In these circumstances Jósef K. was rendered unable to make a will in notarial form as the result of his losing the right of disposing of his property by virtue of the enactments mentioned above. As to the legal consequences of such a state of affairs, it should be noted that, in a somewhat analogous situation in which the Occupant had unlawfully made it impossible for Polish citizens to enter into notarial contracts on the transfer of immovable property, the Supreme Court, in a resolution of the full Civil Chamber of March 19, 1948 (C. 935/48), took the view that in such a situation one could not make the validity of such contracts dependent on compliance with the notarial form as this would amount in a sense to sanctioning the illegal act of the Occupant. The making of a will by an illiterate testator in another form conforming to the Code Napoléon was also practically impossible, because the Code, in providing for the form of wills in cases covered by Article 981, 985, 988 and 999, did not provide for a specific form in a contingency such as the unlawful taking possession of foreign territory and the introduction of a new legal order excluding the making of wills in the prescribed form. To this extent there is a lacuna in the Code Napoléon, the filling of which is permissible by virtue of Article 3 of the General Principles of Civil Law, by way of acknowledging as valid wills of illiterate persons made during the occupation in territories incorporated into the Reich, provided that there exists satisfactory evidence of the contents of the will and in particular if it is possible to prove the will by adducing the testimony of witnesses before whom the testator has declared his intentions.

" The District Court, starting from different premises, took the view that, in the particular situation brought about by the Occupant's illegal act, non-compliance with the ' strict requirements regarding wills ' deprived a court of ' absolute certainty that the will expressed the actual intention of the deceased '. This view is wrong. It will be for the District Court, in re-hearing the case, to decide in the light of Article 3 of the General Principles of Civil Law and the above explanations whether the oral will of K., made before witnesses, can be regarded as valid in spite of the lack of notarial form.

" For these reasons the judgment appealed against must be reversed and the case is remitted for further hearing."

[Report: *Państwo i Prawo*, 4 (1949), No. 12, p. 115.]

NOTE.—I. The above case is noted by Marowski in *Państwo i Prawo*, 4 (1949), No. 12, at p. 118. His comments are partly reprinted in *Przeglad Notarialny*, 1950, vol. 1, p. 149.

II. See also *In re Will of Stefan J.*, decided by the Supreme Court of Poland on January 28, 1949 (*Państwo i Prawo*, 4 (1949), No. 4, p. 109), where the will was declared in the presence of four witnesses, written down by one of them, and signed by all the witnesses and the testator. In evidence, the testator's wife stated that at the time the will was made (March 17, 1943), the testator could not go to a notary public because during the occupation the German notaries public did not attest wills of Poles, and the deceased could not write out his will with his own hand because of ill health. Both the Court of first instance and, on appeal, the District Court came to the conclusion that the document put forward was not a valid will. The wife appealed to the Supreme Court in its capacity as a court of cassation. In her appeal she contended that the finding of the District Court was contrary to Article 78 of the Law of Succession, Article XIX of the Introductory Provisions of that Law, and Hague Convention No. IV of 1907. She further contended that the will was valid because, although the testator was unable to make it in the form prescribed by the Code Napoléon, it fulfilled the requirements of Section 2250 of the Civil Code of 1896, which was introduced by the Occupant into the Polish territories incorporated into Germany.

The Supreme Court *held* that the appeal must fail, seeing that the validity of a will made during the occupation in territories unlawfully annexed by Germany must be judged in the light of the Polish law then in force and not in the light of German law introduced into those territories contrary to Hague Convention No. IV.

The Court said: " The contention of the appellant that the District Court infringed the provisions of Article 78 of the Law of Succession read in conjunction with Article XIX of the Introductory Provisions of that Law is not correct. That Article [78] lays down, as far as the form of wills is concerned, that the law in force at the moment of the making of the will shall be applied. In spite of the fact that the Occupant introduced into the territories ' annexed ' to the Reich the law obtaining in the Reich, including, *inter alia*, the provisions as to the form of a ' special will ' (not Section 2250 of the Civil Code of 1896 but Section 24 of the Law concerning the Making of Wills of 1938), it cannot be admitted that these provisions were ' binding ' in Poland. The appellant quotes the provisions of the Hague Convention of 1907 but does not point to any specific provision thereof which, under the conditions existing in the Polish territories during the last war, would empower the Occupant to change the civil law. In consequence, the appellant did not show in what respect the District Court ignored the provisions of that Convention in this case. Since the provisions of Section 24 of the German Law referred to cannot be regarded as having been in force in Poland during the occupation, the contention that there was an infringement of Article XIX of the Introductory Provisions of the Law of Succession is equally unfounded, because the will in question should have complied, as to its form, with Polish and not German law. The appellant does not contend that in this case the District Court infringed or did not apply any other provisions of law. That being so, the application for cassation must be dismissed."

Belligerent Occupation—Administrative Functions of Occupant—Apointment of Notaries Public in Occupied Territory—Appointment of German Notaries Public in Occupied Poland—Whether Notaries According to Polish Law—Validity of Acts Performed by German Notaries Public in Occupied Poland—Relevant Polish Post-Occupation Law—Validity of Contracts and Wills Made before German Notaries—Conditions of Validity.

In re WILL OF JAN M.

Poland, Supreme Court. July 14, 1950.

THE FACTS.—This case concerned the validity of a will executed during the Second World War by a Polish national, one Jan M., in Polish Upper Silesia. This area was annexed by Germany during the war. The will was made before a German notary public. The deceased had several children, but by the will he bequeathed all his property to only one of them, his daughter Bronisława G. A son of the deceased, Ryszard M., filed with the Court of first instance an application for a ruling establishing the claims to inheritance of all the children of the deceased. He contended that the will in question was invalid because it did not comply with the provisions of Polish law, inasmuch as it had been made on Polish territory by a German notary public neither with the assistance of another notary public nor in the presence of two witnesses. The Court of first instance made an order as prayed. Bronisława G. appealed against this order, but the District Court confirmed it. She now appealed to the Supreme Court.

Held: that the appeal must be granted and the order reversed. Although the German notaries public acting in the Polish occupied territories were not notaries within the meaning of Polish law, some of the acts done by them must be regarded as valid. In principle, wills made before such notaries were valid although they did not comply with the formal requirements of Polish law. Every case must be decided on its merits and one must inquire whether the testator had the capacity to make a will and whether the will which he made corresponded to his actual intention. One must also inquire whether the German notary public did not, at the making of the will, exercise any pressure on the testator, nor introduce into the will any provisions contrary to Polish public policy or favouring the Occupant and his interests.

The Court said: " The essential problem in this case is the question whether the will made before a notary public appointed by the German occupying authorities was valid.

" In this respect the objection of the appellant that the order under appeal was contrary to Article 5 of the Law of August 2, 1926 (private international law) is incorrect. In so far as it concerns the form in which a legal act must be done, the said Article provides that for the purpose of being legally valid it is sufficient for the act to comply with the form which is binding at the time and place of the making of the act in question.

"As has already been explained by the Supreme Court on many occasions, it is beyond doubt that the Nazi invader was not authorized to change Polish civil law which was in force in Polish territories. Consequently, provisions of law introduced by him were not binding in the area of Polish Silesia forcibly annexed to the German Reich.

" Thus the provisions of private international law supply no basis for the allegations of the appellant, who seeks to make a distinction between the ' law in force ', not being the ' actual ' law, and the law ' binding in fact ', that is, according to the appellant's argument, the Nazi law in Polish Silesia.

" Nevertheless the appeal must be regarded as justified.

" It should be stated above all that the so-called German ' notaries public ' introduced by the invader in the territories forcibly incorporated into the Reich were not ' notaries public ' in the sense of the [Polish] Law on Notaries Public, and that in consequence thereof acts made by them were not, in principle, ' notarial acts ', irrespective of whether they complied as to their form with the Polish provisions (which, in fact, they did not, if only for the reason that they were made in the German language).

" Nevertheless the Polish legislator, acting in the interests of the Polish nationals, who were wholly deprived of legal protection under the rule of the invader, considered it possible (in order not to cause chaos in legal relationships) to respect to a certain degree the acts of both the so-called notaries public and the German judges who performed their duties in the Polish territories. [The Polish legislator] started here from the premise that measures of the invader could not do what would harm Polish nationals, and especially they could not deprive such nationals of their ability and factual capacity to perform legal acts.

" Thus, for example, the Decree of June 6, 1945, concerning the binding force of judicial decisions rendered at the time of the German occupation in the territory of the Polish Republic,[1] as revised by the Decree of April 11, 1947,[2] provides that decisions of the German courts ordering entries to be made in the land title registration books are valid and create legal effects, so far as the said entries were not based on provisions of law directed against the Polish State and its citizens or on invalid judicial decisions or other decisions or measures contrary to the principles of public policy existing in Poland (Article 1, para. 2, of the Decree).

" It follows from the above that, for instance, an entry in the land title registration book executed in the area of Polish Silesia by a German court on the basis of a contract of transfer of property made before a German ' notary public ', is to be regarded as valid (unless there existed the special circumstances indicated above), even though the said contract did not comply with the formal provisions of the Polish Law on Notaries Public. The same is true about an entry made on the basis of a will made before a German ' notary public ', although such will did not fulfil the formal conditions required by Polish law. Besides, what would be the significance, as far as the validity of such a will is concerned, of calling another German ' notary public ' to participate in the making of the will (a point mentioned by the District Court in the reasons for its order), since neither the first ' notary public ' nor the second, that is, neither the notary who made the will nor the notary who would have witnessed its making, were ' notaries public ' in the sense of the Polish Law or authorized to execute notarial acts in Polish territory.

"As has been shown, however, the Polish legislator recognizes the validity of entries made on the basis of acts legalised by such ' notaries ', and thus he indirectly recognizes also the validity of those acts, even though they did not comply with the formal provisions of Polish law.

" It should also be observed that the fact that the Polish legislator did not, during the past five years, enact provisions expressly regulating the validity of acts legalised by the German ' notaries public ', does not permit the conclusion *a contrario* that he [the legislator] does not recognize the validity of such acts.

"Above all, as has been previously pointed out, the Polish legislator indirectly recognized the validity of the said acts in so far as entries based thereon have already been made in the land title registration books; besides, it should be taken into account that, at the present time of fundamental changes of an economic and social nature, the legislator has so many more important matters to regulate that he has been unable to devote his special attention to this question, which was not of paramount importance, and he left it to be decided by the courts. [The latter], in accordance with the needs of life, and taking into consideration all the above-mentioned circumstances, and correctly applying Article 3 of the General Principles of Civil Law, ought to decide each question as it arises, having regard to the public interest and the lawful interests of the parties.

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[1] *Dziennik Ustaw Rzeczypospolitej*, No. 25, item 151.

[2] *Dziennik Ustaw Rzeczypospolitej Polskiej*, No. 32, item 144.

" The decisions of the Supreme Court, in developing the above thesis that measures of the invader could not deprive Polish nationals of their legal capacity and, consequently, of their right to conclude contracts or to make wills or to dispose of their property, have shown on several occasions that under the conditions existing during the occupation compliance with the formal provisions of law could have been dispensed with, if otherwise the realization of the said right would have been made impossible or would have been seriously impaired. [For such formal provisions] have been binding in times when life followed its regular course; they were enacted for such times, and they did not take into account the extraordinary conditions created by the Occupant. [Were they not dispensed with,] then the provisions in question would enable the invader to expropriate Polish nationals and to make them subject to serfdom.

" Hence the full Civil Chamber, in its decision of March 19, 1949, C. 935/48,[1] recognized as valid contracts of transfer of property which were made without complying with the obligatory form of a notarial act in the area seized by the invader and ' incorporated ' by him into the Third Reich.

" There was also recognized the validity of wills executed in the same territory without complying with the form provided for by Polish law, inasmuch as the testator, because of measures taken by the Occupant, could not make his will in such form, while his actual intention expressed in the will, which did not correspond as to its form to the rigorous provisions of the Code Napoléon, was perfectly clear and beyond doubt (decision of May 21, 1949, C. 486/49, published in *Państwo i Prawo*, No. 12, item 2,[2] and decision of April 24 and May 5, 1948, C. III. 200/48, published in *Państwo i Prawo*, No. 12, item 1.[3])

"An equitable principle follows from the above decisions, namely, that at such exceptional times as those of the past war and those in which the unlawful measures of the criminal invaders were taken, one should dispense with formal requirements the essential purpose of which is to ensure, in a way permitting no doubt whatsoever, the carrying into effect of the testator's intention as set out in the will and, once such requirements have been dispensed with, one should inquire whether the will constitutes a declaration of the intention of the Polish national who made it, expressed in just such a way as to leave no doubt as to its contents, as to the actual aims

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[[1] Reported *supra*, p. 962, *sub. nom. B.* v. *T.*

[[2] Reported *supra*, p. 966, *sub nom. In re Will of Józef K.*]

[[3] Reported *supra*, p. 960, *sub nom. In re Will of Wincenty K.*]

of that national, and as to his soundness of mind and legal capacity; and in a case where it is possible to establish both the existence of such a declaration of intention and its contents, one should recognize the validity of that will. Only in this manner can one neutralize or abolish the obnoxious effects of the above-mentioned measures of the Occupant.

" Reasoning in the above way, one comes to adopting the following view. In the territory unlawfully annexed to the Reich a Polish national could execute a valid will without complying with the formal provisions of law which were binding in that territory; it has only to be investigated whether that will was in fact that national's will, whether it beyond doubt expressed his actual intention, and whether the testator had the capacity to make a will. Thus, neither the fact that the will in question was declared before a German ' notary public ', who in fact was not a notary according to Polish law, nor the fact that the ' notary ' did not when the will was made comply with Polish law can be regarded as obstacles in the way of recognizing the validity of the will.

" It should be taken into account that a Polish national who executed his will before a German ' notary public ' in Polish Upper Silesia cannot be made to bear the disadvantageous consequences which would be caused by the unlawful administrative and judicial measures of the Occupant. Nor can the fact that the testator approached a ' notary ' who, according to Polish law, was not a notary public, be held against him, since even had he been aware of the legal situation involved, he would have had no possibility of making his will in the official form prescribed by Polish law, while at the same time he might have been physically unable or inadequately prepared to make a holograph will. Nevertheless, he wanted his successors to have an official and ' public ' will on the basis of which they could obtain, without further formalities, a valid entry in the land title registration book (since even the Polish authorities expressly recognized the validity of such an entry).

" The above question could have been decided otherwise only if it followed from either the circumstances in which the will was made or from the contents of the will that the German ' notary public ' exercised, at the time of the making of the will, pressure on the Polish national concerned, or acted in the interest of the invader in introducing into the will stipulations which were contrary to the Polish public policy, favoured alien national groups, etc. If there are, however, no circumstances of this kind, and if the testator's intentions are clear beyond doubt, then there will not, in principle, be any obstacles to recognizing the validity of a will made by a Polish national before a German ' notary public '.

" It will, of course, be for the court deciding on the merits to establish, in every case, all the relevant facts bearing on the validity of such a will.

"Seeing that the District Court, as is shown by the contents of its decision, did not duly take into account the public and private interests as explained above . . . the order under appeal must be reversed in accordance with Article 437 of the Code of Civil Procedure and the case remitted for further consideration in the District Court of Katowice."

[Report: *Państwo i Prawo*, 5 (1950), No. 12, p. 190.]

NOTE.—In an unpublished decision of June 17, 1953 (File No. C. 649/53), the Supreme Court of Poland expressed the view that notarial acts performed by German notaries public in occupied Poland from 1939 to 1945 could not be recognized as equivalent to acts performed by notaries public installed by Polish authorities. This was so because the German occupation of Poland was an act of aggression and notaries installed by the invader acted for the purposes of a criminal organization. According to the Supreme Court, the belligerent occupant had under international law the duty to ensure that in the occupied country the administration of justice was left to courts which decided cases on the basis of the law of the land. Therefore, the Court continued, after the occupation of Poland there had to be applied the provisions of the Decree of June 6, 1945, concerning the binding force of judicial decisions rendered at the time of the German occupation in the territory of Poland. By virtue of this Decree, decisions of German courts handed down in the territory of occupied Poland were ineffective. The Supreme Court decided that the provisions concerning judicial decisions should also be applied to notarial acts. [This Note is based on the summary of the decision given by Szachulowicz in *Nowe Prawo*, 15 (1959), p. 1325.]

Belligerent Occupation—Legislative and Administrative Functions of Occupant—Effect of Occupation on Non-Political Laws of Occupied Territory—Status of Internal Revenue Laws During Occupation.

HILADO *v.* THE COLLECTOR OF INTERNAL REVENUE AND THE COURT OF TAX APPEALS.

Philippines, Supreme Court. October 31, 1956.

THE FACTS.—In his income tax return for 1951 the petitioner deducted from his gross income as a business loss the sum of $12,837.65, which was the amount of a war damage claim approved by the Philippine War Damage Commission[1] but unpaid pending further appropriations by the Congress of the United States of America. The basis of this claimed deduction was General Circular

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[1] The Philippine War Damage Commission was established by the Philippine Rehabilitation Act of 1946 (60 Stat. 128 (1948) as amended, 50 App. U.S.C. §§1751–63 (1952)), which was enacted by the United States Congress on April 30, 1946. The Commission, consisting of three members appointed by the President of the United States, was authorized "to make compensation . . . on account of physical loss or destruction or damage to property in the Philippines" occurring during the war, out of funds authorized by the Act for appropriation. The Commission was wound up on April 30, 1951.

No. V–123, which authorized the deduction from gross income, as a business loss, of approved but unpaid war damage claims. On August 30, 1952, General Circular No. V–139 revoked and voided General Circular No. V–123 and provided that losses to property during the Second World War were deductible in the return of the tax year of actual loss. On the basis of this circular, the petitioner's deduction was disallowed, and a deficiency was asserted against him.

The petitioner sought review from the Court of Tax Appeals on the grounds that his unpaid claim constituted a business loss, that to give General Circular No. V–139 a retroactive effect would deprive him of a vested right, and that General Circular No. V–139 could not require that war damage losses be deducted in the tax year of the actual loss since the Philippines were occupied territory at the time of the loss and Philippine internal revenue laws were then unenforceable. The Tax Court affirmed the delinquency assessment against the petitioner, who then appealed to the Supreme Court.

Held: that the decision of the Court of Tax Appeals must be affirmed. The Court held that the war damage claim could not be regarded as a business asset since it was a mere discretionary payment which could not be enforced by the claimant. Further, there could be no vested right acquired by the petitioner from General Circular No. V–123, since that circular had construed the law erroneously and " a vested right cannot spring from a wrong interpretation ".

With regard to the status of the internal revenue laws of the Philippines during the occupation, the Court said: " Petitioner's contention that during the last war and as a consequence of enemy occupation in the Philippines ' there was no taxable year ' within the meaning of our internal revenue laws because during that period they were unenforceable, is without merit. It is well known that our internal revenue laws are not political in nature and as such were continued in force during the period of enemy occupation and in effect were actually enforced by the occupation Government. As a matter of fact, income tax returns were filed during that period and income tax payments were effected and considered valid and legal. Such tax laws are deemed to be the laws of the occupied territory and not of the occupying enemy."

[Report: *Official Gazette*, 53 (1957), p. 2481.]

Belligerent Occupation—Recognition of Legislative Acts of Occupant in Third Country—Nationalization Decree by Soviet Occupant in Germany—Whether Decree Entitled to Recognition in Austria —The Law of Austria.

See p. 42 (*Jenaer Glaswerk Schott & Gen.* v. *Waldmüller*).

iii.—Respect for Private Property. The Public Property of the Enemy State. Requisitions and Contributions

Belligerent Occupation—Respect for Private Property—Seizure of War Material by Belligerent—Payment of Inadequate Compensation—Whether Seizure an Act of Requisition or Pillage—Claim by Former Owner to Full Compensation—Liability of Owner's Home State—The Law of France.

ÉSTABLISSEMENTS BRACQ LAURENT S.A. *v.* SERVICE CENTRAL DES DOMAINES.

France, Court of Cassation. November 13, 1957.

THE FACTS.—When the German armed forces invaded France in 1940, the German navy seized war material manufactured and owned by the appellants, a French Company. The appellants received compensation which was wholly inadequate. After the departure of the German armed forces from France the material was put under sequestration by the respondents, a French Government agency, who regarded the material as enemy property. The respondents subsequently sold the material to the appellants. In an action by the appellants against the respondent for reimbursement of the purchase price, the French (departmental) War Damage Commission held that as the compensation paid to the appellants by the German authorities was wholly inadequate, the German seizure must be regarded as an act of pillage and not of requisition, with the result that the appellants were still the lawful owners of the material and therefore entitled to be fully reimbursed. The Court of Appeal of Douai reversed this decision, and the Company appealed to the Court of Cassation.

Held: that the judgment of the War Damage Commission must be restored. The German authorities had committed an act of pillage and the appellants were therefore entitled, as the rightful owners, to receive full compensation, *viz.*, to be fully reimbursed by the respondents.

The Court said: " The findings of fact are that in May 1940 the German navy seized a large quantity of war material which was difficult to move and which the appellants, a company working for the [French] Ministry of Defence, had left at their works at Achicourt when they fled from the invasion. In September of the same year, the director of the appellant Company returned to Achicourt and made a claim against the German authorities. The latter checked and approved, in May 1941, an inventory of the material which they had moved to and used at Calais, and on June 15, 1944, they paid to the appellants the sum of 118,857 Reichsmark—or 2,374,000 French francs. Four days later, the appellants replied in writing that they regarded this payment as ' an advance payment on the total amount claimed for the machine tools and material requisitioned ' at their works, on the ground that the assessment made was not in conformity with the Hague Convention so far as concerned the payment to be made on requisition. When Calais was liberated the appellants found that the material was in the possession of the respondents, who had put it under sequestration as enemy property, in pursuance of the Ordinance of October 3, 1944. The respondents re-sold the material to the appellants for 3,111,337 francs, and the War Damage Commission held on March 20, 1950, that as the Germans had not requisitioned the material but had committed an act of pillage, the damage suffered by the appellants must include ' the material found in Calais ', on the ground that the appellants had never ceased to be the owners.

" The Court of Appeal of Douai dismissed the claim of the appellants for reimbursement of the price paid to the respondents, and held that the decision of the War Damage Commission ' could not become *res judicata* because it was not properly made ', and that the respondents ' were not a party to the decision in the capacity of representatives of the State, and that the decision of the Commission cannot be operative as against them.' In holding as it did when in fact the State was affected by the decision, the Court of Appeal of Douai acted in a manner contrary to the Ordinance of October 3, 1944. The judgment of the Court of Appeal of Douai of October 21, 1952, must accordingly be set aside and the parties referred to the Court of Appeal of Amiens."

[Report: *Bulletin des Arrêts de la Cour de Cassation, Chambres Civiles*, 1957, I, No. 432, p. 349.]

Belligerent Occupation—Respect for Private Property—Requisition of—Subsequent Sale of Property—Whether Purchaser Acquires Title—The Law of Sarawak.

HO HONG SOON *v.* HAJI SAHARI BIN HAJI SU'UT AND ANOTHER.

Sarawak, Supreme Court. July 13, 1946.

(Hedges C.J.)

THE FACTS.—The plaintiff was the owner of an Austin 8 car which he purchased in 1940 for about $1,800. In May 1942, he received written instructions from the Japanese transport officer, Kuching, to hand over the car. The car was in fact requisitioned by the Japanese occupation forces, and some three months later the plaintiff received $300 in Japanese currency as compensation. On September 8, 1945, the defendant entered into a transaction which purported to be a purchase of the car from a Japanese for $1,500 in Japanese currency. The Australian military forces, returning to

Sarawak, took possession of the car, but in October 1945 they returned it to the original owner, the plaintiff. The matter was investigated by the Deputy Custodian and he appeared to contemplate action under Proclamation No. 9, section 10. This provides as follows:—

> "The Chief Civil Affairs Officer or any officer empowered by him may by order direct that any transaction made at any time with regard to any property shall be set aside and held to be null and void, if in the opinion of the Chief Civil Affairs Officer or such officer empowered by him, the transaction was made to defeat, evade or avoid any provision in this Proclamation or any responsibility, fine or punishment imposed or to be imposed on any person or enemy government."

Under this section the Deputy Custodian might have declared the transaction between the Japanese and the defendant to be null and void. However, he did not do so, and on January 23, 1946, he wrote to the plaintiff in the following terms—

> "The case of motor-car Austin '8' K.537 has been brought to the notice of the Custodian of Property who directs that in view of the circumstances he will not authorise intervention under para. 9,[1] section 10. You are therefore required to return this car either to the Public Works Department or to Haji Sahari."

A copy of this letter was sent to Haji Sahari, the defendant. Some time in January 1946, or thereabouts, the defendant entered into a transaction which purported to be a sale of the car by the defendant to the co-defendant for $1,600.

The plaintiff claimed the return of his car, alleging that the Japanese had acquired no title. The defendant contended that he had a good title, and relied on the letter from the Deputy Custodian of Property to the plaintiff, dated January 23, 1946. The defendant further claimed that he had incurred expenses amounting to $480 in repairs to the car. The co-defendant, who used the car as a taxi, claimed that he incurred expenses amounting to $1,200 for repairs. The Magistrate made the following order:

> "The car to be returned to the plaintiff. Plaintiff to pay $480 to the defendant. Defendant to return the cost of the car to co-defendant. Plaintiff to pay $1,200 to co-defendant."

Both the plaintiff and the defendant appealed against this order.

Held: that the plaintiff was the legal owner of the car. Since no valid title was acquired by the Japanese, the defendant had no title which he could pass on to the co-defendant.

Hedges C.J. said: "It is clear that the Deputy Custodian had no power to determine questions of ownership as between private individuals, and the letter [of January 23, 1946, to the plaintiff] was no doubt intended merely as an intimation that the Deputy Custodian was not claiming the car as enemy property and that the parties

[1 *Sic.* "Proclamation No. 9" was probably intended.]

interested must settle the question of ownership among themselves. Unfortunately the letter misled the defendant, who believed that the Deputy Custodian had given a decision in his favour. . . .

" So far as the ownership of the car is concerned, the issue is not a difficult one. On the evidence given in the Court below I am satisfied that the Japanese acquired no title to the car, and the ownership remained vested in the plaintiff. The defendant acquired no valid title in September 1945, nor even a voidable one, and he could not pass a valid title to the co-defendant. The learned Magistrate was right in holding that the plaintiff is the legal owner.

"As regards other matters, the rights of the parties *inter se* raise several questions of law. There are no pleadings, and the real issues must be determined by the Court. It is clear that the parties have no idea of the legal effect of their acts.

" The plaintiff might have argued that the defendant was a trespasser or have sued him in trover claiming damages for wrongful conversion of the car. In the circumstances, however, I am satisfied that the defendant had a right to the custody of the car, as he was authorised by the Deputy Custodian, then a Military Officer, during the period of military administration, to take the car into his custody. There is no suggestion that the defendant did not act in good faith.

" The question now arises whether the defendant is entitled to recover from the plaintiff the cost of repairs to the car executed by him. The general principle of law is that no remuneration can be claimed for work done voluntarily or without request, even though another party accepts the benefit thereof and even though a subsequent promise to pay is made. But a request is implied so as to render the work and labour good consideration in certain circumstances—for instance, where the work was done for the benefit of another person's property and he adopts the benefit in such circumstances as give rise to an inference of a contract to pay. In such cases there is not a true contract, because there is no real agreement between the parties, and because of its fictitious nature as a mere creation of the law, such a contract is often called a quasi-contract. I am prepared, with some hesitation, and only in relation to the particular facts, to hold that there is a quasi-contractual obligation on the plaintiff to pay for the work and labour performed by the defendant. The subsequent sale to the co-defendant was a wrongful act on the part of the defendant, but I do not consider that the plaintiff is entitled to more than nominal damages.

" The position of the co-defendant is quite different. The plaintiff's remedy in this case lies in trover and detinue. Trover lies where there has been conversion. To constitute conversion there must be a positive wrongful act of dealing with chattels in a manner and with an intention inconsistent with the owner's rights, but there need not be any knowledge on the part of the person sued that the goods converted belong to someone else (*Hollins* v. *Fowler,* (1875) L.R. 7 H.L. 757).

" In the case before me the co-defendant, although he acted in good faith, is liable in damages to the plaintiff. But where the defendant in an action for trover or detinue, who has not been guilty of fraud or negligence, has *bona fide* incurred expenses with respect to the goods and the goods are delivered up to the plaintiff who has the benefit of such expenses, the defendant is entitled to have such expenses taken into account in assessing the damages awarded against him (*Peruvian Guano Co.* v. *Dreyfus Bros.*, [1892] A.C. 166). So far as the co-defendant is concerned there can be no question of any quasi-contractual obligation on the part of the plaintiff to pay for the repairs. On the particular facts the defendant's possession might be held to be innocent, as he acted under the authority of a Military Officer, but the co-defendant's possession was wrongful although he acted in good faith. The circumstances are not such as to give rise to any inference of a contract to pay. Moreover, if one man wilfully intermixes his chattels with those of another without the approbation or knowledge of the latter, the law refuses to allow him any interest in the result of the intermixture and gives the whole to the latter (*Lupton* v. *White* (1808) 15 Ves. 432).

"As regards the rights *inter se* of the defendant and co-defendant, the defendant purported to sell a car to which he had no title. Section 12 (3) of the Sale of Goods Act, 1893, provides that in a contract of sale there is an implied condition on the part of the seller that he has a right to sell the goods. A breach of this condition is not one which is waived by acceptance of the goods, if the seller's title was, unknown to the buyer, defective. For example, in *Rowland* v. *Divall*, [1923] 2 K.B. 500, the buyer was held entitled to recover the whole purchase price of a stolen car purported to be sold to him, although he had had the use of it for several months. In the case before me, the car has now been returned to the appellant under the Court order. It is clear therefore that the co-defendant is entitled to recover the purchase price from the defendant.

" The order made by the Magistrate in the Resident's Court must be varied so far as concerns payments to be made by the plaintiff to the defendant and co-defendant respectively. It is unnecessary for me to make an accurate assessment of the cost of work and labour performed on the car by the co-defendant, but from the evidence given before me in the Supreme Court I am not satisfied that $1,200 would be correct. Moreover, the defendant said in evidence that he could not remember what spare parts he supplied, and in the circumstances his estimate of $480 is too precise to be wholly reliable.

" The order made in the Resident's Court is varied. The plaintiff is declared to be the legal owner of the car. The defendant is to return the purchase price to the co-defendant. The plaintiff is to pay $400 to the defendant in lieu of $480 ordered in the lower

Court. The order that the plaintiff pay to the co-defendant $1,200 is set aside."

[Report: Sarawak Supreme Court Reports, 1946, p. 4.]

NOTE.—A month after delivering judgment in this case, Hedges C.J., in *Wee Koh Eng* v. *Gan Ah Chang* (Sarawak Supreme Court Reports, 1948, p. 10, reported *infra*), quoted *Ho Hong Soon* v. *Haji Sahari Bin Haji Su'ut and Another* as an illustration of the principle that, whereas a belligerent Occupant has a right recognized by international law to seize private movable property which could serve as war material and can acquire a valid title to such property if adequate compensation is paid, if " compensation is merely paid for the use of the moveable property in question and bears no relation to its value, no title will pass at all ".

Belligerent Occupation—Respect for Private Property—Contract Induced by Duress or Undue Influence—Whether Purchaser Acquires Title—The Law of Sarawak.

WEE KOH ENG *v.* GAN AH CHANG.

Sarawak, Supreme Court. August 16, 1948.

(Hedges C.J.)

THE FACTS.—This action was brought by the present respondent for the recovery of a quantity of pepper. In the action the Custodian of Property was joined as co-defendant, but he interpleaded and, whilst admitting that the pepper was in his possession, he stated that he claimed no interest therein.

In September 1945, a stock of pepper, which the respondent alleged was his, was transferred to a Japanese firm carrying on business in Sarawak under the name of Mitsui Busan. It was claimed that the pepper was sold to the Japanese firm. The appellant claimed that he subsequently bought the pepper from the Japanese firm. Later still, the Custodian of Property took the pepper into his custody. The Magistrate before whom the case was heard found as a fact that the sale to the Japanese was a forced sale, being entered into under duress, and gave judgment for the plaintiff. The defendant appealed.

Held: that the appeal must be dismissed. A valid title to private movable property which could serve as war material might be acquired by a belligerent Occupant on payment of adequate compensation, but the acquisition of such property by a firm of the country of the Occupant by duress or undue influence gave only a voidable title.

Hedges C.J. said: " Transactions of this nature have come before the Courts fairly frequently since the liberation. Three categories of cases must be distinguished.

" First, there are cases in which the Japanese military authorities, by virtue of their rights as a military occupant recognized by international law, might lawfully seize private moveable property which could serve as war material. For example, a military occupant might lawfully requisition the means of transport, whether motor-cars, bicycles, bullock-carts or horses. In such cases, if adequate compensation is paid, a valid title will pass. If, however, compensation is merely paid for the use of the movable property in question and bears no relation to its value, no title will pass at all. An illustration is found in the case of *Ho Hong Soon* v. *Haji Sahari bin Haji Su'ut and Another*, (1946) S.C.R. 4.[1] In that case the plaintiff was the owner of an Austin 8 car which he purchased in 1940 for about $1,800. In May 1942, he received written instructions from the Japanese transport officer, Kuching, to hand over the car. The car was in fact requisitioned by the Japanese, and some three months later the plaintiff received the sum of $300 in compensation. The Supreme Court, upholding the Resident's Court, First Division, held that the Japanese acquired no title to the car and that the ownership remained vested in the plaintiff.

" Secondly, there are cases in which a Japanese military officer, private individual, or firm might induce a person to enter into a contract by the exercise of duress or undue influence. Duress means the compulsion under which a person acts through fear of personal suffering, as from injury to the body or from confinement, actual or threatened (Halsbury, *Laws of England*, vol. VII, p. 98). Undue influence, for which relief is granted in equity, is the unconscientious use by one person of power possessed by him over another in order to induce the other to enter into a contract (*ibid.*, p. 100). In both these cases the contract will be voidable, but not void. In other words it is a valid contract, and it continues valid until the party entitled to avoid it does so. If he affirms the contract, he cannot afterwards avoid it. Moreover, the rights of innocent third parties may intervene, as will be seen in the third category of cases.

" Thirdly, there are cases in which a sale or other contract took place through duress or undue influence, and was therefore avoidable, but before any steps could be taken to avoid the contract—and such steps might well be impossible during the period of enemy occupation—the goods were bought from the Japanese by a *bona fide* purchaser. In such a case, provided that the transaction was entered into in good faith and for value, a valid title would pass.

" In the case before me it seems probable that the Magistrate regarded the case as falling within the second category of cases. If so, it is unfortunate that he did not make specific finding as to the *bona fides* or *mala fides* of the appellant. Perhaps it may be tacitly assumed from the fact that he gave judgment for the plaintiff that he did not regard the appellant as a *bona fide* purchaser. In any

[1 Reported *supra*, p. 979.]

event there was ample evidence on which the Magistrate could find that the appellant knew that the Japanese sellers did not possess a valid title and therefore could in no circumstances pass a title to the appellant.

" The petition of appeal in this case is a curious document, and as the appellant does not possess a knowledge of English which would have enabled him to prepare it himself, I asked him if he fully understood its contents. He assured me that he did. Briefly, his contention is that the question of coercion or duress by the Japanese is irrelevant, because before the material date when the respondent is said to have sold the pepper to the Japanese firm of Mitsui Busan, the respondent had in fact already sold the pepper to one Lo Lian Ho. This question is not before the Court, but if indeed the contention of the appellant is correct, then clearly no title could have passed to the Japanese, and the appellant's claim would collapse from such foundation, if any, as might be there to support it. In legal terminology, as against a plaintiff relying on the fact of possession at the material time when the alleged transaction of sale took place, a defendant is not permitted to plead the *jus tertii*.

" In disposing of this appeal, I do so not on the ground that the grounds set out in the petition of appeal would, if true, effectively dispose of the appellant's case, but on the ground that the Japanese firm which purported to sell the pepper had no more than a voidable title."

[Report: Sarawak Supreme Court Reports, 1948, p. 10.]

War—Occupation of Enemy Territory—Respect for Private Property—Looted Bonds—Invalidation of—Board for the Validation of German Bonds in the United States—Decisions of—Review in Municipal Courts Pursuant to Treaty—Scope of Review—The Law of the Federal Republic of Germany and of the United States of America.

See p. 774 (*Abrey* v. *Reusch et Al.*).

iv.—Inhabitants. Services. Deportations. Hostages

Belligerent Occupation—Treatment of Civilian Population—Irregular Forces Committing Acts of Belligerency against Occupant—Reprisals by Occupant—Whether Victims of Reprisals Entitled to Damages from Irregular Forces Responsible for Acts of Belligerency against Occupant—"Ardeatine Massacre" in Rome in March 1944.

Sansolini and Others *v.* Bentivegna and Others.

Italy, Court of Cassation. July 19, 1957.

The Facts.—In March 1944, certain members of the Italian resistance movement (defendants in the present action) who were in the habit of carrying out isolated acts of sabotage against the German army of occupation, caused an explosion in the Via Rasella, in Rome. As a result of the explosion more than thirty German soldiers were killed, and by way of reprisal the German army executed over 300 Italian citizens on the following day. This mass execution, which was carried out in the Ardeatine Caves in Rome, subsequently became known as the "Ardeatine Massacre". Among the persons executed were relatives of the plaintiffs, and the latter now sued the defendants for damages. Three contentions were put forward on behalf of the plaintiffs: (1) that as Rome had been declared an open city by the Italian Government, all acts of belligerency in Rome were prohibited and therefore unlawful; (2) that the persons who had committed the act of sabotage which resulted in the explosion were neither members of the regular armed forces nor members of irregular formations acting in accordance with Article 1 of the Hague Regulations, and that all acts committed by them were therefore unlawful; and (3) that the Court was entitled to enquire into the legality (or otherwise) of the act of sabotage committed by the defendants and should hold such act to be illegal as having been committed by individuals not acting under the authority of the State.

Held: that all the contentions of the plaintiffs failed, and their application must be dismissed. (1) The declaration whereby the Italian Government had declared Rome an open city was a unilateral declaration and therefore of no legal effect. (2) Partisan warfare by irregular forces, even though not complying with the requirements of Article 1 of the Hague Regulations, was lawful, and in any event such illegality as might exist could not avail the plaintiffs as against the defendants because the Hague Regulations were designed only to govern relations between belligerents. (3) The Court was not entitled to enquire into the legality of the act committed by the defendants because it was authorized (albeit in a general way) by the lawful Italian Government.

The Court said: " The first ground of appeal states that the Court below ought to have determined the preliminary question whether Rome was an open city at the time of the explosion in the Via Rasella. It is said that if this question had been answered in the affirmative, it would have meant that all belligerent acts in Rome were forbidden. In fact, in such case a suspension of hostilities or a partial armistice would have existed. The applicants add that Article 170 of the Military Penal Code provides for the punishment of a commander who engages in acts of hostility while a suspension of hostilities or an armistice is in existence, and that Article 174 of the Code provides for the punishment of a commander who orders or authorizes the use of measures of war forbidden by law or international conventions.

" The second ground of appeal alleges a violation of certain provisions of the Decree-Law of July 8, 1938, and Articles 174 and 175 of the Military Penal Code because the lower Court held that it was concerned with a legitimate act of war without considering: (a) whether this act was authorised by the authorities which represented the legitimate Government in Rome; (b) that the act was committed by persons who did not possess the requisite qualifications to be regarded as lawful belligerents (uniforms or distinctive signs recognisable at a distance); (c) that the act was not justified by military necessity; and (d) that the act was committed, not to inflict damage on the enemy, but to cause the population to rise against the Germans.

" Lastly, the third ground of appeal alleges that the lower Court denied that the act was subject to judicial investigation as being a public act. It is said that if the decision of the public administration to decide on the commission of an act of this kind is not subject to control, the actual commission of the act is.

" The first ground of appeal is intended to demonstrate the illegality of the outrage as an act of war, having regard to the status of Rome as an open city. The second ground of appeal is concerned with the general proposition (of illegality). To take this latter ground first, this Court observes that the act committed in the Via Rasella, as a lawful act of war, cannot be brought within the confines of Articles 25 and 27 of the Law of July 8, 1938, the violation of which is alleged. In defining in the terms of that Law who are lawful belligerents, Italy intended to limit her own powers towards the citizens of other States at war with Italy. This Law provides that the authorities must regard as lawful belligerents and treat as such, in accordance with the rules of international law, all enemy subjects who may find themselves in the position there indicated. Article 29 of the Law regards as unlawful belligerents those who are not in the position for which Articles 25 and 27 provide, and it provides for the punishment of hostile acts committed by them. Italy has, of course, enacted these provisions in pursuance of international conventions (the Hague Convention of October 18, 1907), in order to ensure that similar provisions are enacted by other States and applied to Italian citizens, so that the latter may be considered and treated as lawful belligerents. This does not mean that these provisions of Italian law can be applied to Italians. As in the present case the perpetrators were Italians and the act was directed against Germany, a country at war with Italy, the question whether the perpetrators were lawful belligerents could only have arisen within the confines of German legislation, on the assumption that the perpetrators had been captured by enemy forces. The treatment to which these persons would have been entitled at the hands of the German authorities could then have been determined. If German law had not then been in conformity with international conventions or these conventions had not been observed, Italy could have protested against the violation of international obligations and taken the necessary measures. We, on the other hand, have to consider the act within the framework of Italian law and in relation to Italian citizens who, notwithstanding that the act was not directed against them, suffered damage by reason of the act. Our enquiry must be directed towards ascertaining the objective and subjective nature of the act in the framework of Italian law. Assuming that, and assuming that the act was not committed for personal ends but merely in order to commit a hostile act against the armed forces of Germany, which had been at war with Italy as from October 13, 1943, and had established a true military occupation of a large part of Italian territory, and assuming further that the legitimate Italian Government had encouraged Italian citizens in the zones of occupation to rise against the Occupant and to commit every possible act of sabotage and belligerency, and in order to co-operate in the liberation, at the side of the United Nations and the regular armed forces, there can be no serious doubt that this was an act of war. This has been confirmed in the most solemn manner by subsequent legislation, which recognised these voluntary formations as combatant patriots and qualified as belligerent action all operations carried out by patriots in the struggle against the Germans and Facists during the period of enemy occupation. . . . The State thus regards the partisans as lawful belligerents who are on a basis of equality with the regular armed forces. This qualification might have been denied by the enemy, on the ground that the necessary formalities identifying these combatants had not been observed, but their status within the framework of Italian law and as far as the relationship between partisans and Italians is concerned cannot be in doubt.

" In so far as concerns the contention that the act did not conform with military necessity and did not serve the purpose of inciting the Italian population and simultaneously inflicting damage on the enemy, all we need say is that acts of war are absolutely discretionary and therefore not amenable to evaluation by a court of law.

" There remains the argument that the act had been forbidden by the authorities which represented the lawful Government in Rome. This argument is linked with the first argument, *viz.*, that Rome was an open city. It is true that the Court of Appeal (of Rome) did not expressly deal with this question. The failure of that Court to examine this question cannot result in a reversal of the judgment under appeal because it is not decisive and cannot result in a different decision. The declaration that Rome was an open city was made by the Italian Government before the armistice, *viz.*, on July 31, 1943. It was made to the British and the Americans but never accepted by them. It follows from this lack of acceptance that the declaration could not create any legal obligation for the Italian Government vis-à-vis the British and the Americans. A similar declaration was never made *quoad* the Germans. Nor was this possible, for the simple reason that Germany had rejected the Italian declaration of war because she regarded the Government of the Italian Social Republic as the legitimate Government of Italy, and not the Government of His Majesty the King. In these circumstances the protection of Rome was not entrusted to a binding agreement—which did not exist—but to the wisdom of the foreign belligerent Powers." The Court then dealt in more detail with the attitude of the Allies and the Germans towards the city of Rome and continued:

" We must therefore reject the contention that there was any violation of an undertaking to respect Rome as an open city because there were no agreements to this effect. We must also reject the argument that, in view of the orders given by the generals, the act must be regarded as an unlawful act of war. The exceptional and unfortunate position in which Italy found herself after September 8, 1943, made it impossible for the military activities of the partisan forces to be carried out according to well-organised plans and in accordance with rigid discipline. It was of necessity left to the initiative and courage of isolated groups to carry out such attacks upon the enemy as in the circumstances they considered possible and opportune. These were clandestine forces operating under enormous difficulties and at grave risk, having regard to the overwhelming force at the disposal of the enemy. The law has not only recognised the partisan struggle of properly organised formations but also the activities of isolated groups.

" It follows that the argument which alleges a violation of Articles 170 and 171 of the Military Penal Code is ill-founded because it would presuppose the conclusion of a truce or an armistice, or a suspension of hostilities. Equally ill-founded is the argument based on a violation of Articles 174 and 175 of the Code. These Articles prohibit unlawful acts of war, *viz.* acts prohibited by law and international conventions and acts contrary to military honour. The German forces could not be unaware of the hostility of the majority of the Italian population, having regard to the directives of the legitimate Government which was at war with Germany. They must therefore have been aware of the danger of attacks by partisan formations which had to conduct the struggle by means of acts of sabotage and improvised and isolated attacks, seeing that there was no regular front line.

" The third ground of appeal is also ill-founded. As we have found that the act was a lawful act of war and as such must be laid at the door of the State and not of the individual perpetrators, the judicial authorities are not entitled to enquire into it. The absolute discretion governing belligerent action, which is based on the prerogative of the State, does not admit of judicial control, except that the Court may enquire whether the act was in fact intended to serve the purpose of belligerency. Thus the appeal is ill-founded from every point of view.'

[Reports: *Giurisprudenza italiana*, 109 (1957), Part I, Section I, col. 1122; *Rivista di Diritto Internazionale*, XLI (1958), p. 129.]

C—WARFARE AT SEA

II.—Visit, Search, Capture and Destruction

i.—Of Enemy Merchantmen

Warfare at Sea—Capture—Enemy Merchantmen—Flag as Test of Enemy Character—Ships Sailing Under Non-enemy Flag Deemed by Enactment to be Enemy Ships.

See p. 916 (*The Nyugat*).

III.—Restrictions on the Right of Capture (Hospital Ships, etc., Postal Correspondence, Property Under Neutral Flag)

Warfare at Sea—Restrictions on Right of Capture—Ships at Sea Unaware of Outbreak of Hostilities—Position Where All Belligerents Parties to Hague Convention No. VI—Relevance of Reciprocity —The Law of Holland.

See p. 916 (*The Nyugat*).

IV.—Prize Law

War—Law of Prize—Seizure of Private Property by Belligerent—Property Not Used by Belligerent—Sale of Part of Property to Third Party—Seizure Declared Unlawful by Prize Court—Repayment of Purchase Price by Belligerent—Purchase Price Handed by Third Party to Original Owner—Claim by Original Owner against Third Party for Full Value and Loss of Profit—The Law of France.

ÉTABLISSEMENTS LEROY *v.* ÉTABLISSEMENTS HARRIBEY.

France, Court of Cassation. May 21, 1957.

THE FACTS.—In 1940 the plaintiffs were the owners of a cargo of timber which was seized at Bordeaux by the German occupation authorities. In 1941 the German authorities returned part of the timber to the plaintiffs and sold the remainder to the defendants. The Prize Court of Hamburg subsequently held that the seizure was unlawful, and the German authorities thereupon repaid to the plaintiffs and the defendants the purchase price paid by them in 1941. The defendants paid the moneys received by them to the plaintiffs, but the plaintiffs contended that they were entitled to an additional sum from the defendants, namely, the difference between the amount actually received from the defendants and the full value of the timber, including the profit they would have earned if they had sold the timber in the ordinary course of business.

Held: that the plaintiffs were entitled to judgment. This was not a case of a belligerent seizing lawful prize, but a case where a belligerent had unlawfully transferred property from one individual to another. Accordingly, the plaintiffs were the rightful owners and were entitled to receive the full value of the timber from the defendants.

The Court said: "According to Article 1 of the Ordinance of April 21, 1945, any disposition of property made by the enemy as a result of measures in excess of the general law is null and void. From the findings in this case it appears that in 1940 the German authorities seized in the port of Bordeaux timber consigned to the plaintiffs. In April 1941, part of the timber was returned to the plaintiffs, the remainder being sold to the defendants. As a result of a judgment of the Prize Court of Hamburg the German authorities repaid to the two firms the moneys previously received, and the defendants paid over to the plaintiffs the moneys received by them from the Germans for the timber which the Germans had originally sold to them. The plaintiffs claimed that the amount paid to them by the defendants was less than the true price of the timber, and they brought an action against the defendants for the difference and for the normal profit which they would have earned on a re-sale of the timber. The Court of Appeal [of Poitiers] rejected the claim and held the Ordinance of April 21, 1945, to be inapplicable, on the ground that the seizure of the timber by the Germans was the exercise of a right of maritime prize which was ' a right recognized and governed by established rules of public international law '. International law accords to a belligerent the right to seize maritime prize in order to satisfy its military needs, but it does not give a belligerent the right to transfer to one individual property which has been seized from another individual. It follows that in this case the seizure of the plaintiffs' timber was in itself a measure in excess of general law, and that the transfer of part thereof in pursuance of such measure was null and void. The judgment of the Court below, in failing to apply the Ordinance, violated its provisions, and the judgment of the Court of Appeal of Poitiers must therefore be set aside and the case remitted to the Court of Appeal of Orleans."

[Report: *Bulletin des Arrêts de la Cour de Cassation*, 1957, I, p. 189.]

i.—Nature and Extent of Jurisdiction of Prize Courts

Prize Law—Nature and Jurisdiction of Prize Courts—The Law of the Netherlands.

See p. 916 (*The Nyugat*).

Prize Law—Jurisdiction of Prize Courts—Necessity for Procedural Rules—Incompetence of Court in Absence of Such.

See p. 916 (*The Nyugat*).

D. CONTRABAND

I.—Conception of Contraband. Absolute and Conditional Contraband

Contraband—Conception of—Goods Consigned to Enemy Territory—Goods which Strengthen War Effort of Enemy—Seizure at Suez—Constantinople Convention, 1888—The Law of Egypt—Egypt and Israel.

The Fedala.

Egypt, Conseil des Prises, Alexandria. March 5, 1957.

The Facts.—On October 29, 1956, the Dutch vessel *Fedala*, sailing from Djibouti and Massawa, arrived at Suez destined for Haifa *via* the Suez Canal. The vessel was carrying a mixed cargo comprising meat, skins, and personal effects and clothes, consigned from Djibouti and Massawa by the Société Incode de Djibouti to institutions and persons in Haifa and Tel Aviv. The port authorities of Suez seized the cargoes on October 30, 1956, on information furnished by the Director of the Regional Bureau for the Boycott of Israel. At the hearing before the *Conseil des Prises* none of the persons adversely affected by the seizure was present: although an advocate intervened in the proceedings demanding the release of some of the personal effects and claiming, in the name of " Dammers & Van Der Heide " (the owners of the vessel), damages for the holding up of the departure of the vessel, he was unable to produce authority to act in that capacity.

Held: that the cargo was lawful prize. (i) Goods which strengthened the war effort of an enemy country were contraband of war and could be seized as lawful prize. (ii) The Constantinople Convention of 1888 permits measures necessary for the defence and safety of Egyptian territory, amongst which measures was the seizure of goods which would strengthen the war effort of a country at war with Egypt.

The Court said: " Considering the decree of February 6, 1950, relating to the search and seizure of prizes in connection with the war in Palestine, and the decree of November 30, 1953, amending certain of its provisions, as well as Law No. 32 of April 3, 1950, on the *Conseil des Prises*;

" Considering the documents in the case, and after deliberating in accordance with the law;

" Whereas the goods seized were despatched from Djibouti and Massawa to Haifa on the Dutch vessel *Fedala,* which arrived at Suez on October 29, 1956; and these goods consisted of frozen meat, preserved meat, skins and personal effects, appearing in the bills of lading as having been despatched by the Société Incode to the same firm as well as to other institutions and persons residing at Tel Aviv and Haifa, being in territory occupied by the enemy;

" Whereas the seizure took place at a time when a state of war continues to exist between Egypt and Zionism, and the armistice signed on February 24, 1949, contains no clause forbidding this seizure; and this seizure took place in the port of Suez at the approaches to the Canal; and that it does not conflict with the provisions of the Constantinople Convention of October 29, 1888, concerning the freedom of navigation in the Canal subject to the right of the Egyptian Government, under Article 10 of that Convention, to take the measures necessary for the defence and safety of its territory; and amongst those measures is the seizure of whatever may strengthen the enemy's war effort;

" Whereas, in accordance with Article 10 of the decree of February 6, 1950, as amended by the decree of November 30, 1953, the goods seized are contraband of war, it being given that meats are

' foodstuffs ', that skins may be used in ' the manufacture of articles used by combatants ', and that these same skins and clothes are used by civilians and are ' goods having the effect of strengthening the war effort of the enemy ' and, moreover, may be used by the combatants themselves; and it is probable that the enemy Government, in its anxiety to arrange the supply of provisions for the occupied territory, would be eager to requisition these goods, making them equivalent to goods imported by the State itself; and that the use to which civilians can put them makes articles of similar value available to combatants;

"And the *Conseil des Prises* has followed this principle prior to the decree of November 30, 1953; and this principle has equally been followed by the Admiralty Court on July 22, 1940, in the case of the *Alwaki*,[1] by the British Privy Council on July 22, 1943, in the case of the *Monte Contes*,[2] by the Prize Court of France on February 14, 1916, in the case of the *Sibilla* and on December 1, 1921, in the case of the *Oscar II*;

" Whereas, in accordance with Article 11 of the decree of February 6, 1950, the destination of the seized cargoes must be considered to be an enemy destination, since they are directly despatched to institutions and persons in the territory occupied by the enemy forces in Palestine; and that is clearly apparent from the bills of lading and other documents;

" Whereas the seizure of the cargoes in question as prize was lawfully made and took place in accordance with the formalities laid down in Law No. 31 of April 3, 1950; and no person considered to be the owner of the goods appeared at the hearing, nor anybody clearly acting on his behalf;

" Whereas it follows that the seizure must be considered valid and the cargoes must be declared good and valid prize for the benefit of the State, except in so far as that prize includes the value of the frozen meat indicated in the papers in the dossier;[3]

" For these reasons,

" Declares the prize good and valid to the benefit of the State."

[Report: *Revue égyptienne de droit international*, 13 (1957), p. 131.]

NOTE.—A comment upon this case appears in the *Revue égyptienne de droit international*, 13 (1957), p. 134.

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[1] [1940] P. 215 [*Annual Digest*, 1938–1940, Case No. 223].

[[2] [1944] A.C. 6; *Annual Digest*, 1943–1945, Case No. 196.]

[3] The reference to the meat would appear to be to some of the meat which had already been taken by the Egyptian army pending the decision of the *Conseil des Prises*.

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